

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2478

SPONSOR: Governmental Oversight and Productivity Committee and Senator Geller

SUBJECT: Rulemaking Authority of the Department of Insurance

DATE: April 25, 2000 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>White</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>BI</u>	_____
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

Section 120.536(2)(b), F.S., requires the Legislature to determine whether specific legislation should be enacted to authorize the rules, or portions thereof, which were identified by agencies as exceeding their statutory rulemaking authority. This bill provides specific statutory authority to authorize rules identified by the Department of Insurance (DOI).

This bill amends the following sections of the Florida Statutes: 386.205, 554.115, 625.305, 626.7353, 627.062, 627.429, 627.481, 627.7282, 627.8405, 627.848, 635.071, 648.4425, and 791.015. The bill creates the following sections of the Florida Statutes: 624.4135, 625.765, 628.2817, 627.7276, 627.796, 627.797, 627.798, and 627.955.

## II. Present Situation:

### Administrative Procedures Act

The Administrative Procedure Act (APA), contained in ch. 120, F.S., sets forth the general standards and procedures that all agencies must follow when adopting administrative rules. Agencies do not have inherent rulemaking authority.<sup>1</sup> Shaping public policy through lawmaking is the exclusive power of the Legislature.<sup>2</sup> The Legislature, however, may delegate to agencies the authority to adopt rules<sup>3</sup> that implement, enforce, and interpret a statute.<sup>4</sup> An enabling statute that delegates rulemaking authority to an agency cannot provide unbridled authority to an agency to

<sup>1</sup>*Grove Isle, Ltd. v. State Dept. of Envtl. Reg.*, 454 So.2d 571, 573 (Fla. 1st DCA 1984).

<sup>2</sup>*Jones v. Department of Rev.*, 523 So.2d 1211, 1214 (Fla. 1st DCA 1988).

<sup>3</sup> A rule is defined by s. 120.52(15), F.S., to mean, “. . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . .”

<sup>4</sup>*State v. Atlantic C.L.R. Co.*, 47 So. 969 (1909).

decide what the law is,<sup>5</sup> but must be complete,<sup>6</sup> must declare the legislative policy or standard,<sup>7</sup> and must operate to limit the delegated power.<sup>8</sup>

Agencies are not authorized to determine whether or not they want to adopt rules.<sup>9</sup> They are required by law to adopt as a rule each agency statement that meets the definition of a rule as soon as feasible and practicable. Rulemaking is presumed to be feasible and practicable unless the agency proves certain statutory standards. Whenever an act of the Legislature requires implementation by rule, an agency has 180 days after the effective date of the act to do so, unless the act provides otherwise.<sup>10</sup>

While agencies are required to adopt as a rule each agency statement that implements, interprets, or prescribes law or policy, there are limitations on the content and scope of these rules. When the Legislature adopted changes to the APA in 1996, it overturned case law that had permitted broader bases for rulemaking, and significantly narrowed the standard for rulemaking.<sup>11</sup> In 1996, ss. 120.52(8) and 120.536(1), F.S., provided in relevant part that, “A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the *particular powers and duties* granted by the enabling statute. [*emphasis added*].”

When this new provision was challenged, the courts had difficulty construing the “particular powers and duties” language. In an administrative proceeding, a judge ruled that the phrase meant an enabling statute must detail the powers and duties that would be the subject of the rule.<sup>12</sup> On appeal, however, the First District Court of Appeals held that a broader interpretation was proper, and stated that the test to determine whether a rule is a valid exercise of delegated authority is whether:

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<sup>5</sup>*State ex rel. Davis v. Fowler*, 114 So. 435, 437 (Fla. 1927).

<sup>6</sup>*Spencer v. Hunt*, 147 So. 282, 286 (Fla. 1933); accord *Florida Beverage Corp. v. Wynne*, 306 So.2d 200, 202 (Fla. 1st DCA 1975).

<sup>7</sup>*Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 268 (Fla. 1991).

<sup>8</sup>*Palm Beach Jockey Club, Inc. v. Florida State Racing Comm’n.*, 28 So.2d 330 (Fla. 1946).

<sup>9</sup>Section 120.54(1)(a), F.S.

<sup>10</sup>Section 120.54(1)(b), F.S.

<sup>11</sup>Before the 1996 revision to the APA, the courts had held that a rule is a valid exercise of delegated legislative authority if it is “reasonably related” to the enabling statute and not arbitrary and capricious. See, *General Tel. Co. of Fla. v. Florida Pub. Serv. Comm’n.*, 446 So.2d 1063 (Fla. 1984); *Department of Labor and Employment Sec., Div. of Workers’ Compensation v. Bradley*, 636 So.2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Ass’n v. Florida Pub. Serv. Comm’n.*, 473 So.2d 237 (Fla. 1st DCA 1985); *Department of Prof’l Regulation, Bd. of Med. Exam’rs v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984); *Agrico Chem. Co. v. State, Dept. of Env’tl. Regulation*, 365 So.2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp., Inc. v. Wynne*, 306 So.2d 200 (Fla. 1st DCA 1975).

<sup>12</sup> *St. Johns River Water Management District v. Consolidated-Tomoka Land Co., et al.*, 717 So.2d 72 (Fla. 1st DCA 1998).

the rule falls within the *range of powers* the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter *directly within the class of powers and duties identified in the statute* to be implemented. This approach meets the legislative goal of restricting the agencies' authority to promulgate rules, and, at the same time, ensures that the agencies will have the authority to perform the essential functions assigned to them by the Legislature [*emphasis added*].<sup>13</sup>

In 1999, the Legislature rejected the First District's broad "class of powers and duties" test when it enacted 99-379, L.O.F. The APA now provides:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the *specific powers and duties* granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute (*emphasis added*).<sup>14</sup>

The Legislature recognized that as a result of this amendment some existing rules might no longer be authorized, and consequently, also provided that agencies could temporarily shield unauthorized rules from rule challenges based on the amendment until July 1, 2001.<sup>15</sup> In order to have shielded a rule, agencies were required to have submitted to the Joint Administrative Procedures Committee (JAPC) by October 1, 1999, a list of rules, or portions thereof, adopted prior to June 18, 1999, which exceeded the newly amended rulemaking authority standard.

The statutory directive further provided that the Legislature is required to consider at the 2000 Regular Session whether specific legislation authorizing the shielded rules, or portions thereof, should be enacted. Thereafter, agencies must begin repeal proceedings by January 1, 2001, for shielded rules for which authorizing legislation does not exist. On or after July 1, 2001, the JAPC or any substantially affected person may petition an agency to repeal any rule because it exceeds the rulemaking authority permitted by the new standard.

## Department of Insurance

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<sup>13</sup> *Id.*

<sup>14</sup> Sections 120.52(8) and 120.536(1), F.S.

<sup>15</sup> Section 120.536(2)(b), F.S.

The following outlines the DOI's summary for the rules for which specific statutory authority is now sought (the term "section" refers to the bill section addressing the cited rule(s)) :

**Section 1:** Rules 4E-3.001 through 3.008, F.A.C., implement the "Florida Clean Indoor Air Act," and specify that no person may smoke in a DOI building, vehicle, or public meeting.

**Section 2:** Rule 4A-51.040, F.A.C., sets forth the violations that allow disciplinary actions, including criminal and administrative proceedings, to be taken against a boiler operator. The rule also provides that the DOI may revoke or suspend certificates of competency to operate a boiler, and that revocation is permanent.

**Section 3:** Rule 4-143.061, F.A.C., establishes procedures and forms for a foreign insurer to apply for certification of authority as a domestic insurer.

**Section 4.** Rule 4-162.011, F.A.C., sets forth the limitations by which a life insurer must abide when investing money received from variable annuities.

**Section 5.** Rules 4-143.006 through 143.018, F.A.C., addresses transactions involving 50 percent or more of the ownership of the common stock of a domestic insurer that are exempted from the reporting requirements of the department.

**Section 6.** Rules 4-211.110 through 211.310, F.A.C., establish procedures and standards for insurance agent pre-licensing education, and for the application for licensure as an insurance agent.

**Section 7.** Rule 4-213.060, F.A.C., establishes the procedures for the appointment of insurance company customer representatives and for the designation of an insurance agent, who is responsible for the actions of the customer representatives.

**Section 8.** Rule 4-170.011, F.A.C., requires insurers to consider the availability of water supplies in setting fire insurance rates.

**Section 9.** Rule 4-203.025, F.A.C., requires prepaid limited health service organizations (PLHSO) to comply with the AIDS protection provision of s. 627.49, F.S.

**Section 10.** Rules 4-202.012 and 4-202.015, F.A.C., require issuers of donor annuity agreements to submit a sworn statement on a form prescribed by the DOI, attesting that the issuer has met all requirements of law.

**Section 11.** Rule 4-184.012, F.A.C., requires that automobile policies which do not contain bodily injury and property damage coverage to be clearly stamped or printed with specific language stating in large print on the declaration page that the policy does not include bodily injury and property damage liability coverage.

**Section 12.** Rule 4-167.002, F.A.C., requires insurers that issue a policy for private passenger motor vehicle insurance to complete the underwriting of the policy and to make a final

determination of the correct premium for the coverage set forth in the insurance application within 60 days after the effectuation of coverage. In the event an insurer issues such a policy and timely determines that the policyholder has been charged an incorrect premium, the insurer shall provide notice to the policyholder. The notice must provide that the policyholder may cancel the policy the policy within a certain time period of at least 10 days.

**Section 13.** Rule 4-186.012, F.A.C., prohibits issuance of any title insurance policy based upon a search performed by any person other than an employee of a title insurer or title insurance agency, unless that person has in effect an Errors and Omissions policy with minimum coverage limits of \$250,000 with a deductible no greater than \$10,000.

**Section 14.** Rule 4-186.014, F.A.C., requires every insurer to file with the DOI a list containing the name and address of every appointed agent exempt from licensure under s. 626.8417(4), F.S., who issues or countersigns binders, commitments, title insurance policies, or guarantees of title. It also requires that on a monthly basis thereafter, every insurer shall report to the DOI the name and address of every non-licensed agent whose appointment is granted or terminated.

**Section 15.** Rules 4-186.001 and 4-186.002, F.A.C., require those who issue mortgagee title insurance or engage in acts involving the issuance of mortgagee title insurance upon a loan made simultaneously with the purchase of all or part of the real estate securing such loans, to give written notice to the purchaser-mortgagor that a mortgagee title insurance policy is to be issued, and that such policy does not provide title insurance protection to the purchaser as owner.

**Section 16.** Rule 4-196.021, F.A.C., requires an insurance agent to disclose any coverages financed with personal injury protection other than property damage liability, bodily injury, collision, uninsured motorist, or comprehensive coverage.

**Section 17.** Rule 4-196.001, F.A.C., requires that when a premium finance agreement contains a power of attorney or other authority enabling the premium finance company to cancel any insurance contract listed in the agreement, all premium finance companies licensed to do business in this state must effect cancellation of such policies by the use of a form containing working and information necessary to afford notice of the rights and duties which follow the cancellation.

**Section 18.** Rule 4-136.033(2), F.A.C., restricts deductibles on purchasing agreements.

**Section 19.** Rule 4-185.005, F.A.C., provides that companies shall not insure mortgages which are being offered to the public by advertisements in newspapers, brochures, direct mail, or like media.

**Section 20.** Rule 4-221.100, F.A.C., establishes a form for the terms and conditions of bailbond contracts.

**Section 21.** Rules 4A-50.001 and 4A-50.005, F.A.C., provide registration requirements for the sale of sparklers.

### III. Effect of Proposed Changes:

**Section 1.** This section authorizes Rules 4E-3.001 through 4E-3.008 by amending s. 386.205, F.S., to provide that state agencies may adopt rules for administering this section which take into consideration the provisions of this part.

**Section 2.** This section codifies Rule 4A-51.040, F.A.C., by amending s. 554.115, F.S., to specify those grounds for revoking or suspending a certificate to operate a boiler which are contained in the rule, but not in the section. Moreover, it amends the section to provide that violations of the section by uncertified persons will be reported to the state attorney, and that violations by certified persons will be subject to administrative action by the chief inspector. Finally, the bill amends the section to provide that a revocation of a certificate of competency is permanent.

**Section 3.** This section authorizes Rule 4-143.061, F.A.C., by creating s. 624.4135, F.S., to provide the DOI shall adopt rules establishing procedures and forms for a foreign insurer to apply for a certificate of authority as a domestic insurer.

**Section 4.** This section authorizes Rule 4-162.011, F.A.C., by amending s. 625.305, F.S., to specify the limitations on a domestic life insurance company's use of money received from variable annuity contracts as enumerated in the rule.

**Section 5.** This section authorizes Rules 4-143.006 through 4-143.018, F.A.C., by creating s. 625.765, F.S., to provide that the department may adopt exemptions by rule from ss. 625.75, F.S. which addresses the filing of statements indicating the amount of ownership of equity securities in an insurer, and 625.76, F.S., which provides for an insurer's recovery of profit by a person required to file a statement pursuant to s. 625.75, F.S. The section also enumerates the type of transactions that may be the subject of the exemptions.

**Section 6.** This section authorizes Rules 4-211.110 through 4-211.310, F.A.C. , by creating s. 626.2817, F.S., to provide that the instructors of prelicensure education courses must be approved by the department, and that the DOI shall adopt rules to establish standards for the approval, registration, discipline and removal of instructors and to prescribe forms necessary to administer the prelicensure requirements.

**Section 7.** This section authorizes Rule 4-213.060, F.A.C., by amending s. 626.7353, F.S., which specifies that who may appoint and who may be a customer representative, to provide that the department shall prescribe by rule forms to administer the section.

**Section 8.** This section authorizes Rule 4-170.011, F.A.C., by amending s. 627.062, F.S., to provide that consideration shall be given to the availability of water supplies in determining fire insurance rates.

**Section 9.** This section authorizes Rule 4-203.025, F.A.C., by amending s. 627.429, F.S., to add that PLHSOs must comply with the AIDs protection provisions contained in the section.

**Section 10.** This section authorizes Rule 4-202.012 and 4-202.015, F.A.C., by amending s. 627.481, F.S., to provide that the DOI shall adopt rules and forms for the filing annual statements and agreements pertaining to donor annuity organizations.

**Section 11.** This section authorizes Rule 4-184.012, F.A.C., by creating s. 627.7276, F.S., to provide that an auto insurance policy must have a disclaimer if it does not include bodily injury and property damage.

**Section 12.** This section authorizes Rule 4-167.002, F.A.C., by amending s. 627.7282, F.S., to provide that the DOI may adopt rule which prescribe the format of the notice for an additional premium.

**Section 13.** This section authorizes Rule 4-186.012, F.A.C., by creating s. 627.796, F.S., to provide that a title insurance policy may not be issued from a search performed by any person other than a title insurance agent, unless that person has an errors and omissions policy.

**Section 14.** This section authorizes Rule 4-186.014, F.A.C., by creating s. 627.797, F.S., to require that every insurer file with the DOI a list that contains the name and address of each appointed agent who is exempt from licensure pursuant to s. 626.8417(4), F.S., and who issues or countersigns binders, commitments, title insurance policies, and guarantees of title.

**Section 15.** This section authorizes Rules 4-186.001 and .002, F.A.C., by creating s. 627.798, F.S., to provide that the DOI shall adopt a form by rule which is used to provide notice to a purchaser-mortgagor that the purchaser-mortgagor is not protected by the title policy of the mortgagee.

**Section 16.** This section authorizes Rule 4-196.021, F.A.C., by amending s. 627.8405, F.S., to add that the DOI shall adopt rules to prescribe the form of the disclosure required for premium financing.

**Section 17.** This section authorizes Rule 4-196.001, F.A.C., by amending s. 627.848, F.S., to provide that the DOI shall adopt a standard cancellation notice for use by premium finance companies in canceling insurance policies.

**Section 18.** This section authorizes Rule 4-136.033(2), F.A.C., by creating s. 627.955, F.S., to provide that a purchasing group may not purchase insurance that provides for a deductible or self-insured retention that is applicable to the group as a whole, except that coverage may provide for a deductible or self-insured retention that is applicable to individual members.

**Section 19.** This section authorizes Rule 4-185.005, F.A.C., by creating s. 635.071, F.S., which provides that mortgage insurance cannot be advertised as valuable because of proposed mortgage guaranty insurance. The advertisement must reflect value based on the safety inherent in the underlying security as it relates to the face value of the mortgage debt.

**Section 20.** This section authorizes Rule 4-221.100, F.A.C., by amending s. 648.4425, F.S., to provide that the DOI shall prescribe forms for bailbond contracts.

**Section 21.** This section authorizes Rules 4A-50.001 and 4A-50.015, F.A.C., by amending s. 791.015, F.S., to provide that the State Fire Marshal may adopt rules establishing a form to be used by entities wishing to do business in this state pursuant to the section.

**Section 22.** This section provides that the act takes effect upon becoming a law.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There should be no direct impact, as the changes will only authorize rules that are currently in effect.

C. Government Sector Impact:

There should be no direct impact, as the changes will only authorize rules that are currently in effect.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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