

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 953 Legislative Reauthorization of Agency Rulemaking Authority  
**SPONSOR(S):** State Affairs Committee; Rulemaking Oversight & Repeal Subcommittee; Eisnaugle and others  
**TIED BILLS:**           **IDEN./SIM. BILLS:** CS/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	15 Y, 0 N, As CS	Moore	Camechis

### SUMMARY ANALYSIS

Agency rulemaking authority must be specifically authorized by law. Under Florida's Administrative Procedure 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. A rule that is projected to have an economic or regulatory cost in excess of \$1 million may not go into effect until ratified by the Legislature. Such ratifications occur by enacting a general law.

The bill suspends any rulemaking authorized by law four years after the effective date of the authority. Rulemaking authority in force upon the bill's effective date will be suspended on July 1, 2020, unless reauthorized. 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 public necessity to delay any suspension for 90 days to allow the Legislature to convene and reauthorize necessary rulemaking. It also allows rulemaking proceedings to be conducted pursuant to ch. 120, F.S., while rulemaking authority is suspended, but delays the effect of any rules adopted during the suspension until the suspension ends.

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

# 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 Procedure Act (APA)<sup>1</sup> 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.<sup>2</sup> Rulemaking authority is delegated by the Legislature<sup>3</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>4</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>5</sup> To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>6</sup> The grant of rulemaking authority itself need not be detailed.<sup>7</sup> 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.<sup>8</sup>

A notice of rule development initiates public input on a rule proposal.<sup>9</sup> The process may be facilitated by conducting public workshops or engaging in negotiated rulemaking.<sup>10</sup> An agency begins formal rulemaking by filing a notice of the proposed rule.<sup>11</sup> The notice is published by the Department of State in the Florida Administrative Register<sup>12</sup> 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,<sup>13</sup> and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis of a rule’s potential impact over the five-year period after the rule goes into effect. The analysis must show whether the rule is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment;<sup>14</sup> is likely to have an adverse impact on business competitiveness,<sup>15</sup> productivity, or innovation;<sup>16</sup> or is likely to increase regulatory costs, including any transactional costs.<sup>17</sup> If the analysis shows the projected impact of the

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<sup>11</sup> Chapter 120, Florida Statutes.

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

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

<sup>4</sup> Section 120.52(17).

<sup>5</sup> Section 120.54(1)(a), F.S.

<sup>6</sup> Section 120.52(8) & s. 120.536(1), F.S.

<sup>7</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>8</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>9</sup> Section 120.54(2)(a), F.S.

<sup>10</sup> Section 120.54(2)(c)-(d), F.S.

<sup>11</sup> Section 120.54(3)(a)1, F.S.

<sup>12</sup> Section 120.55(1)(b)2, F.S.

<sup>13</sup> 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.

<sup>14</sup> Section 120.541(2)(a)1., F.S.

<sup>15</sup> This includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>16</sup> Section 120.541(2)(a) 2., F.S.

<sup>17</sup> Section 120.541(2)(a) 3., F.S.

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.

Current law distinguishes between a rule's being "adopted" and becoming enforceable or "effective."<sup>18</sup> A rule must be filed for adoption before it may go into effect<sup>19</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>20</sup> Because a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, the rule must be filed for adoption before being submitted for legislative ratification.

Proposed rules must also be formally reviewed by the Legislature's Joint Administrative Procedures Committee (JAPC),<sup>21</sup> which reviews rules to determine their validity, authority, sufficiency of form, consistency with legislative intent, reasonableness of regulatory cost estimates, and other matters.<sup>22</sup> An agency must formally respond to JAPC concerns or objections.<sup>23</sup>

There are presently tens of thousands of agency rules in force.<sup>24</sup> There are many hundreds of statutes authorizing rules.<sup>25</sup> 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.<sup>26</sup> 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 branch 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.<sup>27</sup>

### Effect of Proposed Changes

The bill suspends all existing rulemaking authority on July 1, 2020, and all new rulemaking authority four years after its enactment unless the Legislature reauthorizes the rulemaking authority. Any reauthorization will have a four-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 laws authorizing rulemaking, rather than repealing them or directing their expiration, reauthorization is not expected to require re-enactment of rulemaking authority, but instead only a clear statement in law that a suspension is avoided or lifted. The bill allows the Legislature to reauthorize currently existing rulemaking on its own schedule to avoid having to reauthorize all such rulemaking in the 2020 Regular Session.

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<sup>18</sup> 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.

<sup>19</sup> Section 120.54(3)(e)6., F.S.

<sup>20</sup> Section 120.54(3)(e), F.S.

<sup>21</sup> Section 120.54(3)(a)4., F.S.

<sup>22</sup> Section 120.545(1), F.S.

<sup>23</sup> Sections 120.54(3)(e)4. and 120.545(3), F.S.

<sup>24</sup> Florida Administrative Code.

<sup>25</sup> 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.

<sup>26</sup> 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>.

<sup>27</sup> Section 120.54(4), F.S.

Subject to the rules of the Senate and the House of Representatives, the bill authorizes the President of the Senate and the Speaker of the House of Representatives to appoint a joint committee for the purpose of overseeing the review of rulemaking authority. The joint committee must report its recommendations regarding reauthorization of rulemaking to the presiding officers each year on or before the convening of the regular legislative session.

The bill authorizes an agency to give notice by October 1 of each year to the Legislature of any agency rulemaking authority that is subject to suspension within the next two years. The notice may include recommendations for reauthorizing, repealing, or amending existing rulemaking authority.

The bill allows an agency to continue or initiate rulemaking proceedings during a suspension, but a rule adopted during a suspension of authority may not take effect unless ratified by the Legislature.

The bill does not apply to emergency rulemaking or rulemaking necessary to maintain the financial or legal integrity of any financial obligation of the state or its agencies or political subdivisions. This allows the 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 provisions allowing renewal of an emergency rule.<sup>28</sup> Specifically, it allows renewal when a permanent rule is pending legislative ratification under any law.<sup>29</sup> It also clarifies that an emergency rule may be renewed pending ratification of a permanent rule or during a pre-adoption administrative rule challenge<sup>30</sup> only when the danger persists that justified emergency rulemaking.

Finally, the bill authorizes the Governor to issue a written declaration of public necessity to delay a suspension for 90 days, allowing the Legislature to convene and reauthorize the rulemaking authority. 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 does not specify what type or level of "public necessity" is sufficient to delay suspension.

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.

##### 2. Expenditures:

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<sup>28</sup> Section 120.54(4)(c), F.S.

<sup>29</sup> Such laws would include the provisions of the bill and s. 120.541(3), F.S.

<sup>30</sup> Section 120.56(2), F.S.

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:**

The 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:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

The bill regularly suspends rulemaking authority, unless reauthorized by general law, and provides that no rule adopted during a suspension is effective without ratification by the Legislature. The bill also clarifies that the authority to renew emergency rules while a challenge to a proposed permanent rule is pending or while the rules are awaiting legislative ratification exists only if the danger upon which the emergency rule is based is continuing at the time of renewal.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**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.

On February 25, 2016, the State Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Changed the date on which all existing rulemaking authority is suspended from July 1, 2019, to July 1, 2020;
- Changed the amount of time after which any new rulemaking authority is suspended from three years to four years;
- Authorized the presiding officers of the Legislature to appoint a joint committee to oversee the review of rulemaking authority; and

- Authorized agencies to provide notice to the Legislature of any rulemaking authority subject to suspension.

This analysis is drafted to the bill as approved by the State Affairs Committee.