

**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.)

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Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

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BILL: CS/SB 1382

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Bennett

SUBJECT: Agency Rulemaking

DATE: April 6, 2011                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Roberts	GO	Fav/CS
2.			BC	
3.				
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill refines certain agency rulemaking procedures under the Administrative Procedures Act by referencing the legislative ratification now required by s. 120.541(3), F.S. The bill also revises certain rulemaking timeframes to conform those times with other periods required in the rulemaking statute, s. 120.54, F.S.

This bill substantially amends the following sections of the Florida Statutes: 120.54, 120.541, and 120.56.

**II. Present Situation:**

**The Administrative Procedure Act**

Because administrative agencies have been granted extensive investigative, rulemaking, and adjudicating powers, statutes such as the Florida Administrative Procedure Act (APA) have been adopted to provide parties in administrative proceedings with procedural protection and due process.<sup>1</sup> The APA allows individuals who feel that their interests are being or will be affected

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<sup>1</sup> 2 FLA. JUR 2D *Administrative Law* s. 1 (2007).

by the preliminary decisions of agencies to challenge those decisions.<sup>2</sup> The central purpose of the APA is to provide the basic fairness that should surround all governmental activity, such as:

- The opportunity for adequate and full notice of agency activities;
- The right to present viewpoints and to challenge the views of others;
- The right to develop a record which is capable of court review;
- The right to locate precedent and have it applied; and,
- The right to know the factual bases and policy reasons for agency action.<sup>3</sup>

The Division of Administrative Hearings (DOAH), which consists of an independent group of administrative law judges (ALJs), conducts hearings under ch. 120, F.S., when certain agency decisions, e.g., rules and determinations of a party's substantial interest, are challenged by substantially affected persons.<sup>4</sup>

### House Bill 1565

HB 1565 was passed during the 2010 regular session but was vetoed by Governor Crist. On November 16, 2010, the Legislature in special session voted to override that veto and the bill became law as Chapter 2010-279. The law created new s. 120.541(3), F.S., requiring submission of rules with certain economic impacts for ratification by the Legislature before they may go into effect. The law also lengthened the time (from 21 days to 45 days) before an agency could adopt a rule after revising a required economic analysis and lengthened the time (from 20 days to 44 days) for a person to challenge the validity of a rule after the agency prepared the required economic analysis. These changes created a potential timing conflict with existing provisions which only allowed 21 days before adopting a rule if the economic analysis was not revised.

### Agency Rulemaking

Under current law, an agency begins the formal rulemaking process by filing a notice of the proposed rule.<sup>5</sup> The notice is published by the Department of State in the Florida Administrative Weekly<sup>6</sup> and must provide certain information, including the text of the proposed rule, a summary of the statement of estimated regulatory costs (SERC), if one is prepared, and how a party may request a public hearing.

Present law distinguishes between a rule being “adopted” and becoming enforceable or “effective.”<sup>7</sup> Prior to the 2010 revision the law provided only two contingencies<sup>8</sup> to “effectiveness;” legislative ratification became the third.<sup>9</sup>

<sup>2</sup> Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, 75 FLA. B.J. 14, 14 (2001); see also 2 FLA. JUR 2D *Administrative Law* s. 5 (2007).

<sup>3</sup> 2 FLA. JUR 2D *Administrative Law* s. 5 (2007) (quoting *Singer Island Civic Ass'n, Inc. v. State Dep't of Environmental Regulation*, 636 So. 2d 723, 725 (Fla. 4th DCA 1994)).

<sup>4</sup> Rigot, *supra* note 2, at 14.

<sup>5</sup> Section 120.54(3)(a)1., F.S.

<sup>6</sup> Section 120.55(1)(b)2., F.S.

<sup>7</sup> Section 120.54(3)(e)6., F.S. Before a rule becomes enforceable, thus “effective,” the agency first must complete the rulemaking process and file the rule for adoption.

<sup>8</sup> *Id.* A rule became effective either 20 days after being filed for adoption or on a date specified by statute. Rules not required to be filed with the Department of State became effective when adopted by the agency head or on a date specified by rule or statute.

Rules normally must be filed for adoption no earlier than 28 days nor later than 90 days after the agency publishes the notice of proposed rule; the later deadline may change depending on different factors.<sup>10</sup> To ensure completion of the rulemaking process, the APA provides different times in which a party may challenge a proposed rule.<sup>11</sup> If an agency is required to prepare a SERC the rule cannot be filed for adoption until 21 days after the SERC is provided to parties and made publicly available.<sup>12</sup>

The 2010 revision did not alter this requirement but created new provisions delaying adoption of a rule for 45 days after the agency made a *revised* SERC available<sup>13</sup> and providing 44 days for a party to challenge a proposed rule.<sup>14</sup> These revised times conflict with the various 21 day timeframes provided for different aspects of rulemaking, such as filing a rule for adoption, requesting a hearing and submitting materials responding to the rulemaking notice,<sup>15</sup> or filing notices of substantial changes due to an objection from the Joint Administrative Procedures Committee.<sup>16</sup>

### III. Effect of Proposed Changes:

The bill would require an agency's statutory notice of proposed rulemaking to include a statement as to whether legislative ratification will be required before the rule goes into effect. The bill also expressly includes legislative ratification in the statutory description of those contingencies affecting when a rule becomes effective.

The bill resolves the timing conflicts created in the 2010 law reversing the changes as follows:

- Instead of allowing 45 days, the bill requires a revised SERC be provided at least 21 days before the rule is filed for adoption, conforming the time with that for adopting a rule after providing an original SERC.<sup>17</sup>
- The bill reverts the time to 20 days for challenging a proposed rule after the agency provides a SERC, requiring the challenge be brought during the waiting period before the rule may be filed for adoption.

The bill takes effect July 1, 2011.

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<sup>9</sup> Section 120.541(3), F.S.

<sup>10</sup> Section 120.54(3)(e)2., F.S. The 90 day period is extended for an additional 21 days if a party submits a lower cost regulatory alternative to a proposed rule and the agency is compelled to prepare a SERC if one was not previously done. S. 120.541(1)(a), as amended by Ch. 2010-279, s. 2, Laws of Florida.

<sup>11</sup> Section 120.56(2)(a), F.S. Originally, a party had 20 days after a SERC or revised SERC was made available in which to challenge a proposed rule.

<sup>12</sup> Section 120.54(3)(e)2., F.S.

<sup>13</sup> Section 120.541(1)(d), F.S.

<sup>14</sup> Section 120.56(2)(a), F.S., as amended by Ch. 2010-279, s. 3, Laws of Florida.

<sup>15</sup> Section 120.54(3)(c)1., F.S.

<sup>16</sup> Section 120.54(d)1., F.S.

<sup>17</sup> Section 120.54(3)(e)2., F.S.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

Requiring disclosure in the rulemaking notice of whether the proposed rule may require legislative ratification will have an indeterminate but probably insignificant impact on agency expenditures.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

## A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on April 5, 2011:**

The committee substitute made a technical amendment to the title.

## B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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