

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 953 Legislative Reauthorization of Agency Rulemaking Authority

SPONSOR(S): Eisnaugle and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1150

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee	12 Y, 0 N, As CS	Rubottom	Rubottom
2) Appropriations Committee	26 Y, 0 N	White	Leznoff
3) State Affairs Committee			

SUMMARY ANALYSIS

Agency rulemaking authority must be specifically authorized by law. Under Florida's Administrative Procedures Act (ch. 120, F.S.), rules must be supported by a law granting rulemaking authority to the agency and a specific law being implemented by the rule. Laws authorizing rulemaking are typically codified in the Florida Statutes as permanent laws. Any rule that has an economic or regulatory cost impact in excess of \$1 Million cannot go into effect until ratified by the legislature. Such ratifications occur by enacting of a general law.

House Bill 953 proposes to suspend any rulemaking authorized by law three years after the effective date of the authority. Rulemaking authority in force upon the bill's effective date will be suspended on July 1, 2019, unless re-authorized. If rulemaking is not reauthorized by general law prior to the suspension, rulemaking authority is suspended until reauthorized. The bill makes exceptions for emergency rules and rules necessary to maintain the financial or legal integrity of any financial obligation of the state or its agencies or political subdivisions.

The bill allows the Governor to issue a declaration of necessity, delaying any suspension for 90 days to allow the Legislature to convene and reauthorize necessary rulemaking. It also allows rulemaking proceedings to be undertaken pursuant to ch. 120, F.S., but delaying the effect of any rules until a suspension ends.

There may be an indeterminate but likely insignificant fiscal impact to the state.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Agency Rulemaking

Process and Ratification

Rulemaking is the executive application of constitutionally delegated legislative power to particularize public policy or regulate within guidelines set by the Legislature. The Florida Administrative Procedures Act (APA)¹ governs all rulemaking by state agencies except when specific legislation exempts its application.

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.² Rulemaking authority is delegated by the Legislature³ through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”⁴ a rule. Agencies do not have discretion whether 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 notice of rule development initiates public input on a rule proposal.⁹ The process may be facilitated by conducting public workshops or engaging in negotiated rulemaking.¹⁰ An agency begins formal rulemaking by filing a notice of the proposed rule.¹¹ The notice is published by the Department of State in the Florida Administrative Register¹² 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,¹³ and how a party may request a public 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 or increase in regulatory costs.¹⁴

The economic analysis mandated for each SERC must analyze a rule’s potential impact over the five-year period from when the rule goes into effect. First is the rule’s likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.¹⁵ Next, is the likely

¹¹ Chapter 120, Florida Statutes.

² Section 120.52(16); *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).

⁴ Section 120.52(17).

⁵ Section 120.54(1)(a), F.S.

⁶ Section 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 Section 120.54(2)(a), F.S.

¹⁰ Section 120.54(2)(c)-(d), F.S.

¹¹ Section 120.54(3)(a)1, F.S.

¹² Section 120.55(1)(b)2, F.S.

¹³ Preparation of a SERC is required 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, preparation of a SERC is triggered 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. Section 120.541(1)(a), (b), F.S.

¹⁴ Section 120.541(2)(a), F.S.

¹⁵ Section 120.541(2)(a)1., F.S.

adverse impact on business competitiveness,¹⁶ productivity, or innovation.¹⁷ Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.¹⁸ 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 five-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.”¹⁹ A rule must be filed for adoption before it may go into effect²⁰ and cannot be filed for adoption until completion of the rulemaking process.²¹ A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over five years²² must be ratified by the Legislature before going into effect.²³ As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Proposed rules also must be formally reviewed by the Legislature's Joint Administrative Procedures Committee (JAPC)²⁴ which reviews rules to determine their validity, authority, sufficiency of form, consistency with legislative intent, reasonableness of regulatory cost estimates, and other matters.²⁵ An agency must formally respond to JAPC concerns or objections.²⁶

There are presently tens of thousands of agency rules in force.²⁷ There are many hundreds of permanent statutes authorizing rules.²⁸ Once rulemaking is authorized, the authority is perpetual unless and until the Legislature enacts a change in law. Agencies and boards have been known to repeatedly reject sound advice provided by JAPC when exceeding their delegated authority.²⁹ Altering any such authority that may have receded in its conformity to the will of the people of Florida requires either the Governor's approval or passage notwithstanding a veto by a 2/3 vote of each legislative chamber. Thus, it is more difficult for the Legislature to withdraw delegated power from the executive than it is to give it.

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 in specific circumstances when the agency has initiated rulemaking to adopt rules addressing the subject.³⁰

Effect of proposed changes

¹⁶ This includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

¹⁷ Section 120.541(2)(a) 2., F.S.

¹⁸ Section 120.541(2)(a) 3., F.S.

¹⁹ Section 120.54(3)(e)6. 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.

²⁰ Section 120.54(3)(e)6., F.S.

²¹ Section 120.54(3)(e), F.S.

²² Section 120.541(2)(a), F.S.

²³ Section 120.541(3), F.S.

²⁴ Section 120.54(3)(a)4., F.S.

²⁵ Section 120.545(1), F.S.

²⁶ Sections 120.54(3)(e)4. and 120.545(3), F.S.

²⁷ Florida Administrative Code.

²⁸ An informal review by the House Rulemaking and Regulation Subcommittee in 2011-12 identified in excess of 2500 rule authorizing provisions in Florida Statutes that have been cited as authority by agencies. There are other redundant and unnecessary provisions that are never used. See, section 11.

²⁹ See, for example, "Summary Final Order", Florida Medical Association, Inc, et al. vs. Department of Health, Board of Nursing, et al., Case 12-1545RP, accessed on January 11, 2016, at: <https://www.doah.state.fl.us/ROS/2012/12001545.pdf>.

³⁰ Section 120.54(4), F.S.

The bill suspends all existing rulemaking authority on July 1, 2019, and all new rulemaking authority three years after its enactment unless the Legislature reauthorizes the rulemaking authority. Any reauthorization will have a three-year life unless a different period is provided in the reauthorization.

The bill provides that reauthorization must be by general law. The Legislature can be expected to use general bills to reauthorize rulemaking by reference to chapter, agency or specific section of law, in a manner procedurally similar to the ratification of rules under s. 120.541(3), F.S.

By suspending the rule-authorizing laws, rather than repealing them or directing their expiration, reauthorization is not expected to require re-enactment of rulemaking authority but only a clear statement in law that a suspension is avoided or lifted. The bill allows for the Legislature to reauthorize currently existing rulemaking on its own schedule to avoid having to reauthorize all such rulemaking in the 2019 Regular Session.

The bill allows an agency to continue or initiate rulemaking proceedings during a suspension but no rule adopted during a suspension of authority may be effective unless ratified by the Legislature.

The bill makes exception for any emergency rulemaking or any rulemaking necessary to maintain the financial or legal integrity of any financial obligation of the state, its agencies or political subdivisions. This allows public health, safety and welfare to be protected and assures the reliability of state obligations such as bonds financing toll roads.

The bill supports the emergency rule exception to a rulemaking suspension by conforming the statutory grounds allowing renewal of an emergency rule.³¹ Specifically, it allows renewal when a permanent rule is pending legislative ratification under any law.³² It also clarifies that an emergency rule may be renewed pending ratification of a permanent rule or during a pre-adoption administrative rule challenge³³ only when the danger persists that justified emergency rulemaking.

Finally, the bill allows the Governor to issue a written declaration of public necessity delaying a suspension for 90 days, allowing the Legislature to convene and address the necessity. In the event the Legislature adjourns a Regular Session without reauthorizing needed rulemaking authority, the Governor would be able to confront the Legislature's neglect by issuing the declaration and calling a Special Session.

The bill expressly provides that all rules lawfully adopted remain in effect during any suspension of rulemaking authority under the bill's provisions.

B. SECTION DIRECTORY:

SECTION 1. amends s. 120.536, F.S., creating a new subsection (2) providing for suspension and reauthorization of rulemaking authority.

SECTION 2. amends s. 120.54(4)(c), F.S., allowing renewal of an emergency rule during pendency of a request for legislative ratification of the permanent rule on the subject.

SECTION 3. provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to affect revenues of the state.

³¹ Section 120.54(4)(c), F.S.

³² Such laws would include the provisions of the bill and s. 120.541(3), F.S.

³³ Section 120.56(2), F.S.

2. Expenditures:

There may be an indeterminate but likely insignificant fiscal impact to the state. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to affect local government revenues.

2. Expenditures:

The bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

They bill does not appear to impact the private sector economy.

D. FISCAL COMMENTS:

Some state agencies have expressed concern about increased workload; however, it is anticipated that any increase in workload is insignificant.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to implicate the Mandates provision.

2. Other:

N/A

B. RULE-MAKING AUTHORITY:

The bill regularly suspends rulemaking authority, unless reauthorized by general law, providing that no rule adopted during a suspension is effective without ratification by the Legislature. The bill also clarifies that the power to renew emergency rules during the pendency of a challenge to a proposed permanent rule or a request for ratification of such rule requires that the danger upon which the emergency rule is based must be continuing at the time of emergency rule renewal.

C. DRAFTING ISSUES OR OTHER COMMENTS:

N/A

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 20, 2016, the Rulemaking Oversight and Repeal Subcommittee adopted an amendment revising the emergency rulemaking provision to clarify that emergency rules may be renewed during the pendency of a ratification request regarding the permanent rule. This analysis is drafted to the bill as amended.