

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 Committee on Governmental Oversight and Accountability

BILL: CS/SB 1150

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Bean

SUBJECT: Legislative Reauthorization of Agency Rulemaking Authority

DATE: February 17, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peacock	McVaney	GO	Fav/CS
2.			AGG	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1150 requires the Administrative Procedures Committee to submit recommendations to the President of the Senate and the Speaker of the House of Representatives by March 1, 2017, on a process to periodically review rulemaking authority granted to state agencies. Such recommendations must outline a process similar to the Open Government Sunset Review Act, set forth in s. 119.15, F.S., including the expiration of rulemaking authority until reauthorized by the Legislature.

The bill takes effect upon becoming a law.

II. Present Situation:

Administrative Procedure Act

Chapter 120, F.S., known as the Administrative Procedure Act (APA),¹ regulates administrative rulemaking, administrative enforcement and administrative resolution of disputes arising out of administrative actions of most state agencies and some subdivisions of state government. The term “agency” is defined in s. 120.52(1), F.S., as:

- Each state officer and state department, and departmental unit described in s. 20.04, F.S.²

¹ Section 120.51, F.S.

² Section 20.04, F.S., sets the structure of the executive branch of state government.

- The Board of Governors of the State University System, the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
- A regional water supply authority.
- A regional planning agency.
- A multicounty special district with a majority of its governing board comprised of non-elected persons.
- Educational units.
- Each entity described in chs. 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation), F.S., and s. 186.504 (regional planning councils), F.S.
- Other units of government in the state, including counties and municipalities, to the extent they are expressly made subject to the act by general or special law or existing judicial decisions.³

The definition of “agency” also includes the Governor⁴ in the exercise of all executive powers other than those derived from the State Constitution.

Administrative actions authorized by law and regulated by the APA include adoption of a rule,⁵ granting or denying a permit or license, an order enforcing a law or rule that assesses a fine or other discipline and final decisions in administrative disputes or other matters resulting in an agency decision. Such disputes include challenges to the validity of a rule or proposed rule or challenges to agency reliance on unadopted rules,⁶ as well as challenges to other proposed agency actions which affect substantial interests of any party.⁷ In addition to disputes, agency action occurs when the agency acts on a petition for a declaratory statement⁸ or settles a dispute through mediation.⁹

Administrative Rulemaking

The APA governs all rulemaking by state agencies except when specific legislation exempts its application. Rulemaking authority is delegated by the Legislature¹⁰ authorizing an agency to “adopt, develop, establish, or otherwise create”¹¹ a rule. Agencies do not have discretion whether to engage in rulemaking.¹² To adopt a rule an agency must have an express grant of authority to implement a specific law by rulemaking.¹³ The grant of rulemaking authority itself need not be detailed.¹⁴ The particular statute being interpreted or implemented through rulemaking must

³ The definition of agency expressly excludes certain legal entities or organizations found in chs. 343, 348, 349 and 361, F.S., and ss. 339.175 and 163.01(7), F.S.

⁴ Section 120.52(1)(a), F.S.

⁵ Section 120.54, F.S.

⁶ Section 120.56, F.S.

⁷ Section 120.569, F.S.

⁸ Section 120.565, F.S.

⁹ Section 120.573, F.S.

¹⁰ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

¹¹ Section 120.52(17), F.S.

¹² Section 120.54(1)(a), F.S.

¹³ Sections 120.52(8) & 120.536(1), F.S.

¹⁴ *Save the Manatee Club, Inc.*, supra at 599.

provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.¹⁵ 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.¹⁶ 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 assigned executive agency. The Legislature may delegate rulemaking authority to agencies but not the authority to determine what should be the law.¹⁷

In 1996 the Legislature extensively revised¹⁸ agency rulemaking under the APA to require both an express grant of rulemaking authority and a specific law to be implemented by the rule.

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.¹⁹ The effect of an agency statement determines whether it meets the statutory definition of a rule, regardless of how the agency characterizes the statement.²⁰ 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.²¹

A notice of rule development initiates public input on a rule proposal.²² The process may be facilitated by conducting public workshops or engaging in negotiated rulemaking.²³ An agency begins the formal rulemaking by filing a notice of the proposed rule.²⁴ The notice is published by the Department of State in the Florida Administrative Register²⁵ and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared,²⁶ and how a party may request a public

¹⁵ *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).

¹⁶ *Conner v. Joe Hatton, Inc.*, 216 So.2d 209 (Fla.1968).

¹⁷ *Sarasota County. v. Barg*, 302 So. 2d 737 (Fla. 1974).

¹⁸ Ch. 96-159, LOF.

¹⁹ Section 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).

²⁰ *Dept. of Administration v. Harvey*, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

²¹ *McDonald v. Dep't 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. Department of Health and Rehabilitative Services*, 452 So.2d 976, 977-978 (Fla. 1st DCA 1984); *Department 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).

²² Section 120.54(2)(a), F.S.

²³ Section 120.54(2)(c)-(d), F.S.

²⁴ Section 120.54(3)(a)1., F.S..

²⁵ Section 120.54(3)(a)2., F.S.

²⁶ Section 120.541(1)(b), F.S., requires preparation of a SERC if the proposed rule will have an adverse impact on small business or if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 within one year of implementation of the rule. Alternatively, s. 120.541(1)(a), F.S., provides that preparation of a SERC is triggered

hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy, adverse impact on business competitiveness or increase in regulatory costs.²⁷

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect.²⁸ First, is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.²⁹ Next, is the likely adverse impact on business competitiveness,³⁰ productivity, or innovation.³¹ Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.³² If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."³³ A rule must be filed for adoption before it may go into effect³⁴ and cannot be filed for adoption until completion of the rulemaking process.³⁵

Proposed rules also must be formally reviewed by the Legislature's Joint Administrative Procedures Committee (JAPC)³⁶ which reviews rules to determine their validity, authority, sufficiency of form, consistency with legislative intent, reasonableness of regulatory cost estimates and other matters.³⁷ An agency must formally respond to JAPC concerns or objections.³⁸

Emergency Rulemaking

Florida's APA provides for emergency rulemaking by any procedure which is fair under the circumstances when an immediate danger to the public health, safety, or welfare requires emergency action. Emergency rules may not be effective for more than 90 days but may be renewed if the agency has initiated rulemaking to adopt rules addressing the subject.³⁹

when a substantially affected person submits a good faith written proposal for a lower cost regulatory alternative which substantially accomplishes the objectives of the law being implemented.

²⁷ Section 120.541(2)(a), F.S.

²⁸ *Id.*

²⁹ Section 120.541(2)(a)1., F.S.

³⁰ Section 120.541(2)(a)2., F.S., states that business competitiveness includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

³¹ *Id.*

³² Section 120.541(2)(a) 3., F.S.

³³ Section 120.54(3)(e)6., F.S. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

³⁴ *Id.*

³⁵ Section 120.54(3)(e), F.S.

³⁶ Section 120.54(3)(a)4., F.S.

³⁷ Section 120.545(1), F.S.

³⁸ Sections 120.54(3)(e)4. and 120.545(3), F.S.

³⁹ Section 120.54(4), F.S.

Administrative Procedures Committee

Section 1.01(16), F.S., provides that the term “Administrative Procedures Committee” means a committee designated by joint rule of the Legislature or by agreement between the President of the Senate and the Speaker of the House of Representatives. This committee is also known as the Joint Administrative Procedures Committee (JAPC).

JAPC, a joint standing committee of the Legislature created by Rule 4.1 of the Joint Rules of the Florida Legislature, is composed of no fewer than five and no more than seven members from each house, as appointed by the President of the Senate and the Speaker of the House. The primary function of JAPC is to generally review agency action pursuant to the operation of ch. 120, F.S., the Administrative Procedures Act, particularly as these actions relate to the rulemaking process. It is JAPC’s responsibility to ensure that rules adopted by the executive branch agencies do not create new law, but rather stay within the authority specifically delegated by the legislature.

Joint Rule 4.6 charges JAPC with maintaining a continuous review of agency rules and the statutory authority upon which they are based. JAPC reviews proposed rules and may review existing rules to determine whether they are within delegated legislative authority and notifies the agency if its authority is eliminated or significantly changed by repeal, amendment or holding of a court of last resort. Following each session of the Legislature, JAPC reviews each law signed by the Governor or allowed to become law without his signature and determines whether the law will have a probable effect on an agency’s rules. JAPC also constantly monitors judicial decisions in administrative law and advises the agency when either its statutory rulemaking authority or its rules are affected by these decisions.

Section 120.545, F.S., provides additional authority for the review of rules and sets out the procedures in the event of a JAPC objection to a rule. If the reviewing attorneys have concerns that a proposed or existing rule may not be authorized or exceeds the delegated rulemaking authority, the agency is contacted. Often, the agency agrees that there is no authority for the rule and withdraws or amends the rule to meet the staff concerns. If there is disagreement about whether or not there is authority for the rule, the rule is scheduled for consideration by the full committee in a public forum. The agency may appear before the committee and present argument and evidence in support of its rule. If, after hearing the agency’s argument, the committee does not find statutory authority for the rule, an objection is voted and the agency has a statutory period in which to respond. If the agency refuses to modify or withdraw a rule to which the committee has objected, public notice of the objection is given and a notation accompanies the rule when it appears in the Florida Administrative Code.

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR Act) prescribes a legislative review process for newly created or substantially amended public records and open meetings exemptions.⁴⁰ The OGSR Act provides that an exemption automatically repeals on October 2nd of the fifth year

⁴⁰ Sections 286.0111 and 119.15, F.S. Section 286.0111, F.S. provides that the OGSR Act’s provisions found in s. 119.15, F.S., apply to s. 286.011, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered substantially amended if it is expanded to include more information or to include meetings. The OGSR Act does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. While the OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one Legislature cannot bind a future Legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.⁴¹ In practice, many exemptions are continued by repeal of the sunset date rather than reenactment of the exemption.

Under the OGSR Act, the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following specific questions in such a review:⁴²

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

The OGSR Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.⁴³

An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;⁴⁴
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;⁴⁵ or
- It protects trade or business secrets.⁴⁶

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.⁴⁷

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.⁴⁸ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.⁴⁹

III. Effect of Proposed Changes:

Section 1 requires the Administrative Procedures Committee as defined in s. 1.01, F.S., to submit recommendations to the President of the Senate and the Speaker of the House of

⁴¹ Section 119.15(3), F.S.

⁴² Section 119.15(6)(a), F.S.

⁴³ Section 119.15(6)(b), F.S.

⁴⁴ Section 119.15(6)(b)1., F.S.

⁴⁵ Section 119.15(6)(b)2., F.S.

⁴⁶ Section 119.15(6)(b)3., F.S.

⁴⁷ Section 119.15(6)(b), F.S.

⁴⁸ FLA. CONST., art. I, s. 24(c).

⁴⁹ Section 119.15(7), F.S.

Representatives by March 1, 2017, on a process to periodically review rulemaking authority granted to state agencies. Such recommendations must outline a process similar to the Open Government Sunset Review Act, set forth in s. 119.15, F.S., including the expiration of rulemaking authority until reauthorized by the Legislature.

Section 2 provides the bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

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:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

None.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on February 16, 2016:

- Deletes provisions of original bill regarding suspension of any new rulemaking authority for 3 years after the effective date of the law authorizing rulemaking until reauthorized by general law;
- Requires the Administrative Procedures Committee to submit recommendations by March 1, 2017, to the President of the Senate and the Speaker of the House of Representatives on a process to periodically review rulemaking authority granted to state agencies;
- Requires such legislative recommendations to outline a process similar to the Open Government Sunset Review Act, set forth in s. 119.15, F.S., including the expiration of rulemaking authority until reauthorized by the Legislature; and
- Changes effective date from July 1, 2016, to taking effect upon becoming a law.

- B. **Amendments:**

None.