

II. Present Situation:

Rulemaking under Florida's Administrative Procedures Act

Rulemaking is a legislative function which may be delegated to an agency by the Legislature¹ by general law. The Legislature must provide an express grant of authority in order for an agency to implement a specific law by rulemaking,² as well as specific standards and guidelines sufficient to preclude the agency from exercising unbridled discretion in creating policy or applying the law.³

All agencies with delegated rulemaking authority must follow the process and procedure set out in the Administrative Procedures Act (APA) contained in Chapter 120, F.S., unless otherwise provided by law. The APA ensures a uniform procedure to protect the rights of the public when dealing with agencies. The Act contains a general mandate to commence rulemaking within 180 days of the effective date of a new law requiring the promulgation of rules,⁴ but does not control the initial process an agency follows to consider, review, research, or otherwise choose among alternative approaches to formulate a rule implementing law.

Unless the proposal is to repeal an existing rule, the agency must publish a notice of rule development and may schedule workshops to allow public input.⁵ Once an internal decision is made and the agency head approves the adoption of a specific proposed rule, the agency must publish notice of intended rule adoption and the complete text of the proposal.⁶ After completing public hearings (if requested),⁷ resolving changes requested by the Joint Administrative Procedures Committee (JAPC),⁸ providing a statement of estimated regulatory costs both to those who provided proposed lower cost alternatives to the rule and to the public,⁹ or the entry of a final order on a petition challenging the proposed rule,¹⁰ with the approval of the agency head the rule may be filed for adoption with the Department of State.¹¹ The rule then goes into effect 20 days after filing, or at a later date if specified in the original notice of rulemaking, or upon ratification by the Legislature.¹²

¹ Section 1, Art. III, Fla. Const.; *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000); *Dept. of Revenue v. Novoa*, 745 So. 2d 378, 380 (Fla. 1st DCA 1999).

² *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001); *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1979).

³ Section 120.52(8) & s. 120.536(1), F.S.

⁴ Section 120.54(1)(b), F.S.

⁵ Section 120.54(2), F.S.

⁶ Section 120.54(3)(a)1., F.S.

⁷ Section 120.54(3)(c), F.S.

⁸ Sections 120.54(3)(d), 120.545(3)(a), F.S.

⁹ Section 120.541, F.S.

¹⁰ Section 120.56, F.S.

¹¹ Section 120.54(3)(e), F.S.

¹² Section 120.54(3)(e)6., F.S.

Former Governors including Bob Martinez, Lawton Chiles, and Charlie Crist have used executive orders in varying capacities to direct and supervise the policies implemented by their appointed agency heads relating to the exercise of statutorily-created rulemaking authority.¹³

Executive Orders 11-01 and 11-72

Upon taking office, Governor Rick Scott issued Executive Order 11-01 creating the Office of Fiscal Accountability and Regulatory Reform (OFARR) within the Executive Office of the Governor.¹⁴ The executive order also directed all agencies under the direction of the Governor to immediately suspend all rulemaking.¹⁵ Agencies not supervised directly by the Governor were requested to suspend all rulemaking activities.¹⁶ OFARR was given specific duties pertaining to agency rulemaking, including reviewing proposed rules under specific policy guidelines set in the order. The main emphasis was to ensure that “agency-created rules do not hinder government performance and that they are fiscally responsible.”¹⁷ The order also established the schedule to be followed by state agencies in submitting proposed or amended rules to OFARR.¹⁸ In April 2011, the Governor issued Executive Order 11-72 superseding Executive Order 11-01. The new order also required the suspension of agency rulemaking until approval was received from OFARR.¹⁹

Whiley v. Scott

In *Whiley*, the Florida Supreme Court heard a petition challenging the Governor’s authority to direct and supervise delegated rulemaking by appointed agency heads serving at his pleasure. On August 16, 2011, the majority of Supreme Court ruled that portions of the executive order violated the Administrative Procedure Act (APA) by “suspending and terminating rulemaking by precluding notice publication and other compliance with Chapter 120 absent prior approval by OFARR.”²⁰ The majority of the court more narrowly interpreted the “supreme executive power” vested in the Governor by article IV, section 1 of the Florida Constitution. Although executive agency heads serve at the pleasure of the Governor, the court concluded that “the power to remove is not analogous to the power to control [an agency].” The majority opinion noted that the Legislature may, and has in several cases, delegate particular responsibilities in the oversight of rulemaking to the Executive Office of the Governor.²¹

In his dissent, Chief Justice Canady found that Florida law imposes no restriction on the authority of the Governor to supervise and direct policy choices made by subordinate executive officials with respect to rulemaking. In a separate dissent, Justice Polston found that “nothing in the APA prohibits the Governor from performing executive oversight to ensure that the

¹³ See Staff Analysis for PCB 12-02, Rulemaking and Regulation Subcommittee, Florida House of Representatives (for a comprehensive discussion of the historical use of executive orders to supervise agency rulemaking).

¹⁴ Office of the Governor, Executive Order Number 11-01, *available at* <http://edocs.dlis.state.fl.us/fldocs/governor/orders/2011/11-01-rulemaking.pdf> [hereinafter Exec. Order 11-01].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Whiley v. Scott*, -- So. 3d --, 2011 Lexis 1900, 36 Fla. L. Weekly S 451 (Fla. 2011).

¹⁸ Exec. Order 11-01, *supra* note 14.

¹⁹ *Id.*

²⁰ *Whiley*, *supra* note 17, at *27.

²¹ *Whiley*, *supra* note 17, at *35; *see, e.g.*, section 14.2015, F.S., section 288.7015, F.S.

rulemaking process at his agencies results in effective and efficient rules that accord with Florida law.”²² Both dissenting justices adopted a more expansive reading of article IV, section 6 of the Florida Constitution granting the Governor authority to suspend executive agency rulemaking.

Responding to the Court’s ruling in *Whiley*, the Governor issued Executive Order 11-211. The order provided that appointed agency heads can voluntarily cooperate with OFARR’s role in overseeing proposed rulemaking.

Unused Rulemaking Delegations

Legislative grants of rulemaking authority provide agencies with flexibility to address issues arising in the administration of a statute. A number of provisions authorizing agency rulemaking have been in statute for more than five years but have never been used. In instances where agencies have been able to administer statutory programs without relying on rulemaking, the grant of rulemaking authority appears unnecessary.

III. Effect of Proposed Changes:

Section 1 provides legislative findings relating to the administrative authority of the executive branch and the Florida Supreme Court’s ruling in *Whiley v. Scott*.

Section 2 affirms that Executive Orders 11-72 and 11-211 are consistent with law and public policy of the state.

Section 3 provides the Legislature’s intent that by placing an agency under the direct supervision of a non-elected agency head appointed by and serving at the pleasure of the Governor, the Legislature does not intend to limit in any way the Governor’s constitutionally vested authority to direct and supervise the implementation of executive policy by these appointees unless expressly stated otherwise in law.

Section 4 creates a new s. 20.02(3), F.S., clarifying that an agency head appointed by and serving at the pleasure of the Governor remains under the oversight, direction, and supervision of the Governor.

Section 5 amends s. 20.03, F.S., amending the definition of “agency head” by stating those agency heads appointed by and serving at the pleasure of the Governor remain under the Governor’s supervision and direction; amending the definition of “Secretary” by changing “constitution” to “State Constitution”; creating a new definition to expressly define “to serve at the pleasure.”

Section 6 amends s. 20.05(1), F.S., by making the exercise of authority of any agency head subject to the allotment power under Article IV of the State Constitution.

Section 7 creates s. 120.515, F.S., clarifying that the APA is a procedural statute and does not alter the substantive authority of elected officials over their appointees; clarifying that the APA

²² *Whiley*, *supra* note 17 at *60-61.

does not divest any authority to direct or supervise appointed agency heads and, by adhering to the direction and supervision of the appointing authority, the appointee does not delegate or transfer any statutory authority.

Section 8 amends s. 120.52, F.S., providing that an agency head appointed by and serving at the pleasure of an appointing authority remains subjects to the direction and supervision of the appointing authority, but actions taken by the agency head as authorized by statute are official acts.

Section 9 amends s. 11.242, F.S., providing that all statutes and law, or parts thereof, containing duplicative, redundant, or unused rulemaking authority, shall be omitted through the process of reviser's bills enacted by the Legislature, providing that rulemaking authority is deemed unused if the provision has been in effect for more than 5 years and no rule has been promulgated using that provision.

Section 10 repeals s. 14.34(3), F.S., removing rulemaking authority to the Executive Office of the Governor to adopt rules relating to the Governor's Medal of Merit. The rulemaking authority was first granted in 2004 and appears to have never been used.

Section 11 amends s. 15.16(7), F.S., removing rulemaking authority to the Department of State to adopt rules relating to international processes for validating and verifying documents. The Department of State has not found it necessary to adopt rules for implementing this provision and has not expressed objection to the rulemaking repeal.

Section 12 repeals s. 15.18(7), F.S., removing rulemaking authority to the Department of State to adopt rules relating to contracts for professional services and events funded by donations. The Department of State has never adopted rules under this provision, which was last amended in 2002. The department has expressed no objection to the rulemaking repeal.

Section 13 amends s. 16.60, F.S., removing rulemaking authority to the Office of the Attorney General to adopt rules of procedure relating to a mediation program that resolves public records disputes. The Attorney General's office has never adopted rules under this provision, which was last amended in 2000. The office has expressed no objection to the removal of the rulemaking authority.

Section 14 repeals s. 17.0416(2), F.S., removing rulemaking authority to the Department of Financial Services (DFS) to adopt rules to implement the section authorizing DFS to provide services on a fee basis to other public bodies and officers. DFS has not adopted rules under this provision, which was created in 2004. DFS does not object to the repeal of this rulemaking authority.

Section 15 repeals 17.59(3), F.S., removing rulemaking authority to the Chief Financial Officer (CFO) to adopt rules for the management of safekeeping services. The CFO has not adopted rules under this provision, which was last amended in 2004. The CFO has expressed no objection to the repeal of this rulemaking provision.

Section 16 repeals s. 25.371, F.S., providing that Supreme Court rules override a statute in the case of a conflict.

Section 17 repeals s. 28.43, F.S., removing rulemaking authority to the Department of Revenue and the Department of Financial Services to adopt rules relating to the funding and budgeting of court clerks. Neither department has objected to the repeal of this rulemaking authority.

Section 18 repeals s. 35.07, F.S., providing that District Courts of Appeal may make rules and regulations for the internal management of the court.

Section 19 repeals s. 39.001(11), F.S., removing rulemaking authority to the Executive Office of the Governor to adopt rules relating to the purposes and intent of proceedings relating to children. EOG and the Governor's Office of Adoption and Child Protection determined no rules were necessary to implement s. 39.001, F.S., and no rules have been adopted in reliance on the provision. The rulemaking power is unnecessary because it is duplicative of s. 39.012, F.S., authorizing the Department of Children and Family Services to make rules to implement the entire chapter.

Section 20 amends s. 39.0137(2), F.S., removing rulemaking authority to the Department of Children and Family Services to adopt rules to facilitate implementation of the federal Indian Child Welfare Act. This rulemaking power is unnecessary because it is duplicative of s. 39.012, F.S., authorizing the Department of Children and Family Services to make rules to implement the entire chapter.

Section 21 repeals s. 39.824(1), F.S., removing a 1989 request to the Supreme Court to adopt rules of procedure to implement part of Chapter 39, F.S.

Section 22 amends s. 63.167(3), F.S., removing rulemaking authority relating to the state adoption information center. This provision was last amended in 2003 and no rules appear to have been adopted by the Department of Children and Family Services based on this provision.

Section 23 repeals s. 88.9051, F.S., relating to the Uniform Interstate Family Support Act. Chapter 88, F.S. currently does not contain a definition identifying the department empowered by the section. No rule appears to be in effect that relies on the section.

Section 24 amends s. 97.026, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to the availability of elections-related forms in alternate formats and via the internet. The Department of State has rulemaking authority under s. 97.012, F.S., to implement s. 97.026, F.S. No rule appears to have been promulgated by the language currently in s. 97.026, F.S. The Department has indicated that it does not object to the repeal.

Section 25 amends s. 97.0555, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to late voter registration by uniformed servicepersons and their accompanying family members. The Department of State has rulemaking authority under s. 97.012, F.S., to implement s. 97.0555, F.S. No rule appears to have been promulgated by the language currently in s. 97.0555, F.S. The Department has indicated that it does not object to the repeal.

Section 26 amends s. 97.061, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to procedures for registering persons requiring assistance. The Department of State has rulemaking authority under s. 97.012, F.S., to implement s. 97.061, F.S. No rule appears to have been promulgated by the language currently in s. 97.061, F.S. The Department has indicated that it does not object to the repeal.

Section 27 repeals s. 101.56062(3), F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to standards for accessible voting systems. The Department of State has rulemaking authority under s. 97.012, F.S., to implement s. 101.56062, F.S. No rule appears to have been promulgated by the language currently in s. 101.56062, F.S. The Department has indicated that it does not object to the repeal.

Section 28 amends s. 103.101, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to the presidential preference primary. No rule appears to have been adopted in reliance on the provision. The Department of State has expressed that it does not intend to adopt rules under this section and does not object to the repeal.

Section 29 amends s. 106.165, F.S., removing rulemaking authority relating to the use of closed captioning in electioneering broadcasts. The Division of Elections currently has rulemaking authority under s. 106.22(9), F.S., to implement s. 106.165, F.S. No rule appears to have been promulgated by the Department of State in reliance on the rulemaking authority currently in s. 106.165, F.S. The Department has indicated that it does not object to the repeal.

Section 30 amends s. 110.1055, F.S., removing obsolete language that may create confusion about the authority of the Department of Management Services to make rules implementing amendments to provisions in chapter 110, F.S., that have been enacted since 2002. The amended language will serve as general rulemaking authority to effectuate all of chapter 110, F.S.

Section 31 repeals s. 110.1099(5), F.S., removing rulemaking authority allowing the Department of Management Services to adopt rules relating to education and training opportunities for state employees. The Department of Management Services has rulemaking authority under s. 110.1055, F.S., to implement s. 110.1099(5), F.S.

Section 32 repeals s. 110.1228(7), F.S., removing rulemaking authority allowing the Department of Management Services to adopt rules relating to participation of small political subdivisions in the state group health plan. The Department of Management Services has rulemaking authority under s. 110.1055, F.S., to implement s. 110.1228(7), F.S.

Section 33 amends s. 110.12301, F.S., removing rulemaking authority allowing the Department of Management Services to adopt rules relating to postpayment claims review and dependent eligibility.

Section 34 repeals s. 112.1915(4), F.S., removing rulemaking authority allowing the State Board of Education to adopt rules to implement a special death benefit for teachers and school administrators. The Board does not appear to have adopted rules under the provision which has not been amended since 2004.

Section 35 amends s. 118.12, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to the certification of civil-law notaries and apostilles. The Department of State has not used the rulemaking authority for implementation of the section and does not object to its appeal.

Section 36 repeals s. 121.085(1), F.S., removing rulemaking authority allowing the Department of State to adopt rules establishing procedures to establish claims of creditable service under the Florida Retirement System.

Section 37 repeals s. 121.1001(4)(b), F.S., which authorizes rulemaking to implement a 1999 provision to protect pension benefits that may exceed federal benefit limitations. The rulemaking authority in paragraph (4)(b) does not appear to have been used by the Division of Retirement. DMS appears to have sufficient authority under s. 121.031(1), F.S., to administer all provisions of law relating to compliance with federal law affecting pension benefits.

Section 38 repeals s. 121.4503(3), F.S., which authorizes rulemaking relating to the Florida Retirement System Contributions Clearing Trust Fund. DMS does not appear to have utilized this particular provision of rulemaking authority since its enactment in 2002. The State Board of Administration and DMS appear to have sufficient rulemaking authority under s. 121.4501(8), F.S., and s. 121.031(1), F.S., to administer the Contributions Clearing Trust Fund.

Section 39 amends s. 121.5911, F.S., striking rulemaking authority relating to the disability retirement program. DMS does not appear to have utilized the particular provision of rulemaking authority since its enactment in 2002. The Department appears to have sufficient rulemaking authority under s. 121.031(1), F.S., to implement legislative intent expressed in s. 121.5911, F.S.

Section 40 repeals s. 125.902(4), F.S., directing the Department of Children and Family Services to adopt rules as necessary to implement this section enacted in 2000 pertaining to children's services councils or juvenile welfare board grant applications. The Department does not appear to have adopted rules, indicating that the rulemaking authority is unnecessary.

Section 41 repeals s. 154.503(4), F.S., which authorizes rulemaking by the Department of Health to implement the Primary Care for Children and Families Challenge Grant Act, adopted in 1997. The Department does not appear to have adopted rules pursuant to the provision, indicating that the rulemaking authority is unnecessary.

Section 42 amends s. 159.8081, F.S., striking rulemaking authority concerning the allocation by the Department of Economic Opportunity of bonding authority to finance manufacturing facility projects. No rule appears to have been adopted under this provision which has been in existence more than 14 years.

Section 43 amends s. 159.8083, F.S., strikes rulemaking authority concerning the allocation by the Department of Economic Opportunity of bonding authority to finance Florida First Business projects. No rule appears to have been adopted under this provision which has been in existence more than 11 years.

Section 44 repeals s. 159.825(3), F.S., which authorizes rulemaking by the State Board of Administration to administer s. 159.825 governing the terms of certain governmental bonds paying interest that is subject to federal income taxes. No rule appears to have been adopted under this provision, which has been in existence more than 13 years.

Section 45 repeals s. 161.75, F.S., which authorizes rulemaking by the Department of Environmental Protection and the Fish and Wildlife Conservation Commission to implement the Oceans and Coastal Resources Act (part IV of ch. 161). No rules appear to have been adopted implementing this part, which is over 6 years old.

Section 46 repeals s. 163.462, F.S., which authorizes rulemaking by the Department of Community Affairs to implement the Community-Based Development Organization Act (ss. 163.455-163.462, F.S.). No rules have been adopted since the 2000 effective date of the Act. HB 4027 (2012) proposes repeal of the entire Act.

Section 47 repeals s. 163.517(6), F.S., which authorizes rulemaking by the Department of Legal Affairs to implement the section relating to the State Neighborhoods Program of matching planning grants and technical assistance. HB 191 (2012) and CS/SB 582 (2012) both recommend repeal of s. 163.517, F.S. The section has not been amended in 18 years, and no rules have been adopted to implement it.

Section 48 repeals s. 175.341(2), F.S., which authorizes rulemaking by the Division of Retirement to implement its duties for daily oversight, monitoring actuarial soundness, and the statutes pertaining to firefighter pension funds. The Department does not utilize rulemaking in administering either chapter 175, F.S., or chapter 185, F.S., and does not object to repeal of this provision.

Section 49 repeals s. 177.504(2)(e), F.S., which authorizes rulemaking by the Department of Environmental Protection to administer ss. 177.501-177.510, F.S., the Florida Public Lands Survey Restoration and Perpetuation Act, pertaining to restoring controlling corner monuments established by prior cadastral surveys. No rules have been adopted under this provision, which is over 13 years old.

Section 50 repeals s. 185.23(2), F.S., which authorizes rulemaking by the Division of Retirement to implement its duties for daily oversight, monitoring actuarial soundness, and the statutes pertaining to municipal police officer pension funds. The Department does not utilize rulemaking in administering either chapter 175, F.S., or 185, F.S., and does not object to repeal of this provision.

Section 51 repeals s. 255.25001(2), F.S., which authorizes rulemaking by the Department of Management Services relating to the efficacy of the state entering into lease-purchase agreements for state-owned office buildings. The Department of Management Services has never adopted rules under this statute and appears to have adequate authority to address lease-purchase agreements under s. 255.25, F.S.

Section 52 repeals s. 257.34(7), F.S., which authorizes rulemaking by the Division of Library and Information Services of the Department of State pertaining to the administration of the Florida International Archive and Repository. The Department of State is able to fully implement the statute without rules and agrees this specific rulemaking authority is unnecessary.

Section 53 repeals s. 364.0135(6), F.S., which authorizes rulemaking by the Department of Management Services pertaining to the promotion of adopting broadband services. The Department has adopted no rules under this statute and sees no need for this authority other than possible contingent changes in public policy.

Section 54 amends s. 366.85, F.S., strikes rulemaking authority pertaining to the duties of the Department of Agriculture and Consumer Services for consumer conciliation conferences which may be required pursuant to federal law and preparing lists of energy conservation products or services. The statute provides sufficient guidance, and the Department has determined this grant of authority is not necessary.

Section 55 repeals s. 409.5092, F.S., which authorizes rulemaking by the Department of Economic Opportunity pertaining to obtaining permission before “weatherizing” a residence. The Department determined this authority is unnecessary as federal rules apply to this issue.

Section 56 amends s. 501.142, F.S., strikes rulemaking authority pertaining to the regulation of refunds in retail sales establishments by the Department of Agriculture and Consumer Services, and the authority to impose sanctions for violating rules of the Department. This rulemaking authority was first created in 2006, was used to adopt rules, and appears unnecessary for the operation of the program. The Department has determined this grant of authority is not necessary.

Section 57 amends s. 985.682, F.S., pertaining to the siting of facilities for children committed to the custody, care, or supervision of the Department of Juvenile Justice. The amendment conforms the language of this statute with the repeal of s. 255.25001(2), in the bill.

Section 58 provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Budget on February 29, 2012:

The CS reorganizes the legislative findings that were in the preamble in the original bill.

The CS also adds additional unused rulemaking delegations to various state agencies.

The CS also clarifies sections of the bill pertaining to the direction and supervision of appointees serving at the pleasure of the Governor or other appointing authority.

B. Amendments:

None.