

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 729 Administrative Procedures

**SPONSOR(S):** Oversight, Transparency & Public Management Subcommittee; Rodriguez, A. M.; Gregory and others

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Public Management Subcommittee	12 Y, 0 N, As CS	Toliver	Smith
2) State Affairs Committee	20 Y, 0 N	Toliver	Williamson

### SUMMARY ANALYSIS

The Administrative Procedure Act (APA) sets forth a uniform set of procedures agencies must follow when exercising delegated rulemaking authority. 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. Agencies do not have the discretion in and of themselves to engage in rulemaking. To adopt a rule, an agency must have a general grant of authority to implement a specific law.

The bill amends the APA to increase transparency in rulemaking and provide a mechanism to ensure agencies reduce unnecessary rules. Specifically, the bill:

- Requires each agency to review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If, after reviewing a rule, the agency determines substantive changes to update a rule are not required, the agency must repromulgate the rule;
- Specifies the economic impacts and compliance costs an agency must consider in creating a statement of estimated regulatory costs (SERC). Each agency is required to have a website where each of its SERCs may be viewed in their entirety;
- Requires an agency, in all notices of rulemaking that include material incorporated by reference, to submit the incorporated material in the prescribed electronic format to DOS with the full text available for free public access through an electronic hyperlink;
- Requires changes to material incorporated by reference to be in a strike-through and underline format;
- Requires the annual regulatory plan to identify and describe each rule, by rule number or proposed rule number, which the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1 and ending September 30. The bill also requires the annual regulatory plan to contain a declaration that the agency head and the general counsel understand that regulatory accountability is necessary to ensure public confidence in the integrity of state government and to that end the agency is diligently working toward lowering the total number of rules adopted;
- Specifies that an adverse impact on small business exists if certain specific criteria is met;
- Specifies that a lower cost regulatory alternative may be submitted after a notice of proposed rule or a notice of change;
- Defines the term "technical change" and requires technical changes to be documented in the history of the rule;
- Requires a period of at least seven days between the publication of a notice of rule development and a notice of proposed rule; and
- Requires the Joint Administrative Procedures Committee to review all existing rules.

The bill may have a negative fiscal impact on state government. See Fiscal Comments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Rulemaking

##### Background

The Legislature, as the sole branch of government with the inherent power to create laws,<sup>1</sup> may delegate to agencies in the executive branch the quasi-legislative ability, or authority, to create rules.<sup>2</sup> The Administrative Procedure Act (APA)<sup>3</sup> sets forth a uniform set of procedures agencies must follow when exercising delegated rulemaking authority. 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>4</sup> Rulemaking authority is delegated by the Legislature through statute and authorizes agencies to “adopt, develop, establish, or otherwise create”<sup>5</sup> rules. Usually, the Legislature delegates rulemaking authority to a given agency because an agency has “expertise in a particular area for which they are charged with oversight.”<sup>6</sup> Agencies do not have the discretion in and of themselves to engage in rulemaking.<sup>7</sup> To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>8</sup> The grant of rulemaking authority itself need not be detailed. 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>9</sup>

An agency begins the formal rulemaking process<sup>10</sup> by filing a notice of rule development of proposed rules in the Florida Administrative Register (FAR) indicating the subject area to be addressed by the rule development and including a short, plain explanation of the purpose and effect of the rule.<sup>11</sup> The notice may include the preliminary text of the proposed rule, but it is not necessary. Such notice is required for all rulemaking, except for rule repeals. Next, an agency must file, upon approval of the agency head, a notice of proposed rule.<sup>12</sup> The notice of proposed rule is published by the Department of State (DOS) in the FAR<sup>13</sup> and must contain the full text of the proposed rule or amendment and a summary thereof.<sup>14</sup> Prior to 2012, the FAR was published weekly, resulting in a period of at least seven days between the publication of a notice of rule development and a notice of proposed rule.<sup>15</sup> In 2012, the Legislature passed HB 541 (2012) that changed the FAR from a weekly publication to a publication that is continuously revised and, as a result, eliminated the seven day period between the two notices.<sup>16</sup>

After publication of a notice of proposed rule, an agency must hold a hearing on the proposed rule if a person requests a hearing within 21 days.<sup>17</sup> If, after the hearing is held or after the time for requesting a hearing has expired, the agency does not change the rule, other than a technical change, the agency

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<sup>1</sup> Article III, s. 1, FLA. CONST.; *see also* art. II, s. 3, FLA. CONST.

<sup>2</sup> *See Whiley v. Scott*, 79 So. 3d 702, 710 (Fla. 2011), stating “[r]ulemaking is a derivative of lawmaking.”

<sup>3</sup> Chapter 120, F.S.

<sup>4</sup> Section 120.52(16), F.S.

<sup>5</sup> Section 120.52(17), F.S.

<sup>6</sup> *Whiley v. Scott*, 79 So. 3d 702, 711 (Fla. 2011).

<sup>7</sup> Section 120.54(1)(a), F.S.

<sup>8</sup> Sections 120.52(8) and 120.536(1), F.S.

<sup>9</sup> *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

<sup>10</sup> Alternatively, a person regulated by an agency or having substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule. Section 120.54(7), F.S.

<sup>11</sup> Section 120.54(2), F.S.

<sup>12</sup> Section 120.54(3)(a)1., F.S.

<sup>13</sup> Section 120.55(1)(b), F.S.

<sup>14</sup> Section 120.54(3)(a)1., F.S.

<sup>15</sup> Chapter 2012-63, L.O.F.

<sup>16</sup> *Id.*

<sup>17</sup> Section 120.54(3)(c), F.S.

must file a notice stating no changes have been made to the rule with the Joint Administrative Procedures Committee (JAPC) at least seven days before filing the rule for adoption.<sup>18</sup> However, if a hearing is requested, the agency may, based upon the comments received at the hearing, publish a notice of change.<sup>19</sup>

As an alternative to the agency initiated process delineated above, a person regulated by the agency or having a substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule.<sup>20</sup> The petitioner must specify the proposed rule and action requested.<sup>21</sup> The agency can either initiate rulemaking or decline to do so; however, if the agency chooses the latter it must issue a written statement of the reasons for the denial.<sup>22</sup>

Once an agency has completed the steps of rulemaking, the agency may file for rule adoption with DOS and the rule becomes effective 20 days later, unless a different date is indicated in the rule.<sup>23</sup> Most adopted rules are published in the Florida Administrative Code (FAC).<sup>24</sup>

The validity of a rule or a proposed rule may be challenged at the Division of Administrative Hearings (DOAH)<sup>25</sup> as an invalid delegation of legislative authority.<sup>26</sup> An invalid delegation of legislative authority is an action that goes beyond the powers, functions, and duties delegated by the Legislature.<sup>27</sup> A rule or proposed rule is an invalid delegation of legislative authority if:

- The agency has materially failed to follow the rulemaking procedures in the APA;
- The agency has exceeded its grant of rulemaking authority;
- The rule enlarges, modifies, or contravenes the specific provisions of the law implemented;
- The rule is vague, fails to establish adequate standards for agency decisions; or vests the agency with unbridled discretion;
- The rule is arbitrary or capricious; or
- The rule imposes regulatory costs on the regulated person, county, or municipality that could have been reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.<sup>28</sup>

An administrative law judge (ALJ) at DOAH hears the rule challenge in a de novo proceeding and, within 30 days of the hearing, makes a determination on the rule's validity based upon a preponderance of the evidence standard.<sup>29</sup> The ALJ's decision constitutes final agency action, which means an agency may not alter the decision after its issuance,<sup>30</sup> but an agency may appeal the decision to the District Court of Appeal where the agency maintains its headquarters.<sup>31</sup>

### Effect of the Bill

The bill requires a notice of proposed rule to be filed within 12 months of a notice of rule development. If a notice of proposed rule is not filed within 12 months of the notice of rule development, the agency must withdraw the rule and give notice of the withdrawal in the next issue of the FAR. The bill also

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<sup>18</sup> Section 120.54(3)(d)1., F.S.

<sup>19</sup> Section 120.54(3)(d)1., F.S.

<sup>20</sup> Section 120.54(7)(a), F.S.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Section 120.54(3)(e)6., F.S.

<sup>24</sup> Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or a state university rules relating to internal personnel or business and finance are not published in the FAC. Forms are not published in the FAC. Section 120.55(1)(a), F.S. Emergency rules are also not published in the FAC.

<sup>25</sup> DOAH is an agency in the executive branch, administratively housed under the Department of Management Services but not subject to its control. DOAH employs ALJs who serve as neutral arbiters presiding over disputes arising under the APA. Section 120.65, F.S.

<sup>26</sup> Section 120.56(1), F.S.

<sup>27</sup> Section 120.52(8), F.S.

<sup>28</sup> Section 120.52(8)(a)-(f), F.S.

<sup>29</sup> Section 120.56(1)(e), F.S.

<sup>30</sup> *Id.*

<sup>31</sup> Section 120.68(2)(a), F.S.

reestablishes the mandatory seven day period between the publication of a notice of rule development and the publication of a notice of proposed rule in the FAR.

The bill further requires that a proposed rule be withdrawn if, *after issuing a notice of proposed rule*, the agency fails to adopt it within the prescribed timeframes in the APA. Once an agency has exceeded the timeframe to adopt the rule, the bill requires JAPC to notify the agency of the failure. If the agency has not withdrawn the rule within 30 days following the notice, JAPC must notify DOS that the date for adoption of the rule has expired. DOS must then publish a notice of withdrawal of the proposed rule.

The bill requires an agency to file a copy of a petition to initiate rulemaking with JAPC.

The bill defines the term “technical change” to mean a change limited to correcting grammatical, typographical, and similar errors not affecting the substance of the rule.

## **Joint Administrative Procedures Committee**

### Background

JAPC is a standing committee of the Legislature established by joint rule and created to maintain a continuous review of administrative rules, the statutory authority upon which those rules are based, and the administrative rulemaking process.<sup>32</sup> Specifically, JAPC may examine existing rules and must examine each proposed rule to determine whether:

- The rule is an invalid exercise of delegated legislative authority;
- The statutory authority for the rule has been repealed;
- The rule reiterates or paraphrases statutory material;
- The rule is in proper form;
- The notice given prior to adoption was sufficient;
- The rule is consistent with expressed legislative intent;
- The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law that the rule implements;
- The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule;
- The rule could be made less complex or more easily comprehensible to the general public;
- The rule’s statement of estimated regulatory cost complies with the requirements of the APA and whether the rule does not impose regulatory costs on the regulated person, county, or municipality that could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives; or
- The rule will require additional appropriations.<sup>33</sup>

### Effect of the Bill

The bill removes the permissive authority of JAPC to examine existing rules and makes such examination mandatory to align with JAPCs mandate to examine proposed rules.

## **Agency Review of Rules**

### Background

The APA requires each agency to annually review its rules.<sup>34</sup> Although an agency may amend or repeal the rule, rules generally do not expire or sunset and many agencies have adopted rules that have not been updated in years.

### Effect of the Bill

The bill creates a process called “repromulgation,” whereby each agency is required to review its rules for consistency with the powers and duties granted by the agency’s enabling statutes. If, after reviewing the rule, the agency determines that substantive changes are not required, the agency must

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<sup>32</sup> Fla. Leg. J. Rule 4.6; *see also* s. 120.545, F.S.

<sup>33</sup> Section 120.545(1), F.S.

<sup>34</sup> *See* s. 120.74, F.S.

repromulgate the rule to reflect the date of the review. The bill defines the term “repromulgated” to mean the publication and adoption of an existing rule following an agency’s review of the rule for consistency with the power and duties granted by its enabling statute. Each agency must review its rules according to the following schedule:

- If the rule was adopted *before* January 1, 2012, within five years after July 1, 2020; or
- If the rule was adopted *after* January 1, 2012, within 10 years after the rule is adopted.

An agency, before repromulgation of a rule and upon approval of its agency head, must:

- Publish a notice of repromulgation in the FAR, which is not required to include the text of the rule; and
- File the rule with DOS. The rule may not be filed for repromulgation less than 28 days before or more than 90 days after the publication of the notice.

An agency must file a notice of repromulgation with JAPC at least 14 days before filing the rule with DOS. JAPC must certify at the time of filing whether the agency has responded to all of JAPC’s material or written inquiries. The bill specifies that a repromulgated rule is not subject to the hearing requirements of the APA nor is it subject to challenge.

The bill requires each agency, upon approval of the agency head, to submit three certified copies of the repromulgated rule it proposes to adopt with DOS and one certified copy of any material incorporated by reference in the rule. The repromulgated rule is adopted upon its filing with DOS and becomes effective 20 days later. DOS must then update the history of the rule in the FAC to reflect the new effective date. The bill requires DOS to adopt rules to implement the bill’s repromulgation provision by December 31, 2020.

If either an agency fails to meet the deadline to review the rule or the timeframe to file the rule for repromulgation, the rule is deemed repealed. After such a failure, JAPC notifies DOS that the agency has elected to repeal the rule. Thereafter DOS must publish a notice of the repeal in the next issue of the FAR and the rule is then stricken from the files of DOS and the agency.

## **Statement of Estimated Regulatory Cost**

### Background

A statement of estimated regulatory cost (SERC) is an agency estimate of the potential impact of a proposed rule on the public, particularly the potential costs to the public of complying with the rule as well as to the agency and other governmental entities to implement the rule.<sup>35</sup> Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.<sup>36</sup> However, a SERC is required if the proposed rule will have an adverse impact on small businesses or increase regulatory costs by more than \$200,000 in the aggregate within one year after implementation of the rule.<sup>37</sup> If the agency revises a rule before adoption and the revision increases the regulatory costs of the rule, the agency must revise the SERC to reflect that alteration.<sup>38</sup>

A SERC must include:

- A good faith estimate of the number of people and entities affected by the proposed rule;
- A good faith estimate of the cost to the agency and other governmental entities to implement the proposed rule;
- A good faith estimate of transactional costs likely to be incurred by people, entities, and governmental agencies for compliance; and
- An analysis of the proposed rule’s impact on small businesses, counties, and municipalities.<sup>39</sup>

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<sup>35</sup> Section 120.541(2), F.S.

<sup>36</sup> Section 120.54(3)(b)1., F.S.

<sup>37</sup> *Id.*

<sup>38</sup> Section 120.541(1)(c), F.S.

<sup>39</sup> Section 120.541(2)(b)-(e), F.S.

The SERC must also include an economic analysis on the likelihood that the proposed rule will have an adverse impact in excess of \$1 million within the first five years of implementation on:

- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness, productivity, or innovation; or
- Regulatory costs, including any transactional costs.<sup>40</sup>

If the economic analysis results in an adverse impact or regulatory costs in excess of \$1 million within five years after implementation of the rule, then the rule must be ratified by the Legislature in order to take effect.<sup>41</sup>

An agency's failure to prepare a SERC can be raised in a proceeding at DOAH to invalidate a rule as an invalid exercise of delegated legislative authority, if it is raised within one year of the effective date of the rule and is raised by a person whose substantial interests are affected by the regulatory costs of the rule.<sup>42</sup>

### Effect of the Bill

The bill requires each agency to have a website where each of its SERCs may be viewed in their entirety. DOS must include on the FAR website the agency website addresses where the SERCs can be viewed. An agency must provide in its notice of intended action the agency website address where the SERC can be viewed. If an agency revises a SERC, it must provide a notice that a revision has been made and include an agency website address where the revision can be viewed for publication on the FAR website.

The bill clarifies the elements an agency must consider in a SERC when evaluating the economic impacts of the rule. Specifically, the bill requires agency estimates of economic, market, and small business impacts likely to result from compliance with the proposed rule to consider elements such as:

- Increased or decreased consumer prices or value of goods and services;
- Increased costs due to obtaining substitute or alternative products or services;
- The value of time expended by business owners and other business personnel to comply with the proposed rule;
- Capital costs incurred to comply with the proposed rule; and
- Other impacts suggested by the rules ombudsman, the agency head's appointing authority, or interested persons.

In addition, the bill replaces the term "transactional costs" with "compliance costs," requires agencies to consider all direct and indirect costs of compliance, and provides 18 specific types of compliance costs as examples for agencies to consider in their evaluation, including:

- Filing fees;
- Costs of obtaining a license;
- Costs to obtain, install, and maintain equipment necessary for compliance;
- Costs related to accounting, financial, and information management processes, as well as other administrative processes;
- Labor costs;
- Costs of education, training, and testing necessary for compliance; and
- Allocation of administrative and other overhead costs.

The bill allows agencies to survey individuals, businesses, business organizations, counties, and municipalities to collect data helpful to estimate and analyze the costs and impacts of the proposed rule. Each notice of proposed rule must also contain a summary of the SERC describing the regulatory impact of the rule in readable language. Additionally, if an agency holds a hearing on a proposed rule, the bill requires the agency to ensure that the person responsible for preparing the SERC be made available to respond to questions or comments.

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<sup>40</sup> Section 120.541(2)(a), F.S.

<sup>41</sup> Section 120.541(3), F.S.

<sup>42</sup> Section 120.541(1)(f), F.S.

## Lower Cost Regulatory Alternative

### Background

A person substantially affected by a proposed rule may, within 21 days after publication of a notice of adoption, amendment, or repeal of a rule, submit a lower cost regulatory alternative (LCRA).<sup>43</sup> The LCRA must be a written proposal, made in good faith, that substantially accomplishes the objectives of the law being implemented.<sup>44</sup> A LCRA may recommend that a rule not be adopted at all, if it explains how the “lower costs and objectives of the law will be achieved by not adopting any rule.”<sup>45</sup> If a LCRA is submitted to an agency, the agency must prepare a SERC if one has not been previously prepared, or revise its prior SERC, and either adopt the LCRA or provide a statement to explain the reasons for rejecting the LCRA.<sup>46</sup> Additionally, if a LCRA is submitted, the 90-day period for filing a rule is extended an additional 21 days.<sup>47</sup> At least 21 days before filing a rule for adoption, an agency that is required to revise a SERC in response to a LCRA must provide the SERC to the person who submitted the LCRA and to JAPC and must provide notice on the agency’s website that it is available to the public.<sup>48</sup>

Just as in the case of an agency’s failure to prepare a SERC, an agency’s failure to respond to a LCRA may be raised in a proceeding at DOAH to invalidate a rule as an invalid delegation of legislative authority if its raised within one year of the effective date of the rule and is raised by a person whose substantial interests are affected by the regulatory costs of the rule.<sup>49</sup>

### Effect of the Bill

The bill specifies that a LCRA may be submitted after a notice of proposed rule or a notice of change. If submitted after the latter, the LCRA is deemed to have been made in good faith only if the person reasonably believes, and the proposal states the reasons for believing, that the proposed rule as *changed by the notice of change* increases the regulatory costs or creates an adverse impact on small business.

The bill allows an agency receiving a LCRA to have the choice of modifying the proposed rule to substantially reduce regulatory costs in addition to either adopting the LCRA or stating its reasons for rejecting it in favor of the proposed rule. If the rule is modified, the agency must revise its SERC, if one has been prepared. If the agency rejects the LCRA or modifies the proposed rule, the agency must state its reasons for rejecting the LCRA in favor of the proposed or modified rule. When a SERC is revised because a change to a proposed rule increases the projected regulatory costs or the agency modified the rule in response to a LCRA, a summary of the revised SERC must be included in subsequent published rulemaking notices. Under the bill, the revised SERC must be provided to the rules ombudsman, the party submitting the LCRA, and JAPC, and must be published in the same manner as the original SERC.

The bill requires an agency to provide a copy of a LCRA to JAPC at least 21 days prior to filing the rule for adoption.

## Emergency Rules

### Background

Agencies are authorized to respond to immediate dangers to the public health, safety, or welfare by adopting emergency rules.<sup>50</sup> Emergency rules are not adopted using the same procedures required of other rules.<sup>51</sup> The notice of the emergency rule and the text of the rule is published in the first available

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<sup>43</sup> Section 120.541(1)(a), F.S.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Section 120.541(1)(d), F.S.

<sup>49</sup> Section 120.541(1)(f), F.S.

<sup>50</sup> Section 120.54(4), F.S.

<sup>51</sup> Section 120.54(4)(a)1., F.S.

issue of the FAR, however, there is no requirement that an emergency rule be published in the FAC.<sup>52</sup> The agency must publish prior to, or contemporaneous with, the rule's promulgation the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare.<sup>53</sup> Emergency rules are effective immediately, or on a date less than 20 days after filing if specified in the rule,<sup>54</sup> but are only effective for a period of no longer than 90 days.<sup>55</sup> An emergency rule is not renewable, except when the agency has initiated rulemaking to adopt rules relating to the subject of the emergency rule and a challenge to the proposed rules has been filed and remains pending or the proposed rule is awaiting ratification by the Legislature.<sup>56</sup> The validity of an emergency rule may be challenged at DOAH subject to an expedited filing and hearing schedule.<sup>57</sup>

### Effect of the Bill

The bill requires emergency rules to be published in the FAC. The bill also allows an agency to make technical changes to the emergency rule within the first seven days after adoption and prohibits an agency from superseding an emergency rule currently in effect. The bill clarifies that an emergency rule is not subject to the legislative ratification process.<sup>58</sup>

## **Small Business Impact in Rulemaking**

### Background

Each agency, before the adoption, amendment, or repeal of a rule, must consider the impact of the rule on small businesses.<sup>59</sup> If the agency determines that the proposed action will affect small businesses, the agency must send written notice to the rules ombudsman<sup>60</sup> in the Executive Office of the Governor at least 28 days before the intended action.<sup>61</sup> The agency must adopt the regulatory alternatives offered by the rules ombudsman if it finds the alternatives are feasible and consistent with the stated objectives of the proposed rule and would reduce the impact on small businesses.<sup>62</sup>

If the agency does not adopt the alternatives offered, before rule adoption or amendment, the agency must file a detailed written statement with JAPC explaining the reasons for failure to adopt such alternatives.<sup>63</sup>

### Effect of the Bill

The bill requires an adverse impact on small business to be found if:

- An owner, officer, operator, or manager of a small business must complete any education, training, or testing to comply with the proposed rule;

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<sup>52</sup> Section 120.54(4)(a)3., F.S.

<sup>53</sup> *Id.*

<sup>54</sup> Section 120.54(4)(d), F.S.

<sup>55</sup> Section 120.54(4)(c), F.S.;

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> In 2011, the Legislature passed two bills, CS/CS/HB 993 (2011) and CS/CS/CS/HB 849 (2011) that contained conflicting provisions concerning the exemption of emergency rules from the legislative ratification process. In one bill, CS/CS/HB 993 (2011), the provision exempting emergency rules in s. 120.541(4), F.S., from the legislative ratification process was expressly included in the bill. In the other, CS/CS/CS/HB 849 (2011), the provision was erroneously deleted, leading to a statutory conflict. In 2013, the Legislature passed CS/CS/SB 1410 (2013), which amended s. 120.541(4), F.S., to correct a cross reference and in the process the bill erroneously continued the omission of the provision exempting emergency rules. This bill corrects those previous errors by reinstating the provision exempting emergency rules from the legislative ratification process.

<sup>59</sup> Section 120.54(3)(b)2., F.S.

<sup>60</sup> The Governor must appoint a rules ombudsman in the Executive Office of the Governor for purposes of considering the impact of agency rules on the state citizens and businesses. The rules ombudsman must carry out the duties related to rule adoption procedures with respect to small businesses; review agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses; and make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to business. Each agency must cooperate fully with the rules ombudsman in identifying such rules, and take the necessary steps to waive, modify, or otherwise minimize the adverse effects of any such rules. Section 288.7015, F.S.

<sup>61</sup> Section 120.54(3)(b)2.b.(I), F.S.

<sup>62</sup> Section 120.54(3)(b)2.b.(II), F.S.

<sup>63</sup> Section 120.54(3)(b)2.b.(III), F.S.



- An owner, officer, operator, or manager of a small business is likely to expend 10 hours or purchase professional advice to understand and comply with the rule in the first year;
- Taxes or fees assessed on transactions are likely to increase by \$500 or more in the aggregate in one year;
- Prices charged for goods and services are restricted or are likely to increase because of the rule;
- Specially trained, licensed, or tested employees will be required;
- Operating costs are expected to increase by at least \$1,000 annually; or
- Capital expenditures in excess of \$1,000 are necessary to comply with the rule.

If the rules ombudsman of the Executive Office of the Governor provides a regulatory alternative to the agency to lessen the impact of the rule on small businesses, the bill requires the agency to provide the regulatory alternative to JAPC at least 21 days before filing the rule for adoption.

## **Incorporation by Reference**

### Background

The APA allows an agency to incorporate material external to the text of the rule by reference.<sup>64</sup> The material to be incorporated must exist on the date the rule is adopted.<sup>65</sup> If after the rule has been adopted the agency wishes to alter the material incorporated by reference, the rule itself must be amended for the change to be effective.<sup>66</sup> However, an agency rule that incorporates another rule by reference automatically incorporates subsequent amendments to the referenced rule.<sup>67</sup> A rule cannot be amended by reference only.<sup>68</sup> An agency may not incorporate a rule by reference unless:

- The material has been submitted in the prescribed electronic format to DOS and the full text of the material can be made available for free public access through an electronic hyperlink from the rule making the reference in the FAC; or
- The agency has determined that posting the material publicly on the Internet would constitute a violation of federal copyright law, in which case a statement stating such, along with the address of locations at DOS and the agency at which the material is available for public inspection and examination, must be included in the notice.<sup>69</sup>

DOS has adopted a rule governing the requirements for materials incorporated by reference through an adopted rule.<sup>70</sup> The rule requires each agency incorporating material by reference in an administrative rule to certify that the materials incorporated have been filed with DOS electronically or, if the agency claims the posting of the material would constitute a violation of federal copyright law, the location where the public may view the material.<sup>71</sup>

### Effect of the Bill

Beginning July 1, 2020, the bill requires an agency, in all notices of rulemaking, repromulgated rules, or rule modifications that include material incorporated by reference, to submit the incorporated material in the prescribed electronic format to DOS with the full text available for free public access through an electronic hyperlink. Alternatively, if an agency determines that posting the incorporated material on the internet would constitute a violation of federal copyright law, the agency must include in the notice a statement to that effect, along with the addresses of locations at DOS and the agency at which the material is available for public inspection and examination.

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<sup>64</sup> Section 120.54(1)(i), F.S.; *see also* r. 1-1.013, F.A.C.

<sup>65</sup> Section 120.54(1)(i)1., F.S.

<sup>66</sup> *Id.*

<sup>67</sup> Section 120.54(1)(i)2., F.S.

<sup>68</sup> Section 120.54(1)(i)4., F.S.

<sup>69</sup> Section 120.54(1)(i)3., F.S.

<sup>70</sup> Rule. 1-1.013, F.A.C.

<sup>71</sup> Rule 1-1.013(5)(d), F.A.C.

The bill requires DOS to prescribe by rule that material incorporated by reference included in a notice of proposed rule and a notice of change be formatted in such a way that additions to the text appear underlined and deletions appear as text stricken through.

## **Annual Regulatory Review**

### Background

Annually, each agency must prepare a regulatory plan that includes a list of each law enacted during the previous 12 months, which creates or modifies the duties or authority of the agency, and state whether the agency must adopt rules to implement the newly adopted laws.<sup>72</sup> The plan must also include a list of each additional law not otherwise listed that the agency expects to implement by rulemaking before the following July 1, except emergency rules. The plan must include a certification by the agency head or, if the agency head is a collegial body, the presiding officer, and the individual acting as principal legal advisor to the agency verifying the persons have reviewed the plan, verifying the agency regularly reviews all of its rules, and identifying the period during which all rules have most recently been reviewed to determine if the rules remain consistent with the agency's rulemaking authority and the laws implemented.<sup>73</sup> By October 1 of each year, the plan must be published on the agency's website or on another state website established for publication of administrative law records with a hyperlink to the plan. The agency must also deliver a copy of the certification to JAPC and publish a notice in the FAR identifying the date of publication of the agency's regulatory plan.<sup>74</sup>

### Effect of the Bill

The bill replaces the requirement that the annual regulatory plan include a listing of each law it expects to implement with rulemaking with the requirement that the plan identify and describe each rule, by rule number or proposed rule number, that the agency expects to develop, adopt, or repeal for the 12 month period beginning October 1 and ending September 30. The annual regulatory plan must also identify any rules required to be repromulgated for the 12-month period.

The bill also requires that the annual regulatory plan contain a declaration that the agency head and the general counsel understand that regulatory accountability is necessary to ensure public confidence in the integrity of state government and to that end the agency is diligently working toward lowering the total number of rules adopted.

## **Florida Administrative Code**

### Background

The FAC is an electronic compilation of all rules adopted by each agency and maintained by DOS.<sup>75</sup> DOS retains the copyright over the FAC.<sup>76</sup>

Each rule in the FAC must cite the grant of rulemaking authority and the specific law implemented, as well as a history note detailing the initial promulgation of the rule and any subsequent changes.<sup>77</sup> Rules applicable to only one school district, community college district, or county or state university rules relating to internal personnel or business and finance are not required to be included in the FAC.<sup>78</sup> DOS is required to publish the following information at the beginning of each section of the code concerning an agency:

- The address and telephone number of the executive offices of the agency;
- The manner by which the agency indexes its rules; and
- A listing of all rules of that agency excluded from publication in the FAC and a statement as to where those rules may be inspected.<sup>79</sup>

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<sup>72</sup> Section 120.74(1), F.S.

<sup>73</sup> Section 120.74(1)(d), F.S.

<sup>74</sup> Section 120.74(2), F.S.

<sup>75</sup> Section 120.55(1)a.1., F.S.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Section 120.55(1)(a)2., F.S.

<sup>79</sup> Section 120.55(1)(a)3., F.S.

DOS is required to adopt rules allowing adopted rules and material incorporated by reference to be filed in electronic form.<sup>80</sup> Further, DOS is required to prescribe by rule the style and form required for rules, notices, and other materials submitted for filing in the FAC.<sup>81</sup> The rule DOS has adopted requires rules that are being amended to be coded by underlining new text and by striking through deleted text.<sup>82</sup>

#### Effect of the Bill

The bill requires the FAC be published once daily, by no later than 8 a.m. If, after publication, a rule is corrected and replaced, the FAC must indicate the rule has been republished and indicate DOS has corrected it. The bill also requires the history note appended to each rule include the date of any technical changes to the rule.

#### B. SECTION DIRECTORY:

Section 1 amends s. 120.52, F.S., relating to definitions applicable to the APA.

Section 2 amends s. 120.54, F.S., relating to rulemaking procedures.

Section 3 amends s. 120.541, F.S., relating to SERCs.

Section 4 creates s. 120.5435, F.S., relating to the repromulgation of rules.

Section 5 amends s. 120.545, F.S., relating to JAPC review of agency rules.

Section 6 amends s. 120.55, F.S., relating to publication requirements in the APA.

Section 7 amends s. 120.74, F.S., relating to agency annual rulemaking and regulatory plans.

Section 8 amends s. 120.80, F.S., relating to exemptions and special requirements.

Section 9 amends s. 120.81, F.S., relating to exceptions to the APA and special requirements.

Section 10 amends s. 420.9072, F.S., relating to the State Housing Initiatives Partnership Program.

Section 11 amends s. 420.9075, F.S., relating to local housing assistance plans.

Section 12 amends s. 443.091, F.S., relating to reemployment benefit eligibility conditions.

Section 13 provides an effective date of July 1, 2020.

## 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:

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<sup>80</sup> Section 120.55(1)(a)5., F.S.

<sup>81</sup> Section 120.55(1)(c), F.S.

<sup>82</sup> Rule 1-1.015(5)(a), F.A.C. *referencing* r. 1-1.011(3)(c), F.A.C.

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill requires each agency to review and repromulgate its rules, which may require agencies to expend funds to institute this new process. While the review process the bill creates is neither intensive nor time-consuming, it would still require agencies to dedicate staff to review existing rules and engage in rulemaking to repromulgate the rules. It is unclear whether this new activity could be absorbed into each agency's current budget.

State agencies currently are required to comply with the notice, publication, and hearing requirements for rulemaking and the requirements for preparing SERCs. The bill adds to these requirements. Compliance with these additional requirements may require agencies to devote more resources to rulemaking. It is unclear whether these new requirements could be absorbed into each agency's current budget.

### 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 requires DOS to adopt rules to implement the provisions of the bill concerning repromulgation. The bill gives DOS until December 31, 2020, to adopt such rules. The bill's provisions regarding repromulgation provide DOS with sufficient direction to guide the department in the creation of the rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 4, 2020, the Oversight, Transparency & Public Management Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differed from the bill in the following ways:

- Removed the creation of the Red Tape Reduction Advisory Council;
- Removed the provision requiring the establishment of a regulatory baseline by which agencies must abide;
- Required each agency to repromulgate its rules according to specified standards;
- Required that each SERC be available online;
- Specified the economic elements that an agency must consider before creating a rule;
- Required emergency rules to be published in the Florida Administrative Code;
- Required forms and material incorporated by reference to be available online sooner and to be coded the same way as legislation; and

- Revised the agency annual regulatory plan to require each agency to identify every rule the agency plans to amend, create, or repeal for the period beginning October 1 and ending September 30 of each year.

The analysis is drafted to the committee substitute as approved by the Oversight, Transparency & Public Management Subcommittee.