

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7001 PCB RORS 14-01 Administrative Procedures

SPONSOR(S): Government Operations Subcommittee; Rulemaking Oversight & Repeal Subcommittee; Santiago

TIED BILLS: IDEN./SIM. BILLS: SB 1708

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|------------------|------------|---------------------------------------|
| Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee | 12 Y, 0 N | Miller | Rubottom |
| 1) Government Operations Subcommittee | 10 Y, 0 N, As CS | Harrington | Williamson |
| 2) Government Operations Appropriations Subcommittee | | | |
| 3) Rules & Calendar Committee | | | |

SUMMARY ANALYSIS

Agencies must review their existing rules to identify and correct deficiencies, improve efficiencies, reduce paperwork and costs, clarify and simplify text, and revise or delete rules that become obsolete, unnecessary, or are redundant of statute. Biennially, each agency head is required to file a report with the Speaker of the House of Representatives, President of the Senate, and the Legislature's Joint Administrative Procedures Committee (JAPC) summarizing the results of this review and revision, suggesting certain legislative changes, and addressing the economic impact of the rules on small business. In 2011, the Legislature suspended biennial reporting for that year and required all agencies to review and report on the economic effect of all then-existing rules by the end of 2013. In the same act, the Legislature required agencies to file a separate annual "regulatory plan" outlining all rulemaking the agency intended to implement in the next fiscal year, except emergency rulemaking.

When a newly-enacted law requires an agency to adopt new or amend current administrative rules for proper implementation, current law requires the agency charged with enforcing that law to formally propose such rules within 180 days of the effective date of the law. While agencies generally comply with this deadline, there are numerous examples of agencies failing to act within 180 days or interpreting the new law as not requiring rulemaking for proper implementation. In some instances this delay or inaction persists for several years.

The bill replaces the biennial summary reporting requirement with an expanded, annual regulatory plan. It requires each agency to determine whether each new law creating or affecting the agency's authority will require new or amended rules. If so, the agency must initiate rulemaking by a specific time. If not, the agency must state concisely why the law may be implemented without additional rulemaking. The regulatory plan also must state each existing law on which the agency will initiate rulemaking in the current fiscal year. The plan must be certified by the agency head and general counsel and published on the agency's internet website, with a copy of the certification filed with JAPC. The existing 180-day requirement is revised to coincide with the specific publishing requirements.

The bill compels adherence with the new reporting requirements and action deadlines by suspending the rulemaking authority of an agency that fails to comply with specific requirements until that agency completes the required action or the end of the next regular legislative session, whichever is earlier. The bill repeals the retrospective economic review of existing rules and repeals the law pertaining to the online survey.

The bill may have an indeterminate negative fiscal impact on the state. See FISCAL COMMENTS.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Agency Rulemaking and Reporting Requirements

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, as well as certain types of forms.¹ The effect of an agency statement determines whether it meets the statutory definition of a rule, regardless of how the agency characterizes the statement.² If an agency statement generally requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law, it is a rule.³

Rulemaking authority is delegated by the Legislature⁴ by law authorizing an agency to “adopt, develop, establish, or otherwise create”⁵ a rule. Agencies do not have discretion whether to engage in rulemaking.⁶ To adopt a rule an agency must have an express grant of authority to implement a specific law by rulemaking.⁷ The grant of rulemaking authority itself need not be detailed.⁸ The particular statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the agency from exercising unbridled discretion in creating policy or applying the law.⁹ A delegation of authority to an administrative agency by a law that is vague, uncertain, or so broad as to give no notice of what actions would violate the law, may unconstitutionally allow the agency to make the law.¹⁰ Because of this constitutional limitation on delegated rulemaking, the Legislature must provide minimal standards and guidelines in the law creating a program to provide for its proper administration by the agency. As such, the Legislature may delegate rulemaking authority to agencies but not the authority to determine what should be the law.

Section 120.54(1)(b), F.S.: The “180 Day” Requirement

An agency may not delay implementation of a statute pending adoption of specific rules unless there is an express provision prohibiting application of the statute before the implementing rules are adopted.¹¹ If a law is enacted that requires agency rulemaking for proper implementation, “such rules shall be drafted and formally proposed as provided in [s. 120.54, F.S.] within 180 days after the effective date of the act, unless the act provides otherwise.”¹² This “180-day requirement” predates the 1996 revisions.¹³

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

² *Dept. of Administration v. Harvey*, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

³ *McDonald v. Dept. of Banking & Fin.*, 346 So.2d 569, 581 (Fla. 1st DCA 1977), articulated this principle subsequently cited in numerous cases. See *State of Florida, Dept. of Administration v. Stevens*, 344 So. 2d 290 (Fla. 1st DCA 1977); *Dept. of Administration v. Harvey*, 356 So. 2d 323 (Fla. 1st DCA 1977); *Balsam v. Dept. of Health and Rehabilitative Services*, 452 So.2d 976, 977–978 (Fla. 1st DCA 1984); *Dept. of Transp. v. Blackhawk Quarry Co.*, 528 So. 2d 447, 450 (Fla. 5th DCA 1988), rev. den. 536 So.2d 243 (Fla.1988); *Dept. of Natural Resources v. Wingfield*, 581 So. 2d 193, 196 (Fla. 1st DCA 1991); *Dept. of Revenue v. Vanjaria Enterprises, Inc.*, 675 So. 2d 252, 255 (Fla. 5th DCA 1996); *Volusia County School Board v. Volusia Homes Builders Association, Inc.*, 946 So. 2d 1084 (Fla. 5th DCA 2007); *Florida Dept. of Financial Services v. Capital Collateral Regional Counsel*, 969 So. 2d 527 (Fla. 1st DCA 2007); *Coventry First, LLC v. State of Florida, Office of Insurance Regulation*, 38 So. 3d 200 (Fla. 1st DCA 2010).

⁴ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

⁵ Section 120.52(17), F.S.

⁶ Section 120.54(1)(a), F.S.

⁷ Sections 120.52(8) & 120.536(1), F.S. In 1996, the Legislature extensively revised agency rulemaking under the Administrative Procedure Act to require both the express grant of rulemaking authority and a specific law to be implemented by rule. Chapter 96-159, L.O.F.

⁸ *Save the Manatee Club, Inc.*, supra at 599.

⁹ *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).

¹⁰ *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209 (Fla.1968).

¹¹ Section 120.54(1)(c), F.S.

¹² Section 120.54(1)(b), F.S.

¹³ The 180 requirement was enacted as chapter 85-104, s. 7, L.O.F.

The statute does not require complete adoption of rules within 180 days. An agency may comply with the statute merely by publishing a notice of proposed rule.¹⁴ Proposed rules can be repeatedly, substantially revised based on public input and may also be withdrawn. Consequently, the 180-day requirement does not ensure prompt rulemaking.

JAPC Monitoring and Agency Compliance

The Joint Administrative Procedures Committee (JAPC) monitors agency compliance with the 180-day requirement in furtherance of its rulemaking oversight duties.¹⁵ JAPC staff reviews legislation enacted each session to identify new or changed laws that appear to require the adoption of new rules or the amendment or repeal of existing rules. Where the law appears to mandate new rulemaking¹⁶ or restates an existing mandate for rulemaking, JAPC sends a letter reminding the agency of the 180-day requirement. If the text of proposed rules is not published, at least as part of a notice of rule development, within the 180-days, JAPC will follow with an inquiry as to when the agency will initiate public rulemaking on that issue.

Agencies generally comply with the 180-day requirement as a matter of maintaining an effective working relationship between the executive and legislative offices even though JAPC has no power to compel compliance. JAPC identified several agencies that had not proposed rules within 180 days of the enactment of laws appearing to mandate new rulemaking during the period of 2007-2011. At its meeting on February 18, 2013, JAPC heard presentations from 13 different agencies on whether rulemaking was necessary to implement particular laws and, if so, explanations for the lack of progress. Some members of JAPC asked whether these agencies treated the statute as a “suggestion” instead of a mandatory rulemaking requirement.

“Directive” vs. “Mandate”

Courts generally interpret words in statutes such as “shall” or “must” as mandating a particular action where the alternative to the action is a possible deprivation of some right. However, use of such otherwise-mandatory terms where there is no effective consequence for the failure to act renders them *directory*, not compulsory.¹⁷ A person regulated by an agency or having a substantial interest in an agency rule may petition that agency to adopt, amend, or repeal a rule,¹⁸ including when the agency does not act within the 180-day requirement. The Administrative Procedure Act (APA) provides no other process to enforce the 180-day requirement, nor the authority for any specific entity to compel compliance.

Section 120.74, F.S.: Biennial Reporting

1996 Reporting Requirement

As part of the comprehensive revision of the APA in 1996, agencies were required to review all rules adopted before October 1, 1996, identify those exceeding the rulemaking authority permitted under the revised APA, and report the results to JAPC. JAPC would prepare and submit a combined report of all agency reviews to the President of the Senate and Speaker of the House of Representatives for legislative consideration.¹⁹

Another 1996 revision required ongoing agency rulemaking review, revision, and reporting.²⁰ Under that law, as amended, each agency must review its rules every two years and amend or repeal rules as

¹⁴ Section 120.54(3)(a), F.S. This is the common interpretation of the 180 day requirement. An alternative interpretation would be that a notice of rule development published under s. 120.54(2), F.S., including a *preliminary* draft of proposed rules, may be sufficient to comply.

¹⁵ Joint Rule 4.6.

¹⁶ Such as stating that the agency “shall adopt rules” or “shall establish” or “must establish” a particular standard or policy.

¹⁷ *S.R. v. State*, 346 So.2d 1018, 1019 (Fla. 1977); *Reid v. Southern Development Co.*, 42 So. 206, 208, 52 Fla. 595, 603 (Fla. 1906); *Ellsworth v. State*, 89 So.3d 1076, 1079 (Fla. 2d DCA 2012); *Kinder v. State*, 779 So.2d 512, 514 (Fla. 2d DCA 2000).

¹⁸ Section 120.54(7)(a), F.S. If the agency denies the petition, the requesting party may seek judicial review of that decision. Sections 120.52(2) and 120.68, F.S.

¹⁹ Chapter 96-159, s. 9(2), L.O.F.

²⁰ Chapter 96-399, s. 46, L.O.F, codified as s. 120.74, F.S. In both 2006 and 2008, the Legislature added substantive provisions to this section. Chapters 2006-82, s. 9, and 2008-149, s. 8, L.O.F.

necessary to comply with specific requirements.²¹ Biennially, the agency head must report the results and other required information to the President of the Senate, Speaker of the House of Representatives, JAPC, and “each appropriate standing committee of the Legislature” on October 1.²²

Limited Utility of s. 120.74, F.S., Reports

Agencies as defined in the APA,²³ including school districts, comply with the requirements of s. 120.74, F.S., typically by filing summary reports that verify the agency performed the required reviews, list rules identified in the review for amendment or repeal, and state a finding of no undue economic impact on small businesses (a required subject of the report). For example, a 2009 report from a school district identified the following changes to the student code of conduct:

The Code of Student Conduct is reviewed and revised annually and serves as the School Board’s policies and procedures for governing student behavior on school grounds, at school activities, and while being transported to and from school. The majority of the recommended changes for 2008-09 are minor revisions in punctuation, spelling, language, or order of paragraphs.²⁴

The 2013 report for the same school district states the following as “what & why the policy changed” for the student code of conduct:

The Code of Student Conduct is reviewed and revised annually and serves as the School Board’s policies and procedures for governing student behavior on school grounds, at school activities, and while being transported to and from school.²⁵

A different school district submitted substantially the same reports for 2009 and 2013, commenting only on that district’s review and management of forms. That district’s reports included no information on whether any rules were identified as requiring revision or repeal due to changes in law.²⁶

Reports by state agencies have reflected inconsistent application of the requirement for the report to “specify any changes made to [the agency’s] rules as a result of the review. . .”²⁷ One agency’s 2009 report identified each rule requiring repeal or amendment and new rules required by program changes, including a brief explanation of the reason for the amendment or adoption.²⁸ In contrast, a different agency simply identified obsolete rules for repeal, without stating why the rules were obsolete, and listed a rule for amendment to update documents incorporated by reference, without identifying the documents so referenced.²⁹ Some agencies provided lengthy lists of rules identified for amendment or repeal with little explanation other than repeating the terms of the review statute as to the reason for such proposed action.³⁰

Regulatory Plans

²¹ Identify and correct deficiencies; clarify and simplify its rules; delete rules that are obsolete, unnecessary, or merely repeat statutory language; improve efficiency, reduce paperwork, decrease costs to private sector and government; coordinate rules with agencies having concurrent or overlapping jurisdiction. Section 120.74(1), F.S.

²² Section 120.74(2), F.S.

²³ Section 120.52(1), F.S.

²⁴ School Board of Manatee County, “Section 120.74 Report” (Sept. 29, 2009), received by JAPC on Nov. 3, 2009 (on file with the Rulemaking Oversight and Repeal Subcommittee).

²⁵ School Board of Manatee County, “Section 120.74 Report” (Sept. 24, 2013), received by the House on Oct. 3, 2013 (on file with the Rulemaking Oversight and Repeal Subcommittee).

²⁶ School Board of Santa Rosa County, 2009 Report received by JAPC on Sept. 30, 2009, and 2013 Report received by the House on Aug. 26, 2013 (on file with the Rulemaking Oversight and Repeal Subcommittee).

²⁷ Section 120.74(2), F.S.

²⁸ Dept. of Children and Families, “Biennial rule review report required by section 120.74, Florida Statutes” (Oct. 1, 2009), received by JAPC on Oct. 7, 2009.

²⁹ Dept. of Agriculture and Consumer Services, “August 20, 2009 Memorandum regarding §120.74, Florida Statutes, Rule Review” (Oct. 1, 2009), received by JAPC on Oct. 1, 2009.

³⁰ Dept. of Business & Professional Regulation, “Section 120.74, Florida Statutes Biennial Report to the Legislature” (Oct. 1, 2009), received by JAPC on Oct. 5, 2009; Dept. of Environmental Protection, 2009 Report received by JAPC on Oct. 2, 2009.

In 2011, the reporting requirements were amended to require that each agency file an annual regulatory plan in addition to the biennial reports.³¹ The regulatory plan identifies those rules the agency intends to adopt, amend, or repeal during the next fiscal year. These reports have not proven any more substantive than the biennial reports described above.

Effect of the Bill

The bill retains the requirement that agencies identify and proceed with rulemaking necessitated by changes in newly-enacted law, but revises the deadlines, method for compliance, and reporting requirements in the APA.

The bill replaces the biennial reporting with an expanded annual regulatory plan. The regulatory plan requires each agency to identify those laws enacted or amended during the previous 12 months that created or modified the duties or authority of the agency. The plan may exclude any law affecting all or most agencies, if the law is identified as such by letter to JAPC from the Governor or the Attorney General. The plan also must identify whether rulemaking is necessary to implement the newly-enacted provisions.

For each law identified in the regulatory plan as requiring rulemaking, the agency must state whether a notice of rule development has been published, and the date by which the agency expects to publish the notice of proposed rule.

The bill imposes specific deadlines for the agency to publish the Notice of Rule Development and Notice of Proposed Rule. Specifically, the bill requires agencies to publish a Notice of Rule Development by November 1 for each law identified in the regulatory plan for which rulemaking is necessary to implement.

The bill requires an agency to move forward with rulemaking by publishing a Notice of Proposed Rule by April 1 of the year after the submission of the regulatory plan. If the agency is unable to publish the notice by April 1, the agency may extend the deadline to the following October 1, which is the deadline for the next regulatory plan. The Notice of Extension must be published in the Florida Administrative Register (FAR) and reference the published Notice of Rule Development. If the agency needs additional time, the agency must re-list the law on the next regulatory plan. Re-listing the law on a subsequent regulatory plan further extends the deadline for the Notice of Proposed Rule.

If the agency states rulemaking is not necessary to implement the new law, the regulatory plan must contain a concise written explanation supporting that conclusion. An agency also is required to identify all other laws the agency expects to implement by rulemaking, except emergency rulemaking, before the end of that fiscal year. For each law listed, the agency must indicate whether the rulemaking is intended to simplify, clarify, increase efficiency, improve coordination with other agencies, reduce regulatory costs, or delete obsolete, unnecessary, or redundant rules.

The regulatory plan must verify that the agency continuously reviews and revises its rules to maintain conformity with applicable law. The regulatory plan must be certified by both the agency head and the agency's primary lawyer. Copies of the certification will be delivered to JAPC and included with the agency's annual budget documents filed with the House of Representatives and Senate.

The agency is responsible for publishing its regulatory plan on its website or another state website established for publication of administrative law records. The agency must publish notice of publication in the FAR along with a hyperlink to the regulatory plan, and deliver a copy of the certification to JAPC.

The bill further requires an agency to file with JAPC a certification of compliance with the publishing requirement for the Notice of Rule Development and for each Notice of Extension or regulatory plan correction filed.

³¹ Chapter 2011-225, s. 4, L.O.F. The bill also suspended reporting in 2011 and 2013 under ss. 120.74(1) and (2), F.S., to avoid duplication with the economic reviews and reports under s. 120.745, F.S.

By October 15 of each year:

- The Department of Business and Professional Regulation must file with JAPC a certification that it has reviewed the regulatory plan for each board established under s. 20.165(4), F.S., and any other board or commission receiving administrative support from the department.
- The Department of Health must file with JAPC a certification that the department has reviewed the regulatory plan for each board established under s. 20.43(3), F.S.

A certification by the Department of Business and Professional Regulation or the Department of Health may relate to more than one board.

An agency is required to supplement its regulatory plan if a law enacted during a special session affects the agency's duties or authority. The supplement must be completed within 30 days after a bill becomes a law if the law is enacted before the next regular legislative session and the law modifies the agency's specifically legislated duties.

To ensure compliance with the law, the rulemaking authority of an agency that fails to comply with any of the following requirements of the bill is suspended until the agency completes the required action or until the end of the subsequent regular legislative session, whichever occurs first:

- By October 1, the agency must publish the annual regulatory plan on its website, deliver a copy to JAPC, and publish a notice in the FAR.
- The agency must publish a Notice of Proposed Rule by April 1, or must file a Notice of Extension, which extends the period to the next October 1.

During the suspension, the agency may complete any rulemaking actions required by the revised statute, including publishing Notices of Rule Development and Notices of Proposed Rules, and may conduct any public hearings that were noticed prior to the period of suspension. The suspension does not authorize an agency to promulgate or apply a statement defined as a rule, unless the statement was filed for adoption prior to the suspension. The suspension tolls the time for filing any already-pending rules for adoption; time resumes running when the agency meets the statutory requirements to remove the suspension. An agency's ability to adopt emergency rules or rules necessary to comply with federal law would not be suspended.

Educational entities, such as school districts, are exempted entirely from the requirements in the bill.

Retrospective Economic Review of Rules

Background

In November 2010, the Legislature enacted HB 1565 (2010)³² overriding a gubernatorial veto. The law created a new limitation on agency rulemaking: any rule adopted after the date of the act, whether a new or amended rule, that may likely have a significant economic impact, could not go into effect unless first ratified by the Legislature.³³ The law requires an agency to prepare a full Statement of Estimated Regulatory Costs (SERC) if the proposed rule either will have an adverse impact on small businesses or if the rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in the first year after the rule is implemented.³⁴ Additionally, the SERC must include an economic analysis addressing whether the rule is likely to have one of three specific impacts, directly or indirectly, in excess of \$1 million in the aggregate within 5 years of going into effect.³⁵

The requirements of chapter 2010-279, L.O.F., applied only to rules which had not become effective as of November 17, 2010, or were proposed for adoption after that date. Existing rules were not subject to the ratification requirement. In 2011 the Legislature passed CS/CS/CS/HB 993 & HB 7239, including a

³² Chapter 2010-279, L.O.F.

³³ Section 120.541(3), F.S.

³⁴ Sections 120.54(3)(b)1. and 120.541(1)(b), F.S.

³⁵ Section 120.541(2)(a), F.S. The three impacts are whether the rule will have 1) an adverse impact on economic growth, private sector job creation or employment, or private sector employment; 2) an adverse impact on business competitiveness, including competition with interstate firms, productivity, or innovation; or 3) an increase in regulatory costs, including transactional costs as defined by s. 120.541(2)(d), F.S.

provision requiring a retrospective economic analysis of those existing rules.³⁶ All agencies required to publish their rules in the Florida Administrative Code (F.A.C.)³⁷ were required to review their rules, identify those potentially having one of the impacts described in s. 120.541(2)(a), F.S., over a five year period, complete a comprehensive economic review of such rules, and publicly publish the results and certify their compliance with the statute to JAPC. In 2011, all agencies were to publish the results of their initial reviews and identify existing rules likely to have significant economic impacts.³⁸ At the agency's discretion, the agency may submit the compliance economic reviews in two approximately equal groups: Group 1 reviews were to be published by December 1, 2012, and the remaining reviews in Group 2 were to be published by December 1, 2013.³⁹

Concurrently with the development of HB 993 and HB 7239, the Governor directed a review of all existing agency rules through the newly-created Office of Fiscal Accountability and Regulatory Reform (OFARR).⁴⁰ Because most agencies participated in this review, and many of the elements were similar to the retrospective economic reviews contemplated by the Legislature, the bill exempted those agencies participating in the Governor's review from most of the new law's requirements. These "exempt" agencies were required to publish their initial determination of those rules requiring compliance economic reviews in 2011⁴¹ and all final reviews by December 31, 2013.⁴²

All agencies complied with the required retrospective review and publication of reports. Of those agencies not participating in the OFARR review process, only five⁴³ identified rules requiring compliance economic reviews.⁴⁴ Of the 161 compliance economic reviews published by these five agencies in 2012, only 72 reviews showed the subject rule as having a specific impact exceeding \$1 million over the 5 year period from July 1, 2011 to July 1, 2016.

³⁶ Chapter 2011-225, s. 5, L.O.F, codified as s. 120.745, F.S.

³⁷ A provision in the act designed specifically to *de facto* exclude educational units (defined in s. 120.52(6), F.S.) which do not publish their rules in the F.A.C. pursuant to s. 120.55(1)(a)2., F.S. Certain other publication requirements also do not apply to educational units. Section 120.81(1), F.S.

³⁸ Section 120.745(2), F.S. The statute required each agency to publish the number of its rules implementing or affecting state revenues (revenue rules), requiring submission of information or data by third parties (data collection rules), rules to be repealed, rules to be amended to reduce economic impacts, and those rules that would be reported in Groups 1 or 2.

³⁹ Section 120.745(5), F.S.

⁴⁰ Executive Order 11-01, subsequently revised by Executive Order 11-72 and replaced by Executive Order 11-211.

⁴¹ As required by the statute, exempt agencies published the number of identified revenue rules (2,078), data collection rules (3,529), rules to be repealed (1,852), rules to be amended to reduce economic impacts (1,441), and rules requiring compliance economic reviews (3,056). At <https://www.myfloridalicense.com/rulereview/Rule-Review-Reports.html> (last accessed February 4, 2014).

⁴² Section 120.745(9), F.S.

⁴³ Dept. of Agriculture and Consumer Services, Dept. of Citrus, Dept. of Financial Services, Office of Financial Regulation, and Public Service Commission.

⁴⁴ As required by the statute, "non-exempt" agencies published the number of identified revenue rules (508), data collection rules (1,169), rules to be repealed (482), rules to be amended to reduce economic impacts (189), and rules requiring compliance economic reviews to be reported in Group 1 (161) and Group 2 (182).

Effect of the Bill

In December 2013, the retrospective economic reviews of all agency rules were completed with the publication of the required compliance economic reviews. Accordingly, the bill repeals s. 120.745, F.S., effective upon the bill becoming law.

Your Voice Survey

Background

As part of the increased oversight of agency rulemaking enacted in 2011, the Legislature sought public participation and input about the effect of agency rules through use of an online survey. Those wanting to comment on any rule could log in to the survey form,⁴⁵ respond to a series of questions intended to identify the particular rule and the context of the comment, and provide as much information as the participant thought necessary. Access to the online form was directed primarily through the website of the Florida House of Representatives and was known as the “Your Voice Survey.”

To encourage public participation and obtain as wide a variety of comments as possible during the period of July 1, 2011 through July 1, 2014, s. 120.7455, F.S.,⁴⁶ was enacted to provide certain limited protections from enforcement actions based on any response to the survey. Specifically, a person reporting or providing information solicited by the Legislature in conformity with the law is immune from any enforcement action or prosecution based on such reporting.⁴⁷ If a person was subject to a penalty in excess of the minimum provided by law or rule, and such person proved the enforcement action was in retaliation for providing or withholding any information in response to the survey, the penalty would be limited to the minimum provided for each separate violation.⁴⁸

The survey was initiated in October 2011, and received 2,723 responses through October 22, 2013. No response appeared to place the participant in jeopardy of prosecution or administrative enforcement. However, the survey responses were of limited value. Many respondents voiced support or disapproval for issues outside the scope of the survey, such as federal laws, regulations or policies, unrelated state statutes, or local ordinances. Fewer than 200 respondents directly addressed a particular agency rule, and of those, no more than 40 respondents provided information about the economic or policy impacts of the rule. Because the limited protection in the statute proved to be unnecessary, no apparent purpose is served by continuing the statute.

Effect of the Bill

The bill repeals s. 120.7455, F.S., effective upon the bill becoming law.

B. SECTION DIRECTORY:

Section 1: Amends s. 120.54, F.S., revising the deadline to propose rules implementing new laws.

Section 2: Amends s. 120.74, F.S., revising requirements for the annual review of agency rules; providing procedures for preparing and publishing regulatory plans; specifying requirements for such plans; requiring publication by specified dates of notices of rule development and of proposed rules necessary to implement new laws; providing for applicability; providing for suspension of an agency’s rulemaking authority under certain circumstances.

Section 3: Repeals ss. 120.745 and 120.7455, F.S., relating to legislative review of agency rules in effect on or before a specified date and an Internet-based public survey of regulatory impacts, respectively; providing for rescission of the suspension of rulemaking authority under such repealed provisions.

Section 4: Provides an effective date of July 1, 2014, except as otherwise provided in this act.

⁴⁵ At <http://www.surveymonkey.com/s/FloridaRegReformSurvey> (last accessed February 4, 2014).

⁴⁶ Chapter 2011-225, s. 6, L.O.F.

⁴⁷ Section 120.7455(3), F.S. The protection also extends to the non-reporting of such information or the use of information provided in response to the survey.

⁴⁸ Section 120.7455(4), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill requires the Department of State to create a new notice, which may have an indeterminate minimal fiscal impact on the department. It also requires agencies to publish additional information in the FAR; publication in the FAR has an associated cost. The additional publication requirements will have an indeterminate minimal fiscal impact on agencies.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires no additional rulemaking by any agency. The main analysis discusses particular changes to the accountability of agencies exercising rulemaking authority and to rulemaking to implement new laws.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues: Extension of Time by Listing a Law on a Regulatory Plan

The bill provides that listing a law on a subsequent annual regulatory plan may further extend the rulemaking proceeding; however, the bill does not indicate a time period for such extension. It is unclear if the extension expires on the following April 1 or the following October 1, at which time the agency would appear to be required to either publish a Notice of Extension or re-list the law in the next regulatory plan.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Rulemaking Oversight & Repeal Subcommittee

On November 5, 2013, the Rulemaking Oversight & Repeal Subcommittee adopted four amendments to the draft PCB and approved PCB RORS 14-01 as amended.

- Amendment 1 revised notice and compliance requirements in section 2 of the bill. Agencies will be required to certify with JAPC their compliance with reporting, filing, and publication requirements. Paragraph (8)(d) was added to exclude emergency rulemaking and rulemaking necessary to comply with federal law from any suspension under this subsection.
- Amendment 2 revised publication requirements, clarifying the agency is responsible for publishing certain notices in the Florida Administrative Register together with a hyperlink providing direct access to the regulatory plan or supplement.
- Amendment 3 added a reference to the statute mandating the filing of annual budget requests by each agency.
- Amendment 4 provided agencies the ability to extend the time for publishing a notice of proposed rule required as a result of this statutory review for up to 180 days.

The final engrossment of the PCB and amendments resulted in changes to some of the internal subsections of the text, a necessary reference to s. 216.351, F.S., and renumbering some of the bill sections.

Government Operations Subcommittee

On March 25, 2014, the Government Operations Subcommittee adopted one strike-all amendment and reported the bill favorably with a committee substitute. The strike-all amendment:

- Clarified the requirements for an annual regulatory plan, including when a law may be excluded from the plan, and allowing for an agency to list a law on a subsequent plan;
- Removed the requirement that the persons certifying the regulatory plan certify the accuracy of the plan;
- Extended the deadline for the notice of proposed rule to April 1; and
- Limited the sanctions for noncompliant agencies to an agency failure to file the regulatory plan, notice of proposed rule, or notice of extension by the applicable deadlines.

This analysis is drawn to the committee substitute as passed by the Government Operations Subcommittee.