

**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: SB 1312

INTRODUCER: Senator Gaetz

SUBJECT: Administrative Authority of the Executive Branch

DATE: January 24, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Seay	Roberts	GO	<b>Pre-meeting</b>
2.			JU	
3.			BC	
4.				
5.				
6.				

**I. Summary:**

This bill clarifies legislative intent of the extent of the executive branch’s administrative authority in response to the Florida Supreme Court’s ruling in *Whiley v. Scott*. The bill authorizes the Division of Statutory Revision to include duplicative, redundant, or unused rulemaking authority in revisers bill recommendations. This bill repeals unused rulemaking delegations to state agencies.

This bill substantially amends sections 20.02, 20.03, 20.05, 120.52, 14.34, 15.16, 15.18, 16.60, 17.0416, 17.59, 39.0137, 39.824, 63.167, 97.026, 97.0555, 97.061, 101.56062, 103.101, 106.165, 110.1099, 110.1228, 110.12301, 112.1915, 118.12, and 121.085 of the Florida Statutes. This bill creates section 120.515 of the Florida Statutes. This bill repeals sections 25.371, 28.43, 35.07, and 88.9051 of the Florida Statutes.

**II. Present Situation:**

**Rulemaking under Florida’s Administrative Procedures Act**

Rulemaking is a legislative function which may be delegated to an agency by the Legislature<sup>1</sup> by general law. The Legislature must provide an express grant of authority in order for an agency to implement a specific law by rulemaking,<sup>2</sup> as well as specific standards and guidelines sufficient

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<sup>1</sup> Section 1, Art. III, Fla. Const.; *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000); *Dept. of Revenue v. Novoa*, 745 So. 2d 378, 380 (Fla. 1<sup>st</sup> DCA 1999).

<sup>2</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001); *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1979).

to preclude the agency from exercising unbridled discretion in creating policy or applying the law.<sup>3</sup>

All agencies with delegated rulemaking authority must follow the process and procedure set out in the Administrative Procedures Act (APA) contained in Chapter 120, F.S., unless otherwise provided by law. The APA ensures a uniform procedure to protect the rights of the public when dealing with agencies. The Act contains a general mandate to commence rulemaking within 180 days of the effective date of a new law requiring the promulgation of rules,<sup>4</sup> but does not control the initial process an agency follows to consider, review, research, or otherwise choose among alternative approaches to formulate a rule implementing law.

Unless the proposal is to repeal an existing rule, the agency must publish a notice of rule development and may schedule workshops to allow public input.<sup>5</sup> Once an internal decision is made and the agency head approves the adoption of a specific proposed rule, the agency must publish notice of intended rule adoption and the complete text of the proposal.<sup>6</sup> After completing public hearings (if requested),<sup>7</sup> resolving changes requested by the Joint Administrative Procedures Committee (JAPC),<sup>8</sup> providing a statement of estimated regulatory costs both to those who provided proposed lower cost alternatives to the rule and to the public,<sup>9</sup> or the entry of a final order on a petition challenging the proposed rule,<sup>10</sup> with the approval of the agency head the rule may be filed for adoption with the Department of State.<sup>11</sup> The rule then goes into effect 20 days after filing, or at a later date if specified in the original notice of rulemaking, or upon ratification by the Legislature.<sup>12</sup>

Former Governors including Bob Martinez, Lawton Chiles, and Charlie Crist have used executive orders in varying capacities to direct and supervise the policies implemented by their appointed agency heads relating to the exercise of statutorily-created rulemaking authority.<sup>13</sup>

### **Executive Orders 11-01 and 11-72**

Upon taking office, Governor Rick Scott issued Executive Order 11-01 creating the Office of Fiscal Accountability and Regulatory Reform (OFARR) within the Executive Office of the Governor.<sup>14</sup> The executive order also directed all agencies under the direction of the Governor to immediately suspend all rulemaking.<sup>15</sup> Agencies not supervised directly by the Governor were

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<sup>3</sup> Section 120.52(8) & s. 120.536(1), F.S.

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

<sup>5</sup> Section 120.54(2), F.S.

<sup>6</sup> Section 120.54(3)(a)1., F.S.

<sup>7</sup> Section 120.54(3)(c), F.S.

<sup>8</sup> Sections 120.54(3)(d), 120.545(3)(a), F.S.

<sup>9</sup> Section 120.541, F.S.

<sup>10</sup> Section 120.56, F.S.

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

<sup>12</sup> Section 120.54(3)(e)6., F.S.

<sup>13</sup> See Staff Analysis for PCB 12-02, Rulemaking and Regulation Subcommittee, Florida House of Representatives (for a comprehensive discussion of the historical use of executive orders to supervise agency rulemaking).

<sup>14</sup> Office of the Governor, Executive Order Number 11-01, *available at* <http://edocs.dlis.state.fl.us/fldocs/governor/orders/2011/11-01-rulemaking.pdf> [hereinafter Exec. Order 11-01].

<sup>15</sup> *Id.*

requested to suspend all rulemaking activities.<sup>16</sup> OFARR was given specific duties pertaining to agency rulemaking, including reviewing proposed rules under specific policy guidelines set in the order. The main emphasis was to ensure that “agency-created rules do not hinder government performance and that they are fiscally responsible.”<sup>17</sup> The order also established the schedule to be followed by state agencies in submitting proposed or amended rules to OFARR.<sup>18</sup> In April 2011, the Governor issued Executive Order 11-72 superseding Executive Order 11-01. The new order also required the suspension of agency rulemaking until approval was received from OFARR.<sup>19</sup>

### ***Whiley v. Scott***

In *Whiley*, the Florida Supreme Court heard a petition challenging the Governor’s authority to direct and supervise delegated rulemaking by appointed agency heads serving at his pleasure. On August 16, 2011, the majority of Supreme Court ruled that portions of the executive order violated the Administrative Procedure Act (APA) by “suspending and terminating rulemaking by precluding notice publication and other compliance with Chapter 120 absent prior approval by OFARR.”<sup>20</sup> The majority of the court more narrowly interpreted the “supreme executive power” vested in the Governor by article IV, section 6 of the Florida Constitution. Although executive agency heads serve at the pleasure of the Governor, the court concluded that “the power to remove is not analogous to the power to control [an agency].” The majority opinion noted that the Legislature may, and has in several cases, delegate particular responsibilities in the oversight of rulemaking to the Executive Office of the Governor.<sup>21</sup>

In his dissent, Chief Justice Canady found that Florida law imposes no restriction on the authority of the Governor to supervise and direct policy choices made by subordinate executive officials with respect to rulemaking. In a separate dissent, Justice Polston found that “nothing in the APA prohibits the Governor from performing executive oversight to ensure that the rulemaking process at his agencies results in effective and efficient rules that accord with Florida law.”<sup>22</sup> Both dissenting justices adopted a more expansive reading of article IV, section 6 of the Florida Constitution granting the Governor authority to suspend executive agency rulemaking.

Responding to the Court’s ruling in *Whiley*, the Governor issued Executive Order 11-211. The order provided that appointed agency heads can voluntarily cooperate with OFARR’s role in overseeing proposed rulemaking.

### **Unused Rulemaking Delegations**

Legislative grants of rulemaking authority provide agencies with flexibility to address issues arising in the administration of a statute. A number of provisions authorizing agency rulemaking have been in statute for more than five years but have never been used. In instances where

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

<sup>17</sup> *Whiley v. Scott*, -- So. 3d --, 2011 Lexis 1900, 36 Fla. L. Weekly S 451 (Fla. 2011).

<sup>18</sup> Exec. Order 11-01, *supra* note 14.

<sup>19</sup> *Id.*

<sup>20</sup> *Whiley*, *supra* note 17, at \*27.

<sup>21</sup> *Whiley*, *supra* note 17, at \*35; *see, e.g.*, section 14.2015, F.S., section 288.7015, F.S.

<sup>22</sup> *Whiley*, *supra* note 17 at \*60-61.

agencies have been able to administer statutory programs without relying on rulemaking, the grant of rulemaking authority appears unnecessary.

### III. Effect of Proposed Changes:

**Section 1** affirms that Executive Orders 11-72 and 11-211 are consistent with law and public policy of the state.

**Section 2** clarifies legislative intent that the placement of an agency head appointed by serving at the pleasure of the governor does not intend to restrict the Governor's authority to direct and supervise the implementation of executive policy by these appointees unless expressly stated otherwise in law.

**Section 3** creates s. 20.02(3), F.S., providing that an agency head appointed by and serving at the pleasure of the Governor remains under the oversight, direction, and supervisory authority of the Governor unless expressly stated otherwise in law.

**Section 4** amends ss. 20.03(4)-(5), F.S. and creates s. 20.03(15), amending the definition of "agency head"; amending the definition of "Secretary"; and creating a new definition to expressly define the phrase "to serve at the pleasure."

**Section 5** amends s. 20.05, F.S., making the authority of any agency head subject to the allocation of executive power under Article IV of the State Constitution.

**Section 6** creates s. 120.515, F.S., providing that Chapter 120 (the APA) does not limit the allocation of executive power under Article IV of the State Constitution; and clarifying that the APA does not limit the authority to direct or supervise rulemaking decisions by appointed agency heads.

**Section 7** amends s. 120.52, F.S., confirming that all actions taken by appointed agency heads under the APA are official acts.

**Section 8** repeals s. 14.34, F.S., removing rulemaking authority to the Executive Office of the Governor to adopt rules relating to the Governor's Medal of Merit. The rulemaking authority was first granted in 2004 and appears to have never been used.

**Section 9** amends s. 15.16(7), F.S., removing rulemaking authority to the Department of State to adopt rules relating to international processes for validating and verifying documents. The Department of State has not found it necessary to adopt rules for implementing this provision and has not expressed objection to the rulemaking repeal.

**Section 10** repeals s. 15.18(7), F.S., removing rulemaking authority to the Department of State to adopt rules relating to contracts for professional services and events funded by donations. The Department of State has never adopted rules under this provision, which was last amended in 2002. The department has expressed no objection to the rulemaking repeal.

**Section 11** amends s. 16.60, F.S., removing rulemaking authority to the Office of the Attorney General to adopt rules of procedure relating to a mediation program that resolves public records disputes. The Attorney General's office has never adopted rules under this provision, which was last amended in 2000. The office has expressed no objection to the removal of the rulemaking authority.

**Section 12** amends s. 17.0416, F.S., removing rulemaking authority to the Department of Financial Services (DFS) to adopt rules to implement the section authorizing DFS to provide services on a fee basis to other public bodies and officers. DFS has not adopted rules under this provision, which was created in 2004. DFS does not object to the repeal of this rulemaking authority.

**Section 13** amends s. 17.59, F.S., removing rulemaking authority to the Chief Financial Officer (CFO) to adopt rules for the management of safekeeping services. The CFO has not adopted rules under this provision, which was last amended in 2004. The CFO has expressed no objection to the repeal of this rulemaking provision.

**Section 14** repeals s. 25.371, F.S., providing that Supreme Court rules override a statute in the case of a conflict.

**Section 15** repeals s. 28.43, F.S., removing rulemaking authority to the Department of Revenue and the Department of Financial Services to adopt rules relating to the funding and budgeting of court clerks. Neither department has objected to the repeal of this rulemaking authority.

**Section 16** repeals s. 35.07, F.S., providing that District Courts of Appeal may make rules and regulations for the internal management of the court.

**Section 17** amends s. 39.0137, F.S., removing rulemaking authority to the Department of Children and Family Services to adopt rules to facilitate implementation of the federal Indian Child Welfare Act. This rulemaking power is unnecessary because it is duplicative of s. 39.012, F.S., authorizing the Department of Children and Family Services to make rules to implement the entire chapter.

**Section 18** amends s. 39.824, F.S., removing a 1989 request to the Supreme Court to adopt rules of procedure to implement part of Chapter 39, F.S.

**Section 19** amends s. 63.167, F.S., removing rulemaking authority relating to the state adoption information center. This provision was last amended in 2003 and no rules appear to have been adopted by the Department of Children and Family Services based on this provision.

**Section 20** repeals s. 88.9051, F.S., relating to the Uniform Interstate Family Support Act. Chapter 88, F.S. currently does not contain a definition identifying the department empowered by the section. No rule appears to be in effect that relies on the section.

**Section 21** amends s. 97.026, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to the availability of elections-related forms in alternate formats and via the internet. The Department of State has rulemaking authority under s. 97.012, F.S., to

implement s. 97.026, F.S. No rule appears to have been promulgated by the language currently in s. 97.026, F.S. The Department has indicated that it does not object to the repeal.

**Section 22** amends s. 97.0555, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to late voter registration by uniformed servicepersons and their accompanying family members. The Department of State has rulemaking authority under s. 97.012, F.S., to implement s. 97.0555, F.S. No rule appears to have been promulgated by the language currently in s. 97.0555, F.S. The Department has indicated that it does not object to the repeal.

**Section 23** amends s. 97.061, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to procedures for registering persons requiring assistance. The Department of State has rulemaking authority under s. 97.012, F.S., to implement s. 97.061, F.S. No rule appears to have been promulgated by the language currently in s. 97.061, F.S. The Department has indicated that it does not object to the repeal.

**Section 24** amends s. 101.56062, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to standards for accessible voting systems. The Department of State has rulemaking authority under s. 97.012, F.S., to implement s. 101.56062, F.S. No rule appears to have been promulgated by the language currently in s. 101.56062, F.S. The Department has indicated that it does not object to the repeal.

**Section 25** amends s. 103.101, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to the presidential preference primary. No rule appears to have been adopted in reliance on the provision. The Department of State has expressed that it does not intend to adopt rules under this section and does not object to the repeal.

**Section 26** amends s. 106.165, F.S., removing rulemaking authority relating to the use of closed captioning in electioneering broadcasts. The Division of Elections currently has rulemaking authority under s. 106.22(9), F.S., to implement s. 106.165, F.S. No rule appears to have been promulgated by the Department of State in reliance on the rulemaking authority currently in s. 106.165, F.S. The Department has indicated that it does not object to the repeal.

**Section 27** amends s. 110.1099, F.S., removing rulemaking authority allowing the Department of Management Services to adopt rules relating to education and training opportunities for state employees. The Department of Management Services has rulemaking authority under s. 110.1055, F.S., to implement s. 110.1099(5), F.S.

**Section 28** amends s. 110.1228, F.S., removing rulemaking authority allowing the Department of Management Services to adopt rules relating to participation of small political subdivisions in the state group health plan. The Department of Management Services has rulemaking authority under s. 110.1055, F.S., to implement s. 110.1228(7), F.S.

**Section 29** amends s. 110.12301, F.S., removing rulemaking authority allowing the Department of Management Services to adopt rules relating to postpayment claims review and dependent eligibility.

**Section 30** amends s. 112.1915, F.S., removing rulemaking authority allowing the State Board of Education to adopt rules to implement a special death benefit for teachers and school administrators. The Board does not appear to have adopted rules under the provision which has not been amended since 2004.

**Section 31** amends s. 118.12, F.S., removing rulemaking authority allowing the Department of State to adopt rules relating to the certification of civil-law notaries and apostilles. The Department of State has not used the rulemaking authority for implementation of the section and does not object to its appeal.

**Section 32** amends s. 121.085, F.S., removing rulemaking authority allowing the Department of State to adopt rules establishing procedures to establish claims of creditable service under the Florida Retirement System.

**Section 33** provides an effective date of July 1, 2012.

**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:

None.

**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.)

None.

**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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