**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

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| BILL: | SB 448 |
| INTRODUCER: | Senator Burgess |
| SUBJECT: | Administrative Procedure |
| DATE: | March 10, 2025 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Harmsen | McVaney | GO | **Pre-meeting** |
| 2. | | | JU | |
| 3. | | | RC | |

## I. Summary:

SB 448 amends the Administrative Procedures Act to:

- Implement an expiration date for most administrative rules, both existing and proposed. An agency may save a rule from expiration if the rule is re-adopted, by current procedures for the adoption of a new rule, before its expiration.
- Require an agency to complete a Statement of Estimated Regulatory Costs (SERC) for all proposed rules, notices of change, or final rules. Under current law, a SERC is completed when it will cause an adverse impact on small businesses, or have a financial impact of $200,000 on regulatory costs within one year. The bill also requires an agency to perform a cost-benefit analysis as part of its SERC, which must find that the benefit of the rule outweighs its cost. Under current law, a SERC is limited to an economic analysis showing the rule's impact on a variety of economic sectors, especially private business and regulatory costs for those businesses. The bill allows any person (rather than just a person with a substantial interest) to challenge a rule on the grounds that the agency failed to adhere to these SERC requirements.
- Require an agency to engage in additional cost-benefit analyses of a rule four and eight years after the rule takes effect.
- Award attorney fees and costs to the prevailing party in a rule challenge based solely on the grounds that the agency lacked express statutory authority to adopt the rule or issue the guidance document upon which the action is based.

The bill will result in significant increased costs to all agencies that engage in rulemaking.

The bill takes effect July 1, 2025.

## II. Present Situation:

### Rulemaking Authority

The Legislature is the sole branch of government with the inherent power to create laws.[1] However, the Legislature may use laws to delegate to executive branch agencies the power to create rules that have the force and effect of law.[2] 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."[3] An agency must have both a general and a specific grant of rulemaking authority from the Legislature.[4] The general grant of rulemaking authority is usually broad, while the specific grant of rulemaking authority provides specific standards and guidelines the agency must implement through rulemaking.[5] An agency, therefore, cannot create rules at its discretion but instead must limit the rule to the specific empowerments and responsibilities delegated by the Legislature in law.[6] A rule is an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedures or practice requirements of an agency.[7] An agency rule therefore includes forms and applications used to administer a program.

The Florida Administrative Procedures Act (APA)[8] provides a framework for rulemaking to be followed by agencies.[9] The APA provides that rulemaking is not a matter of agency discretion; rather, each agency statement that is in effect a "rule" must be adopted by the rulemaking procedure set forth in the APA as soon as feasible and practicable.[10]

At several points throughout the rulemaking process, citizens, state bodies, such as the Joint Administrative Procedures Committee (JAPC), and the Executive Office of the Governor through the Office of Fiscal Accountability and Regulatory Reform, have a right to intervene in the process and provide feedback.

### Rulemaking Process

The APA[11] provides uniform procedures that agencies must follow when they engage in rulemaking. An agency may initiate rulemaking either as the result of a legislative mandate in

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[1] Article III, s. 1, FLA. CONST. *See also* Art. II, s. 3, FLA. CONST.
[2] Section 120.52(17), F.S. *See also, Whiley v. Scott,* 79 So. 3d 702, 710 (Fla. 2011) ("Rulemaking is a derivative of lawmaking.").
[3] *Whiley*, 79 So. 3d at 711 (Fla. 2011).
[4] Sections 120.52(8) and 120.536(1), F.S.
[5] *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).
[6] Section 120.54(1)(a), F.S. *See also*, s. 120.52(8)(b), which defines agency action outside of its grant of rulemaking authority (including action on unadopted policies, or the action outside of the scope of its adopted rules) as an invalid exercise of delegated legislative authority.
[7] Section 120.52(16), F.S.
[8] Sections 120.51 *et seq*., F.S.
[9] *Dep't. of Transp. v. Blackhawk Quarry Co. of Fla.*, 528 So. 2d 447, 449 (Fla. 4th DCA 1988); 2 FLA. JUR. 2D ADMINISTRATIVE LAW s. 5 *Florida Administrative Procedure Act, generally; purpose* (2024).
[10] Sections 120.52 and 120.54(1); 2 FLA. JUR. 2D ADMINISTRATIVE LAW s. 5 *Florida Administrative Procedure Act, generally; purpose* (2024).
[11] Chapter 120, F.S.

statute, public request,[12] or its own agency initiative—presuming sufficient rulemaking authority exists in statue.

***Notice of Rule Development***

An agency begins the formal rulemaking process[13] by filing a notice of rule development in the Florida Administrative Register (FAR), which must indicate the subject area to be addressed by the rule development and provide a short, plain explanation of the rule's purpose and effect.[14] Such notice is required for all rulemaking (including creation of a new rule and amendment of an existing rule) except for rule repeals. A notice of rule development may, but is not required to, include the preliminary text of the proposed rule or amendment.[15] At this point, the public may participate in the rulemaking process through either a request for a public rule development workshop,[16] negotiated rulemaking,[17] or simply communication of one's position to the agency.[18]

***Notice of Intended Agency Action***

Next, an agency must file a notice of intended agency action, which may be a notice of proposed rule, a notice of proposed amendment to an existing rule, or a notice of rule repeal. This section (and ch. 120, F.S., more generally) use the term "proposed rule" to refer to both a proposed rule and a proposed amendment to a rule. The notice must contain the full text and a summary of the proposed rule or amendment, as well as a reference to the grant of rulemaking authority and the specific statute or law the agency is implementing or interpreting.[19] The agency must also include a summary of its Statement of Estimated Regulatory Costs (SERC), if it prepared one.

The notice of intended agency action must also provide information detailing how a member of the public can:

- Request that the agency hold a public hearing on the proposed rule. The requesting party must be affected by the proposed rule and must request the hearing within 21 days of the publication of the notice of proposed rule (or other intended agency action);[20]
- Provide input regarding the agency's SERC;[21]
- Submit a lower cost regulatory alternative (LCRA) pursuant to s. 120.541(1)(a), F.S.; or

[12] Section 120.54(7)(a), F.S.
[13] 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.
[14] Section 120.54(2), F.S.
[15] Section 120.54(2), F.S., requires the agency to "include the preliminary text of the proposed rules, if available…"
[16] Section 120.54(2)(c), F.S., requires an agency to hold a public workshop for the purposes of rule development, if requested in writing by an affected person, unless the agency head explains in writing why a workshop is unnecessary.
[17] Section 120.54(2)(d), F.S.
[18] Jowanna Oates, The Florida Bar, *Escaping the Labyrinth: A Practical Guide to Rulemaking*, 29 FLA. BAR J. 61, *available at* https://www.floridabar.org/the-florida-bar-journal/escaping-the-labyrinth-a-practical-guide-to-rulemaking/ (last visited Mar. 10, 2025).
[19] Section 120.54(3)(a), F.S.
[20] Section 120.54(3)(c), F.S. The agency cannot file the rule for adoption with the Department of State until at least 14 days after the final public hearing has occurred.
[21] See "Statement of Estimated Regulatory Cost" section above.

- Petition for an administrative hearing held by an administrative law judge at the Division of Administrative Hearings (DOAH) on whether the proposed agency action is a proper exercise of authority or is otherwise invalid.[22]

***Statements of Estimated Regulatory Costs (SERC) and Lower Cost Regulatory Alternatives***

A SERC is an agency's estimation of the impact of a rule on the public, focusing on the implementation and compliance costs.[23] An agency is encouraged to prepare a SERC before adopting, amending, or repealing any rule[24] but is not required to do so unless the proposed action will have a negative impact on small businesses or increase regulatory costs by more than $200,000 in the aggregate within 1 year.[25] If the SERC determines that the rule will have an adverse impact of $1 million within 5 years on economic growth, private sector investment, private business' productivity or innovation, or regulatory costs, then the rule must be referred for Legislative ratification after its adoption; the rule does not take full effect until ratified by the Legislature.[26]

If the agency completes a SERC, it must provide a hyperlink to it in the applicable notice of intended agency action. If the agency revises a rule before its adoption and the revision increases the rule's regulatory costs, then the agency must revise the SERC appropriately.[27]

A person who is substantially affected by a proposed rule may submit a lower cost regulatory alternative (LCRA). A LCRA may recommend that the rule not be adopted at all, if it explains how the lower costs and objectives of the law will be achieved. If an agency receives an LCRA, it must prepare a SERC if it has not done so already or revise its prior SERC to reflect the LCRA's input. The agency must either adopt the LCRA or explain its reasons for rejecting it.[28] In order to provide adequate time for review, the agency must provide its new or revised SERC to the individual who submitted the LCRA and to the JAPC.[29] The agency must also post a notice of the SERC's availability on the agency website at least 21 days before it files the rule for adoption.[30]

Agencies must also separately consider the impact of a proposed rule, amendment, or rule repeal on small businesses, small counties, and small cities, and consider alterations to the rule to lessen any impact to these entities. If an agency determines that a proposed agency action will affect small businesses, then it must forward the notice to the rules ombudsman, an appointee of the Governor.[31] The rules ombudsman makes recommendations on any existing or proposed rules to

[22] Section 120.56(2)(a), F.S.
[23] Section 120.541(2), F.S.
[24] Section 120.54(3)(b)1., F.S.
[25] *Id.*; s. 120.541(2)(a), F.S.
[26] See s. 120.541(3), F.S., for exceptions for the adoption of specific federal standards and updates to the Florida Building and Fire Prevention Codes. *Fernandez v. Dep't. of Health, Bd. of Medicine*, 223 So. 3d 1055, 1057-8 (Fla. 1st DCA 2017).
[27] Section 120.541(1)(c), F.S.
[28] Section 120.541(1)(d), F.S.
[29] The Joint Administrative Procedures Committee (JPAC) "examines existing and proposed rules made by agencies in accordance with [the Administrative Procedures Act]." *Comm'n on Ethics v. Sullivan*, 489 So. 2d 10, 14 (Fla. 1986); *see* s. 120.545, F.S. (referring to "the committee" which section 120.52, F.S., defines as the Administrative Procedures Committee).
[30] *Id*.
[31] Sections 120.54(3)(b)2. and 288.7015, F.S.

alleviate unnecessary or disproportionate adverse effects to business.[32] Each agency must adopt recommendations made by the rules ombudsman to minimize impacts on small businesses, unless the adopting agency finds the recommendation unfeasible or inconsistent with the proposed rule's objectives.[33]

***Filing for Adoption of the Proposed Rule***

The agency must submit materials proving compliance with the rulemaking process to the JAPC, which must then review the rule for compliance.[34] The JAPC must certify to the Department of State (DOS) whether the agency responded to all material and timely written comments or inquiries made on behalf of JAPC (these inquiries are outlined in additional detail below in the "Joint Administrative Procedures" section). If the JAPC notifies the agency that it is considering making an objection to the adopted rule or amendment based on its inquiry, the agency may withdraw or modify the rule by publication in the FAR and notice to interested parties. Once an agency has completed the rulemaking steps within the appropriate timeframe, the agency may file the rule for adoption with the DOS.[35]

The DOS may approve an agency rule for adoption if it finds that the agency:
- Filed the rule for adoption within the applicable timeframes;
- Complied with all rulemaking requirements;
- Timely responded to all material and timely written inquiries or comments; and
- Is not engaged in pending administrative determination on the rule in question.[36]

The rule becomes effective 20 days after such filing for adoption, unless a different date is indicated in the rule.[37]

**Expiration or Challenges of a Rule**

A rule does not expire unless the underlying delegation of legislative authority is repealed or otherwise made ineffective.[38] There are several ways in which a rule can be made ineffective—by investigation by the JAPC, which often results in agency agreement to amend or repeal a rule; by rule challenge from a substantially affected party on the basis that the rule was not adopted in accordance with the APA's requirements, or is an invalid delegation of legislative authority; or by legislative action repealing the underlying delegation of legislative authority.

***Joint Administrative Procedures Committee Review of Proposed and Adopted Rules***

The 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

[32] Section 288.7015(3), F.S. *See also*, E.O. 11-01 (establishing the Office of Fiscal Accountability and Regulatory Reform (OFARR)) (renewed by E.O. 11-72 and 11-211).
[33] Section 120.54(3)(b)2.b.(II)., F.S.
[34] Section 120.54(3)(a)4., F.S.
[35] Section 120.54(3)(e), F.S.
[36] Section 120.54(3)(e)4., F.S.
[37] Section 120.54(3)(e)6., F.S.
[38] Section 120.536, F.S.

rules are based, and the administrative rulemaking process.[39] The JAPC *may* examine existing rules, but *must* examine each proposed rule to determine whether:

- The rule is a valid 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 costs (discussed below) 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.[40]

If, during its review, the JAPC has concerns that a proposed or existing rule may not be authorized or exceeds the delegated rulemaking authority, it contacts the agency. Often the agency agrees that there is no authority for the rule and withdraws or amends the rule to meet the staff concerns.[41] If there is disagreement, the rule is scheduled for consideration by the full committee. The agency may appear before the JAPC and present argument and evidence in support of its rule. If, after hearing the agency's argument, the JAPC does not find statutory authority for the rule, it votes on an objection and the agency must respond.[42] If the agency refuses to modify or withdraw a rule to which the JAPC has objected, public notice of the objection is given, and a notation accompanies the rule when it is published in the Florida Administrative Code (FAC). The JAPC may also seek judicial review to establish the invalidity of a rule or proposed rule but has not exercised this authority to date.[43]

***Rule Challenges***

Sections 120.56-120.595, F.S., provide the general process for challenging a rule (either proposed or final).

*Unadopted Rules (Section 120.56(4), F.S.)*

Generally, an agency cannot base its action that determines the substantial interests of a party on an unadopted rule.[44]

[39] 2 Fla. Leg. J. Rule 4.6. *See also* s. 120.545, F.S.
[40] Section 120.545(1), F.S.
[41] JAPC, *2024 Annual Report* at 1 (Jan. 11, 2024), https://www.japc.state.fl.us/Documents/Publications/2024AnnualReport.pdf (last visited Mar. 10, 2025).
[42] Section 120.545(3)-(7), F.S.
[43] JAPC, *2024 Annual Report* at 2 (Jan. 11, 2024), https://www.japc.state.fl.us/Documents/Publications/2024AnnualReport.pdf (last visited Mar. 10, 2025).
[44] Section 120.57(2)(b), F.S.

An unadopted rule is an agency statement that meets the definition of the term "rule," but that hasn't been adopted in accordance with the requirements of the APA—it can include a form, a policy, and the amendment or repeal of a rule.[45, 46] An agency statement or policy is a rule if its effect requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law.[47]

An individual who is substantially affected by an agency statement that is an unadopted rule may seek an administrative determination by an administrative law judge (ALJ) that the agency statement was not adopted as required by s. 120.54(1)(a), F.S. An agency may rebut a finding if it shows that it has sufficient rulemaking authority, has not had time to adopt rules because the legislative delegation occurred recently, and has initiated rulemaking and is proceeding in good faith to adopt the rule.[48] The agency must demonstrate that the unadopted rule:[49]

- Is within the powers, functions, and duties delegated by the Legislature or the State Constitution, if applicable.
- Does not enlarge, modify, or contravene the specific provisions of the law implemented.
- Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency.
- Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic and the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational.
- Is not being applied to the substantially affected party without due notice.
- Does not impose excessive regulatory costs on the regulated person, county, or city.

If the administrative law judge finds that the rule was not properly adopted by the agency, then the agency can no longer rely on that rule.[50]

The prevailing non-agency party is awarded reasonable costs and attorney's fees, not to exceed $50,000, in a matter in which an appellate court or ALJ finds that the agency statement was not adopted properly, and that the statement is not otherwise required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receive federal funds. Alternatively, if an agency commences rulemaking during the rule challenge proceedings, then the ALJ must award reasonable costs and attorney's fees accrued by the petitioner prior to the notice of rulemaking's publication, unless that agency proves that it did not know and should not have known that the statement was an unadopted rule. For attorney's fee awards in both instances, there must be a finding that (1) the agency received notice that the statement may constitute an unadopted rule at least 30 days before petitioner filed a petition; and (2) the agency failed to publish a required notice of rulemaking that addresses the statement within 30-day period.[51]

[45] Section 120.52(20), F.S.
[46] Section 120.52(16), F.S.
[47] *Jenkins v. State*, 855 So. 2d 1219, 1225 (citing *Fla. Dep't of Revenue v. Vanjaria Enters., Inc.*, 675 So. 2d 252, 254-255 (Fla. 5th DCA 1996); *Balsam v. Dep't of Health & Rehabilitative Servs.*, 452 So. 2d 976, 977-978 (Fla. 1st DCA 1984)).
[48] Section 120.57(1)(e)(3), F.S.
[49] *Id*.
[50] Section 120.56(4)(e), F.S.
[51] Section 120.595(4)(a)-(b), F.S.

*Invalid Exercise of Delegated Legislative Authority (Sections 120.56(2)-(3), F.S.)*

An invalid exercise of delegated legislative authority is an action that "goes beyond the powers, functions, and duties delegated by the Legislature." A proposed or existing rule is an invalid exercise of delegated legislative authority if any of the following apply:[52]

- The agency materially failed to follow the applicable rulemaking process or requirements (generally outlined in s. 120.54, F.S.);
- The agency exceeded its grant of rulemaking authority;
- The rule enlarges, modifies, or contravenes the specific provisions of law implemented;
- The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
- The rule is arbitrary or capricious; or
- The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

All rulemaking authority delegated to administrative agencies is limited by the statute that confers the power to do so.[53] Section 120.536, F.S., states clearly that "a grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required." Additionally, "[n]o agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation […] nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy." Conversely, the legislature cannot delegate unbridled discretion to an agency.[54]

Any person with standing may file a rule challenge at the Department of Administrative Hearings (DOAH) to challenge a rule or proposed rule as an invalid delegation of legislative authority pursuant to ss. 120.56(3)(a) and 120.56(2)(a), F.S., respectively.[55] The individual must prove by a preponderance of the evidence that he or she will be substantially affected by the proposed rule,[56] or that the existing rule is an invalid exercise of delegated legislative authority.[57] If the rule is declared an invalid exercise of delegated legislative authority, then the rule is deemed void, and the agency must give notice of such in the FAR.[58]

The prevailing non-agency party is awarded reasonable costs and attorney's fees, not to exceed $50,000, in a matter in which an appellate court or ALJ finds that a proposed rule, or portion thereof, is an invalid exercise of delegated legislative authority.[59] However, if an agency can demonstrate that its underlying actions were substantially justified (there was a reasonable basis in law and fact at the time the agency took the actions) or that special circumstances exist which would make the award unjust, the agency may not have to pay such attorney's fees.

[52] Section 120.52(8), F.S.
[53] *Bd. of Trustees of Internal Imp. Trust Fund of Fla. v. Bd. of Prof. Land Surveyors*, 556 So. 2d 1358, 1360 (Fla. 1st DCA, 1990) (citing *Dep't of Prof. Reg. v. Fla. Society of Prof. Land Surveyors*, 475 So. 2d 939, 942 (Fla. 1st DCA 1985)).
[54] Section 120.52(8)(d), F.S.
[55] Section 120.57(1)(e)2.b., F.S.
[56] Section 120.56(2)(a), F.S.
[57] Section 120.56(3)(a), F.S.
[58] Section 120.56(3)(b), F.S.
[59] Section 120.595(2)-(3), F.S.

### *The Office of Legislative Services*

The Office of Legislative Services (OLS) oversees the statutory revision plan, which involves recommending the deletion of all laws which have expired, become obsolete, and/or had their effect or served their purpose.[60] Similarly, the OLS is authorized to include duplicative, redundant, or unused statutory rulemaking authority among its recommended repeals in revisers bill recommendations.[61] The OLS is also authorized to exercise all other powers, duties, and functions necessary or convenient for properly carrying out the provisions of law relating to statutory revision.[62]

## Agency Guidance

### *Declaratory Statement[63]*

Any substantially affected person may seek an agency declaratory statement to clarify the agency's opinion regarding the applicability of a statute, agency rule, or agency order, as it applies to the petitioner's particular set of circumstances.[64] An individual who seeks declaratory relief must show that:

- There is a bona fide dispute, not a hypothetical question;
- The plaintiff has a justiciable question as to the existence or nonexistence of some right, status, immunity, power or privilege, or as to some fact upon which existence of such a claim may depend;
- The plaintiff is in doubt as to the claim; and
- There is a bona fide, actual, present need for the declaration.[65] For this reason, an agency may not issue a declaratory statement when there is pending litigation—there is no need for agency action where it has been preempted by the judicial exercise of jurisdiction on the same matter.[66]

The agency must either deny the petition or provide a declaratory statement within 90 days of its receipt of the petition, and must publish notice of such action in the Florida Administrative Register.[67]

A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency.[68] While an agency cannot use a declaratory statement to announce a rule or rule policy, it may issue a declaratory statement that deals with the petitioner's particular set of circumstances while, at the

[60] Section 11.241(1)(i), F.S.
[61] Section 11.241(5)(j), F.S.
[62] Section 11.241(8), F.S.
[63] *See generally*, Fred. Dudley, *The Importance and Proper Use of Administrative Declaratory Statements*, 87 Fla. Bar Journal 41 (March 2013).
[64] Section 120.565, F.S. *See also, Citizens of the State ex rel. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n*, 164 So. 2d 58, 59 (Fla. 1st DCA 2015).
[65] *Heisel v. City of Deltona*, 328 So. 3d 56 (Fla. 5th DCA 2021), *citing Ribaya v. Bd. of Trs. Of City Pension Fund for Firefighters & Police Officers in the City of Tampa*, 162 So. 3d 348, 352 (Fla. 2d DCA 2015).
[66] *ExxonMobil Oil Corp. v. Fla. Dep't of Agriculture and Consumer Servs*, 50 So. 3d 755 (Fla. 1st DCA 2010).
[67] *Id*.
[68] Rule 28-105.001, Fla. Admin. Code

same time, announcing its intention to initiate rulemaking to establish an agency statement of general applicability.[69]

Should a party disagree with an agency's declaratory statement, they may seek review in the appellate courts, which can reverse the statement if the agency's interpretation of the law is clearly erroneous[70] or if there is clear error or conflict with the statute's intent.[71]

***Department of Revenue Technical Assistance Advisement***

The Department of Revenue is specifically granted authority to issue informal rulings called "Technical Assistance Advisements" (TAAs) to a taxpayer who requests the agency's position on a tax problem that he or she faces.[72] These are distinct from a declaratory statement, but are similarly used—to answer taxpayer inquiries pertaining to the tax effects and consequences of their acts and transactions—but are even more limited in their application in that they have no precedential value except to the individual taxpayer or taxpayer association who requests the TAA.

***Federal Guidance Documents***

"Guidance documents" is not a term used in Florida Statutes. The federal APA, however, recognizes two types of "guidance documents," interpretive rules and general statements of policy. Interpretive rules are statements of general applicability and future effect that set forth an agency's interpretation of a statute or regulation. General statements of policy set forth an agency's policy on a statutory, regulatory, or technical issue—for example, the agency's intended posture on enforcement priorities.[73] Both of these agency statements would likely be classified as a rule under Florida law (or something that should be adopted as a rule, and therefore subject to challenge as an unadopted rule).[74]

## III. Effect of Proposed Changes:

**Challenge of Agency Guidance Documents and Other Agency Interpretive Statements**

**Section 1** amends s. 120.52, F.S., to include in the definition of "invalid exercise of delegated legislative authority" a specific statement that a proposed rule or existing rule is an invalid exercise of authority if the agency issues a guidance letter or other statement interpreting a statute without express statutory delegation to issue such guidance.

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[69] *Fla. Dep't of Bus. And Prof. Reg., Div. of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999).

[70] A declaratory statement is defined as an agency final order in s. 120.52(7), F.S. Section 120.68, F.S., provides for appeal of agency final orders to district courts of appeal. *Thrivent Financial for Lutherans v. Fla. Dep't of Financial Servs*, 145 So. 3d 178 (Fla. 1st DCA 2014), *superseded on other grounds*.

[71] *Sans Souci v. Div. of Fla. Land Sales and Condominiums, Dep't of Bus. Reg*., 421 So. 2d 623 (Fla. 1st DCA 1982).

[72] Section 213.22, F.S.

[73] Congressional Research Service, Kate Bowers, *Agency Use of Guidance Documents* (Apr. 19, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10591 (last visited Mar. 10, 2025).

[74] Sections 120.52 and 120.54(1); 2 FLA. JUR. 2D ADMINISTRATIVE LAW s. 5 *Florida Administrative Procedure Act, generally; purpose* (2024).

Similarly, **section 2** amends s. 120.536, F.S., to prohibit an agency from issuing guidance documents unless the agency has been expressly granted the power to issue guidance documents by a specific statutory delegation.

**Section 7** amends s. 120.56, F.S., which describes the rule challenge procedures to add that any person affected by a rule *or guidance document* may pursue an administrative challenge at the Division of Administrative Hearings pursuant to s. 120.56, F.S. If an agency declaratory statement issued pursuant to s. 120.565, F.S., is ultimately determined to be a "guidance document," then this will subject such agency declaratory statements to challenge at DOAH, whereas they are currently deemed final agency action reviewable by a district court of appeal.

The bill further provides that any party subject to an "enforcement action" may challenge the action solely on the grounds that the agency lacked express statutory authority to adopt the rule or issue the guidance document upon which it based its action. The bill allows the prevailing party to recover reasonable costs and attorney's fees in such challenges.

**SERC**

***SERC required of all Rules***

**Section 3** amends s. 120.541, F.S., to require an agency to prepare a statement of estimated regulatory costs (SERC) for all proposed rules, notices of change, and final rules, regardless of whether the agency action will result in an adverse impact or increase regulatory costs. The bill expands the SERC requirements to include a cost-benefit analysis that "clearly demonstrates" that the rule's (or other action's) projected benefits "exceed" the projected costs that will be incurred for at least the first 5 years after the rule goes into effect. The agency must also publish on a publicly accessible website the documents, assumptions, methods, and data that it used to prepare the SERC in a machine-readable format, when relevant, so that the analysis and its results can be replicated. Examples of such information include supporting calculations, databases, and data tables.

**Section 7** amends s. 120.56, F.S., to allow a person (rather than a party with substantial interests) to challenge a rule on the grounds that an agency failed to comply with the new SERC requirements, specifically by:

- Failing to prepare a SERC;
- Preparing a SERC that does not include all of the required information;
- Failing to make the SERC and its underlying data and analysis publicly available; or
- Failing to conduct a retrospective analysis.

If an ALJ finds that an agency failed to comply with s. 120.541, F.S., then the rule must be declared invalid and void.

The bill requires a SERC for each "proposed rule…or final rule[.]"

***Ongoing Analysis***

The bill requires agencies to conduct a second agency cost-benefit analysis 4 years after the rule's effective date. This analysis, which does not appear to be subject to the full SERC requirements, must compare the rule's actual costs and benefits to the projected costs included in

the rule's initial SERC. The agency must conduct a third analysis as part of its rule review which must compare the initial SERC, the 4-year cost-benefit analysis, and any other outcome observed up to the time of the final analysis.

The bill directs agencies to incorporate findings and lessons learned from its analyses (particularly the final rule analysis) into the standards for future SERCs,[75] and to apply those standards to similar rules.

**Rule Expiration**

**Section 5** creates s. 120.55, F.S., to implement a recurring 8-year expiration date from the effective date (or last expiration date) of each rule adopted after July 1, 2025. For rules that are already in effect, the JAPC must set an expiration date that falls between two and twelve years after July 1, 2025. The Governor may extend the expiration date by no more than 365 days based on an agency's request in which it explains why it cannot timely readopt the rule and why the expiration of the rule would harm the public's health, safety, or welfare. Any such extension does not extend the expiration date for purposes of subsequent reviews and expirations.

An agency may save its rule from expiration if it re-promulgates the rule in the same manner required for the proposal and adoption of new rules in s. 120.54, F.S. The agency cannot begin its rule review earlier than 1 year before the rule's expiration date.

Specific types of rules are exempt from the 8-year expiration, but are still subject to an agency review requirement. The exempt rules are those (1) required to comply with federal law, or to receive federal funds; (2) adopted pursuant to authority granted under the State Constitution; and (3) adopted by agencies that are headed by an elected official.

The agency review of the exempt rules will occur pursuant to a schedule set by the JAPC. The agency review of exempt rules consists of:

- Public notice of the review, including making the text of the notice, the text of the rule, and all analyses associated with the review available on the agency's website.
- Holding a 30-day public comment period.
- Conducting all analyses required "if the rule were being readopted pursuant to s.120.54[, F.S.]."
- Providing a reasoned response to unique public comments.
- Publishing a report on its website which includes the analyses and the agency's response to public comments.

The agency may not commence the exempt rule review earlier than 1 year before the JAPC-determined review date.

**Section 4** makes a conforming change to s. 120.545, F.S., which requires the JAPC to ensure that each proposed rule has an expiration date that is set in accordance with the above requirements.

[75] It is not clear what a "standard" for a SERC is, and therefore this directive to the agency is ambiguous. Section 120.541(3), F.S., outlines required findings that an agency must include in a SERC, but these required findings and analyses are not defined as a "standard."

**Section 6** makes a conforming change to s. 120.555, F.S., which directs the Department of State to update the Florida Administrative Code to remove the rule and provide historical notes which identify the expiration. Generally, s. 120.555, F.S., relates to the process for removal of a rule that the Department of State determines is not in full force and effect. It may be more appropriate to locate this instruction for removal of an expired rule from the Florida Administrative Code within s. 120.55, F.S., itself, which, similar to s. 120.536, F.S., instructs the Department of State to remove a rule from the Florida Administrative Code upon the nullification of the law that grants authority for the rule's adoption.

**Effective Date**

**Section 8** provides that the law takes effect July 1, 2025.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties and municipalities.

### B. Public Records/Open Meetings Issues:

The bill requires an agency to make public all data it relies on in the creation of its Statement of Estimated Regulatory Costs. This may include data that is exempt from public record disclosure requirements. The Legislature may wish to specify that an agency is not required to post data that is protected by a public record exemption.

### C. Trust Funds Restrictions:

None identified.

### D. State Tax or Fee Increases:

None identified.

### E. Other Constitutional Issues:

Administrative bodies or commissions, unless specifically created in the State Constitution, are creatures of statute and derive only the powers specified therein.[76] Thus, the APA expressly states that statutory language delegating authority to executive agencies must be construed to extend no further than the powers and duties conferred by

[76] *Grove Isle, Ltd. v. State Dept of Environmental Regulation*, 454 So. 2d 571 (Fla. 1st DCA 1984). *See also*, *WHS Trucking LLC v. Reemployment Assistance Appeals Comm'n*, 183 So. 3d 460 (Fla. 1st DCA 2016).

that statute.[77] Even when an agency is pursuing the policy objectives that underlie the statutory scheme it is charged with enforcing, the agency may not disregard or expand upon the terms of the statutes themselves.[78] Since administrative agency action is derived from legislative delegation, it follows that the legislature may oversee and alter that delegation.[79]

The bill provides that rules will expire by blanket application of a policy. A rule is created by an agency upon the Legislature's delegation of authority to the agency. The Legislative authority to affect the rule after its initial delegation is limited to oversight and amendment of the delegating statute.[80] The Legislature cannot force an agency to implement an expiration date in its rule unless the Legislature specifically provides for the expiration of authority in its delegating statute. Alternatively, the Legislature can repeal the delegating statute, which has the effect of repealing any rule adopted pursuant to its authority.[81]

The bill grants authority to the Governor to extend the effect of a rule by extending its expiration date by up to one year based on his adopted findings of harm that would result to the public health, safety, or welfare upon the rule's expiration. This does not clearly specify standards to guide the Governor in making this determination, and therefore grants the office the ability to apply its own understanding of a health, safety, or welfare need. This may constitute a separation of powers issue because "discretionary authority granted to the executive branch of government must be limited and guided by an appropriately detailed legislative statement of the standards and policies to be followed."[82] To grant such authority without clear limits may be an unconstitutional delegation of the power to make law.[83]

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None identified.

### B. Private Sector Impact:

Private sectors impacted by rules may face higher costs associated with the ongoing rule expiration and re-adoption process. These private sectors will likely face higher attorney or consultant fees to provide industry input or to participate in rule challenges during these processes.

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[77] Sections 120.52(8) and 120.536(1), F.S. *See also, Tampa Bay Downs, Inc. v. Dep't of Bus. And Prof. Reg.*, 293 So. 3d 38 (Fla. 2d DCA 2020).
[78] *Tampa Bay Downs, Inc.*, 293 So. 3d 38.
[79] *City of Cape Coral v. GAC Utilities, Inc. of Fla.*, 281 So. 2d 493 (Fla. 1973).
[80] *Id*.
[81] 120.536, F.S.
[82] *Fla. Home Builders Ass'n v. Div of Labor, Bureau of Apprenticeship*, 367 So. 2d 219, 220 (Fla. 1979).
[83] Art. II, s. 3, FLA. CONST.

Additionally, rules will have a more uncertain effect long-term, as they may fail to be readopted at their 8-year expiration. This may result in uncertainty in certain industries that rely on administrative rules.

C. Government Sector Impact:

State agencies will see an increased cost associated with rulemaking to implement the heightened SERC duties and the work associated with re-adopting rules every 8 years.

The Legislature may be faced with an instance in which an agency is barred from enacting (or continuing) a rule to effectuate a statute's legislative delegation as the result of the rule's cost or the agency's failure to timely renew a rule. This may result in the failure of legislative policy to be carried out. The Legislature or a private citizen may incur litigation costs to enforce the underlying statute.

## VI. Technical Deficiencies:

The bill addresses "guidance documents or other statements interpreting a statute." The term "guidance document" is not used in Florida Statutes. The federal concept of a guidance document would likely be classified as a rule under Florida law (or something that should be adopted as a rule and therefore subject to challenge as an unadopted rule).[84] However, an agency declaratory statement may also be considered a 'guidance document.' If the bill intends to include declaratory statements in the concept of a "guidance document or other statement that interprets a statute," then an additional amendment to s. 120.565, F.S., regarding declaratory statements, may be required for consistency. Additionally, if an agency interpretation of statute has general application, then current law would also define it as a rule that is subject to challenge as either an unadopted rule, or an invalid delegation of legislative authority.[85]

The bill adds "notice of change, or final rule" to several instances of "proposed rule." This results in inconsistent terminology throughout chapter 120, F.S., which, in practice, uses the term "proposed rule" to mean a proposed rule, and a proposed rule amendment. It is illogical to apply procedures for proposed rules to final rules, and may lead to redundancies in the rulemaking process wherein an agency has to do the same rulemaking procedures twice—once for the proposed rule (version published in the FAR) and again for the final rule (version published in the FAC), even though there are currently processes to account for amendments to the proposed rule that occur during the rulemaking process.

Section 5 requires an agency to readopt a rule "through rulemaking process outlined in s. 120.54, F.S." There is not a "readoption" process outlined in 120.54, F.S., therefore it is unclear whether the intent is to apply standard rule adoption procedures—e.g., requiring an agency to publish a notice of intended agency action, perform a SERC, and submit to the Legislature for ratification (if required).

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[84] Sections 120.52 and 120.54(1); 2 FLA. JUR. 2D ADMINISTRATIVE LAW s. 5 *Florida Administrative Procedure Act, generally; purpose* (2024).

[85] Section 120.52(8)(b), F.S., defines agency action outside of its grant of rulemaking authority (including action on unadopted policies, or the action outside of the scope of its adopted rules) as an invalid exercise of delegated legislative authority. Section 120.536, F.S., further states that agency rulemaking authority may occur "only pursuant to a specific law to be implemented."

A final rule cannot be adopted without first being put forth by the agency as a proposed rule. It is therefore unclear whether section 3 of the bill, which requires an agency to perform a SERC for "each proposed rule, notice of change, or final rule" requires two separate SERCs for the same policy—one at the time it is proposed and another at the time it is adopted as a final rule.

The bill requires an agency to demonstrate that its proposed rule's, notice of changes, or final rule's projected benefits outweigh its projected costs. A rule often implements a portion (the agency's implementation) of a larger policy crafted by a law. Therefore, the rule does not always reflect the benefit of the larger policy. The bill requires the agency's benefit to be limited to that found within the rule, not the policy it implements. Additionally, it is not clear how an agency should move forward with rulemaking if it cannot demonstrate this benefit. If the agency abandons the rule because of its cost, it would constitute a failure to act on the Legislature's delegation. The JAPC may not have grounds to certify a rule for adoption if its SERC does not include a statement of benefit outweighing its cost. Lastly, if the agency adopts the rule, it is subject to a rule challenge for failure to perform the SERC as required by the bill.

Section 120.541(1)(e), F.S., provides that "the failure of the agency to prepare a [SERC…] as provided in this subsection is a material failure to follow the applicable rulemaking procedures or requirements set forth in this chapter." Lines 446-458 of the bill, which grant a person grounds to challenge a rule on the grounds that an agency failed to comply with s. 120.541, F.S., appear repetitive of this provision.

The term "enforcement action" as used on lines 440-441 is not defined and perhaps is better substituted with the more frequently used "agency action."

## VII. Related Issues:

It is unclear whether the Department of Revenue's TAAs would be interpreted to qualify as a guidance document under the bill and thus be subject to rulemaking and SERC requirements. Such an interpretation would render void the provisions of s. 213.22, F.S., that state that a TAA "is not an order issued pursuant to s. 120.565 or s. 120.569 or a rule or policy of general applicability under s. 120.54. The provisions of s. 120.53 are not applicable to technical assistance advisements."

## VIII. Statutes Affected:

This bill substantially amends sections 120.52, 120.536, 120.541, 120.545, 120.555, and 120.56, and creates s. 120.55 of the Florida Statutes.

## IX. Additional Information:

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

None.

B. Amendments:

None.