

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: SB 1470

INTRODUCER: Senator Norman

SUBJECT: Repeal of Administrative Rules

DATE: January 24, 2012 REVISED: 1/25/2012 _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Jenkins	Roberts	GO BC	Favorable
2.			
3.			
4.			
5.			
6.			

I. Summary:

The bill amends the Administrative Procedure Act¹ by codifying the legal rule that the repeal of a substantive statute also acts to repeal the administrative rules adopted to implement that statute. The bill also creates a summary process for the Department of State to repeal rules which are no longer in full force and effect; this process includes legal review by the Attorney General, notice requirements, and an opportunity for anyone to challenge a proposed summary rule repeal which cannot be effective until the challenge has been resolved.

The bill also provides for the nullification and repeal of 270 existing rules which are no longer needed or for which the specific law implemented has been repealed.

This bill substantially amends the following sections of the Florida Statutes: s. 120.536, F.S., and s. 120.555, F.S.

II. Present Situation:

Rulemaking and the Administrative Procedure Act

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency.² Rulemaking authority is delegated by the Legislature³ through statute and authorizes an agency to “adopt,

¹ Ch. 120, F.S.

² s. 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

³ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

develop, establish, or otherwise create”⁴ a rule. Agencies do not have discretion whether or not to engage in rulemaking.⁵ To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.⁶ The grant of rulemaking authority itself need not be detailed.⁷ The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.⁸

A rule is binding and operative from its effective date until modified or superseded by subsequent legislation.⁹ The Administrative Procedure Act (APA), found in chapter 120, F.S., sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. The APA is silent on how to treat rules adopted to implement or interpret specific powers and duties in a substantive law when that law is subsequently repealed. The courts have determined that repeal of the specific law implemented by a rule *de facto* repeals the rule, since the rule no longer has a substantive basis.¹⁰

The Florida Administrative Code and the Department of State’s Continuous Revision System

The purpose of the rulemaking process is to provide public notice of the generally-applicable policies implementing or interpreting specific laws.¹¹ Publication of all rules in the Florida Administrative Code (FAC) is designed to provide a central resource for the public to find rules adopted by any agency having a regional or statewide jurisdiction.¹²

The Department of State (DOS) is required to conduct a continuous revision system as part of maintaining and publishing the FAC.¹³ There is uncertainty regarding how the DOS is to deal with rules still published in the FAC for which the promulgating agency was abolished, the rulemaking authority was repealed, or the laws implemented by the rules were repealed.¹⁴ The current statutes provide for the preservation and continuation of administrative rules when a program is transferred completely from one agency to another.¹⁵ They do not, however, directly

⁴ s. 120.52(17), F.S.

⁵ s. 120.54(1)(a), F.S.

⁶ s. 120.52(8) & s. 120.536(1), F.S.

⁷ *Save the Manatee Club, Inc.*, supra at 599.

⁸ *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).

⁹ *Florida Department of Revenue v. A. Duda & Sons, Inc.*, 608 So. 2d 881 (Fla. 5th DCA 1992), quoting *Hulmes v. Division of Retirement*, 418 So. 2d 269, 270 (Fla. 1st DCA 1982), rev. den. 426 So. 2d 26 (Fla. 1983).

¹⁰ *Office of Insurance Regulation v. Service Insurance Company*, 50 So. 3d 637 (Fla. 1st DCA 2011); *Hulmes*, supra at 270.

¹¹ Sections 120.52(16), 120.54(1)(a), F.S.

¹² Section 120.55(1)(a)1., F.S.

¹³ Section 120.55(1)(a)1., F.S.

¹⁴ For example, currently, both the printed and online versions of the FAC include rules adopted by the former Advisory Council on Intergovernmental Relations (ACIR) and the former Department of Labor and Employment Security (DLES) despite the fact that both agencies, together with their rulemaking authority, have been abolished, and the laws implemented have been repealed. However, certain rules of the former Department of Commerce (DOC) continued to be published in the online version of the FAC as recently as November 8, 2011, but are now identified by DOS as “repealed” based only on the statute abolishing DOC and not on any repeal of the specific laws implemented by these rules.

¹⁵ Section 20.06(2), F.S., providing for Type Two program transfers.

address the impact of abolishing an agency or a grant of rulemaking power without altering the specific powers and duties granted to a subdivision of that agency by a prior enabling statute.

Although repeal of the law implemented has been interpreted as repealing the rules adopted to implement that law,¹⁶ this legal doctrine has not been codified. Furthermore, the DOS does not have express authority to determine whether a rule is still in full force and effect. Unless expressly repealed by act of the Legislature or as a result of repeal of the substantive law on which it depends, a rule may be repealed only by proper administrative action.¹⁷ Where a rule continues in force and effect because the law implemented remains unchanged, only an entity with the grant of rulemaking authority to implement that law is able to take action to repeal the rule. Where the rule remains in force but no rulemaking authority exists, the Legislature would have to create a new grant of rulemaking authority or repeal the rules by direct action.

Water Management District Rules

A review by the Governor's Office of Fiscal Accountability and Regulatory Reform and each of the Water Management Districts concluded that a total of 165 rules of the five Water Management Districts were not needed for continued effective operation of the Districts' programs. Most of these fall into the following general categories, with two specific exceptions:

- The rule is duplicative of statute or rule.
- The rule is not required to implement the policy of the statute.
- The rule references another rule or statute.
- The rule references a repealed statute.
- The rule is outdated or unnecessary to implement the statute.
- The statutory mandate for the rule was repealed.
- The rule duplicates information available in the District's Procedures Manual.
- The authority exercised in the rule was transferred to the Department of Environmental Protection.
- Rule 40D-4.054: Alteration of Exempt Projects - Rule to be combined with 40D-4.041, F.A.C., which sets forth what activity requires a permit.
- Rule 40D-21.441: Public Supply Water Shortage Mitigation Plans - Burdensome requirements for submittal of request for alternative water shortage plan.

Former Department of Commerce

The former Department of Commerce (DOC) was abolished in 1996¹⁸ and several of its programs were moved to the Office of Tourism, Trade, and Economic Development (OTTED).¹⁹ The rules in Chapters 8K-1 and 8K-2, FAC, pertained to one such program. After relocation to OTTED, the rulemaking authority for this program was repealed²⁰ but the various laws

¹⁶ *Office of Insurance Regulation v. Service Insurance Company* and *Hulmes v. Division of Retirement*, supra.

¹⁷ Section 120.54(3)(a)1., F.S.

¹⁸ Ch. 96-320, s. 3, Laws of Florida.

¹⁹ Ch. 96-320, s. 61, 133, Laws of Florida.

²⁰ Ch. 2002-180, s. 3, Laws of Florida.

implemented by the rules remained unaffected.²¹ Two of the laws implemented were repealed in 2007,²² and the remainder in 2011.²³

The rules in Chapter 8M-1, FAC, implemented provisions of the implementing bills for the 1991-1992 General Appropriations Act and apparently expired with the conclusion of that fiscal year. The rules in Chapter 8M-2, FAC, implemented a statute which was repealed in 1996.²⁴ The rules in Chapter 8M-3, FAC, pertained to a program which was also transferred to OTTED along with the law implemented but with the rulemaking authority repealed.²⁵ The specific law implemented was revised extensively but that revision may not have completely repealed the substance of the law implemented by the rule.²⁶

No entity currently has rulemaking authority to repeal these rules. DOS now shows these rules as repealed due to the abolition of the DOC in 1996.²⁷

Former Department of Health and Rehabilitative Services

In 1996, responsibility for all public health matters was moved from the Department of Health and Rehabilitative Services (HRS) to the Department of Health (DOH).²⁸ This was a Type Two transfer,²⁹ which included the rules previously adopted by HRS to implement the relevant statutes.

The rules adopted by HRS in Chapter 10D-116, FAC, implemented s. 383.336, F.S., establishing practice parameters pertaining to the incidence of cesarean births in provider hospitals where the procedure was paid for with state or federal funds.³⁰ This section was not formally transferred to the DOH until 1999.³¹ Most rules of the DOH are indexed in the FAC under Title 64, FAC, but the seven rules under former HRS Chapter 10D-116, FAC, have not been amended or readopted since their effective date in 1992.³² Another question arises concerning the two rules in Chapter 10D-124, FAC, pertaining to the nursing scholarship loan program. The statute implemented by these rules was repealed³³ in 2002. A new program has since been created³⁴ and the DOH adopted rules to administer that program,³⁵ but the DOH has not acted to incorporate the rules in Chapter 10D-124 into the present program.

Because the DOH has not exercised jurisdiction over the rules in either chapter, a question exists as to whether the DOH has rulemaking authority to amend or repeal these rules.

²¹ Former sections 288.707, 288.709, 288.7091, 288.71, 288.711, F.S.

²² Former sections 288.71 and 288.711 were repealed by Ch. 2007-157, s. 24, Laws of Florida.

²³ Ch. 2011-142, s. 487, Laws of Florida.

²⁴ Former s. 288.806, F.S., repealed by Ch. 96-320, s. 154, Laws of Florida.

²⁵ The transfer and repeal of the rulemaking grant were by Ch. 96-320, s. 133, Laws of Florida.

²⁶ Ch. 97-278, s. 49, Laws of Florida.

²⁷ See note 17, *supra*.

²⁸ Ch. 96-403, s. 6, Laws of Florida.

²⁹ The operative language existing in statute at the time has since been renumbered as Section 20.06(2), F.S.

³⁰ Section 383.336, F.S. (1995).

³¹ Ch. 99-8, s. 77, Laws of Florida.

³² <https://www.flrules.org/gateway/ChapterHome.asp?Chapter=10D-116> (accessed on 11/30/2011).

³³ Ch. 2002-387, s. 1058, Laws of Florida.

³⁴ Section 1009.67, F.S., created by Ch. 2002-387, s. 450, Laws of Florida.

³⁵ Ch. 64E-24, FAC.

Former Advisory Council on Intergovernmental Relations

Title 37 of the FAC is comprised of 42 rules adopted by the Advisory Council on Intergovernmental Relations (ACIR) in 1978. Many of the rules were adopted based on the authority of earlier versions of the APA³⁶ as well as the separate grant of rulemaking power to the ACIR.³⁷ In 1996, the rulemaking authority for ACIR was partially eliminated by revisions to the APA and its separate rulemaking authority, together with the agency itself, were abolished.³⁸ While the specific laws implemented by the ACIR rules were repealed at the same time,³⁹ the substance of those statutes apparently was reenacted with the creation of the Legislative Committee on Intergovernmental Relations.⁴⁰ This substantive statute was repealed in 2011.⁴¹ The FAC still shows all rules in Title 37 as in force.⁴²

Former Department of Labor and Employment Security

The Department of Labor and Employment Security (DLES) was abolished in 2002.⁴³ Laws relating to the DLES asbestos management program were repealed in 1999,⁴⁴ 2001,⁴⁵ and 2011.⁴⁶ In 2011, the rulemaking authority associated with this program was also abolished.⁴⁷ The implementing rules, found in chapter 38I-40, FAC, are still listed as in effect.⁴⁸ This chapter also contains rules the DLES adopted related to its oversight of vocational rehabilitation. After the abolishment of the DLES, the Division of Vocational Rehabilitation was placed under the Department of Education (DOE).⁴⁹ This designation did not expressly transfer the rules the DLES adopted for the program to DOE and the Department has not acted to readopt or amend the rules as part of the agency's rulemaking.

III. Effect of Proposed Changes:

Section 1 Creates a new subsection (2) in s. 120.536(1), F.S., stating that unless the Legislature provides otherwise, the repeal of specific powers and duties granted by substantive law will automatically repeal all rules adopted to implement those specific powers and duties.⁵⁰ The DOS

³⁶ Prior to its substantial amendment in 1996, s. 120.53, F.S., could have been interpreted as providing separate rulemaking authority for all agencies to adopt procedural requirements of the APA. This language was completely removed by Ch. 96-159, s. 9, Laws of Florida.

³⁷ Former section 163.706(4), F.S.

³⁸ Ch. 96-311, s. 9, Laws of Florida.

³⁹ Ch. 96-311, s. 9, Laws of Florida.

⁴⁰ Ch. 96-311, s. 1, Laws of Florida, created s. 11.70, F.S.

⁴¹ Ch. 2011-34, s. 3 Laws of Florida.

⁴² <https://www.flrules.org/gateway/Division.asp?toType=r&DivID=408> (accessed on 11/30/2011).

⁴³ Ch. 2002-194, s. 69, Laws of Florida.

⁴⁴ Ch. 99-5, s. 10, Laws of Florida, repealing former s. 255.554, F.S.

⁴⁵ Ch. 2001-89, s. 15, Laws of Florida, repealing s. 255.565, F.S.

⁴⁶ Ch. 2011-213, s. 35, Laws of Florida, repealing s. 255.552, 255.553, 255.555, 255.556, 255.557, 255.558, 255.559, 255.56, 255.561, and 255.562, F.S.

⁴⁷ Ch. 2011-213, s. 35, Laws of Florida, repealing s. 255.563, F.S.

⁴⁸ <https://www.flrules.org/gateway/ChapterHome.asp?Chapter=38I-40> (accessed on 11/30/2011).

⁴⁹ Ch. 2002-22, s. 1, Laws of Florida.

⁵⁰ The bill clarifies the law by codifying the legal doctrine in *Office of Insurance Regulation v. Service Insurance Company* and *Hulmes v. Division of Retirement*.

is directed to update the FAC by showing the repeal of affected rule(s) as of the effective date of the repealing law.

Section 2 Creates new section 120.555 and the procedure for DOS to review and institute summary repeal of rules that are no longer in full force and effect. Requires a response from the agency with authority over the rule, or the Governor if there is no such agency, stating whether the rule is still in full force and effect. Provides public notice of the proposed repeal. Any objection to the summary repeal is required to be brought as a challenge to proposed rulemaking under the APA.

Sections 3-7 Nullify a total of 165 rules in Title 40, FAC, of the five Water Management Districts.

Section 8 Nullifies rules in chapters 8K-1, 8K-2, 8M-1, 8M-2, and 8M-3, FAC, of the former Department of Commerce. Provides explanatory notes.

Section 9 Nullifies certain rules of the former Department of Health and Rehabilitative Services pertaining to implementation of a review program for cesarean births paid for with state or federal funds. Directs the Department of Health to initiate rulemaking to retain any of the rules. Provides an effective date for this section of July 1, 2013, to allow sufficient time for agency rulemaking. Provides explanatory notes.

Section 10 Nullifies other rules of the former Department of Health and Rehabilitative Services pertaining to implementation of a review program for cesarean births paid for with state or federal funds, which rules exceed the scope of authority in the law to be implemented by the rules. Provides explanatory notes.

Section 11 Nullifies certain rules of the former Department of Health and Rehabilitative Services pertaining to nursing scholarship loans. Directs the Department of Health to initiate rulemaking to retain any of the rules. Provides an effective date for this section of July 1, 2013, to allow sufficient time for agency rulemaking. Provides explanatory notes.

Section 12 Nullifies rules in Title 37, FAC, of the former Advisory Council on Intergovernmental Relations. Provides explanatory notes.

Sections 13-14 Nullify rules in chapter 38I-40, FAC, of the former Department of Labor and Employment Security pertaining to a repealed asbestos management program and vocational rehabilitation, which now falls under the jurisdiction of the Department of Education. It directs the DOE to initiate rulemaking to retain any of the vocational rehabilitation rules that are necessary for its program and delays the effect of the nullification of those rules to July 1, 2013. Provides explanatory notes.

Section 15 Requires rules nullified by this bill to be treated as repealed and so noted in the Florida Administrative Code and the Florida Administrative Weekly. It provides that sections nullifying rules shall not be codified in the Florida Statutes.

Section 16 Provides an effective date of 60 days after the bill becomes law.

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.)

None.

B. Amendments:

None.