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

BILL:	SB 1150
INTRODUCER:	Senator Bean
SUBJECT:	Legislative Reauthorization of Agency Rulemaking Authority
DATE:	January 25, 2016 REVISED: 02/08/2016

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peacock	McVaney	GO	**Pre-meeting**
2.			AGG	
3.			AP	

I. Summary:

SB 1150 amends s. 120.536, F.S., to suspend any new rulemaking authority for 3 years after the effective date of the law authorizing rulemaking until reauthorized by general law. Any rulemaking authority effective on or before July 1, 2016, is suspended July 1, 2019, until reauthorized by general law.

The bill provides that reauthorization of rulemaking authority remains in effect for 3 years, after which the reauthorization expires and rulemaking authority is then suspended until reauthorized by general law.

Although the rulemaking authority is suspended, an agency may continue to use the rulemaking process to adopt rules. However, any rule adopted during this suspension of rulemaking authority must be ratified by the Legislature.

The bill allows the Governor to issue a one-time written declaration of public necessity delaying a suspension for 90 days, allowing the Legislature to convene and address the necessity.

SB 1150 makes exceptions for emergency rulemaking and rulemaking necessary to maintain financial or legal integrity of any financial obligation of the state, its agencies or political subdivisions.

The bill has an effective date of July 1, 2016.

II. Present Situation:

Administrative Procedure Act

Chapter 120, F.S., known as the Administrative Procedure Act (APA),[1] regulates administrative rulemaking, administrative enforcement and administrative resolution of disputes arising out of administrative actions of most state agencies and some subdivisions of state government. The term "agency" is defined in s. 120.52(1), F.S., as:

- Each state officer and state department, and departmental unit described in s. 20.04, F.S.[2]
- The Board of Governors of the State University System, the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
- A regional water supply authority.
- A regional planning agency.
- A multicounty special district with a majority of its governing board comprised of non-elected persons.
- Educational units.
- Each entity described in chs. 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation), F.S., and s. 186.504 (regional planning councils), F.S.
- Other units of government in the state, including counties and municipalities, to the extent they are expressly made subject to the act by general or special law or existing judicial decisions.[3]

The definition of "agency" also includes the Governor[4] in the exercise of all executive powers other than those derived from the State Constitution.

Administrative actions authorized by law and regulated by the APA include adoption of a rule,[5] granting or denying a permit or license, an order enforcing a law or rule that assesses a fine or other discipline and final decisions in administrative disputes or other matters resulting in an agency decision. Such disputes include challenges to the validity of a rule or proposed rule or challenges to agency reliance on unadopted rules,[6] as well as challenges to other proposed agency actions which affect substantial interests of any party.[7] In addition to disputes, agency action occurs when the agency acts on a petition for a declaratory statement[8] or settles a dispute through mediation.[9]

[1] Section 120.51, F.S.
[2] Section 20.04, F.S., sets the structure of the executive branch of state government.
[3] The definition of agency expressly excludes certain legal entities or organizations found in chs. 343, 348, 349 and 361, F.S., and ss. 339.175 and 163.01(7), F.S.
[4] Section 120.52(1)(a), F.S.
[5] Section 120.54, F.S.
[6] Section 120.56, F.S.
[7] Section 120.569, F.S.
[8] Section 120.565, F.S.
[9] Section 120.573, F.S.

Administrative Rulemaking

The APA governs all rulemaking by state agencies except when specific legislation exempts its application. Rulemaking authority is delegated by the Legislature[10] authorizing an agency to "adopt, develop, establish, or otherwise create"[11] a rule. Agencies do not have discretion whether to engage in rulemaking.[12] To adopt a rule an agency must have an express grant of authority to implement a specific law by rulemaking.[13] The grant of rulemaking authority itself need not be detailed.[14] The particular 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.[15] A delegation of authority to an administrative agency by a law that is vague, uncertain, or so broad as to give no notice of what actions would violate the law, may unconstitutionally allow the agency to make the law.[16] Because of this constitutional limitation on delegated rulemaking, the Legislature must provide minimal standards and guidelines in the law creating a program to provide for its proper administration by the assigned executive agency. The Legislature may delegate rulemaking authority to agencies but not the authority to determine what should be the law.[17]

In 1996 the Legislature extensively revised[18] agency rulemaking under the APA to require both an express grant of rulemaking authority and a specific law to be implemented by the rule.

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms.[19] The effect of an agency statement determines whether it meets the statutory definition of a rule, regardless of how the agency characterizes the statement.[20] If an agency statement generally requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law, it is a rule.[21]

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[10] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).
[11] Section 120.52(17), F.S.
[12] Section 120.54(1)(a), F.S.
[13] Sections 120.52(8) & 120.536(1), F.S.
[14] *Save the Manatee Club, Inc.*, supra at 599.
[15] *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).
[16] *Conner v. Joe Hatton, Inc.,* 216 So.2d 209 (Fla.1968).
[17] *Sarasota County. v. Barg*, 302 So. 2d 737 (Fla. 1974).
[18] Ch. 96-159, LOF.
[19] Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[20] *Dept. of Administration v. Harvey*, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).
[21] *McDonald v. Dep't of Banking & Fin.*, 346 So.2d 569, 581 (Fla. 1st DCA 1977), articulated this principle subsequently cited in numerous cases. See, *State of Florida, Dept. of Administration v. Stevens,* 344 So. 2d 290 (Fla. 1st DCA 1977); *Dept. of Administration v. Harvey*, 356 So. 2d 323 (Fla. 1st DCA 1977); *Balsam v. Department of Health and Rehabilitative Services*, 452 So.2d 976, 977–978 (Fla. 1st DCA 1984); *Department of Transp. v. Blackhawk Quarry Co.*, 528 So.2d 447, 450 (Fla. 5th DCA 1988), rev. den. 536 So.2d 243 (Fla.1988); *Dept. of Natural Resources v. Wingfield*, 581 So. 2d 193, 196 (Fla. 1st DCA 1991); *Dept. of Revenue v. Vanjaria Enterprises, Inc.*, 675 So. 2d 252, 255 (Fla. 5th DCA 1996); *Volusia County School Board v. Volusia Homes Builders Association, Inc.*, 946 So. 2d 1084 (Fla. 5th DCA 2007); *Florida Dept. of Financial Services v. Capital Collateral Regional Counsel*, 969 So. 2d 527 (Fla. 1st DCA 2007); *Coventry First, LLC v. State of Florida, Office of Insurance Regulation,* 38 So. 3d 200 (Fla. 1st DCA 2010).

A notice of rule development initiates public input on a rule proposal.[22] The process may be facilitated by conducting public workshops or engaging in negotiated rulemaking.[23] An agency begins the formal rulemaking by filing a notice of the proposed rule.[24] The notice is published by the Department of State in the Florida Administrative Register[25] and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared,[26] and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy, adverse impact on business competitiveness or increase in regulatory costs.[27]

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect.[28] First, is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.[29] Next, is the likely adverse impact on business competitiveness,[30] productivity, or innovation.[31] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[32] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[33] A rule must be filed for adoption before it may go into effect[34] and cannot be filed for adoption until completion of the rulemaking process.[35]

Proposed rules also must be formally reviewed by the Legislature's Joint Administrative Procedures Committee (JAPC)[36] which reviews rules to determine their validity, authority, sufficiency of form, consistency with legislative intent, reasonableness of regulatory cost

[22] Section 120.54(2)(a), F.S.
[23] Section 120.54(2)(c)-(d), F.S.
[24] Section 120.54(3)(a)1., F.S..
[25] Section 120.54(3)(a)2., F.S.
[26] Section 120.541(1)(b), F.S., requires preparation of a SERC if the proposed rule will have an adverse impact on small business or if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 within one year of implementation of the rule. Alternatively, s. 120.541(1)(a), F.S., provides that preparation of a SERC is triggered when a substantially affected person submits a good faith written proposal for a lower cost regulatory alternative which substantially accomplishes the objectives of the law being implemented.
[27] Section 120.541(2)(a), F.S.
[28] *Id*.
[29] Section 120.541(2)(a)1., F.S.
[30] Section 120.541(2)(a)2., F.S., states that business competitiveness includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[31] *Id*.
[32] Section 120.541(2)(a) 3., F.S.
[33] 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 with the Department of State.
[34] *Id*.
[35] Section 120.54(3)(e), F.S.
[36] Section 120.54(3)(a)4., F.S.

estimates and other matters.[37] An agency must formally respond to JAPC concerns or objections.[38]

Emergency Rulemaking

Florida's APA provides for emergency rulemaking by any procedure which is fair under the circumstances when an immediate danger to the public health, safety, or welfare requires emergency action. Emergency rules may not be effective for more than 90 days but may be renewed if the agency has initiated rulemaking to adopt rules addressing the subject.[39]

III. Effect of Proposed Changes:

Section 1 amends s. 120.536, F.S., to suspend all existing rulemaking authority on July 1, 2019, and to suspend all new rulemaking authority three years after its enactment unless the Legislature reauthorizes the rulemaking authority by general law.

A reauthorization of rulemaking authority remains in effect for three years, unless another date is specified in the law reauthorizing rulemaking, after which the reauthorization expires and the rulemaking authority is suspended until reauthorized by general law.

The bill allows an agency to continue or initiate rulemaking proceedings during a suspension but no rule adopted during a suspension of authority may be effective unless ratified by the Legislature.

Also, the bill allows the Governor to issue a written declaration of public necessity delaying a suspension for 90 days, allowing the Legislature to convene and address the necessity. A declaration of public necessity may be issued only once in regards to any suspension of rulemaking authority.

The bill makes exception for any emergency rulemaking or any rulemaking necessary to maintain the financial or legal integrity of any financial obligation of the state, its agencies or political subdivisions.

The bill expressly provides that all rules lawfully adopted remain in effect during any suspension of rulemaking authority under the bill's provisions.

Section 2 provides an effective date of July 1, 2016.

[37] Section 120.545(1), F.S.
[38] Sections 120.54(3)(e)4. and 120.545(3), F.S.
[39] Section 120.54(4), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It is unclear whether, under the State Constitution, an act of the legislature today can effectively suspend the rulemaking authority granted to the executive branch by a subsequent legislature. Lines 27-29 of the bill provide that "any new rulemaking authority is suspended 3 years after the effective date of the law authorizing rulemaking until reauthorized by general law." A subsequent act of the Legislature granting new rulemaking authority is most likely to take precedence over this act suspending all rulemaking authority generally. First, a new act granting new rulemaking authority is the later enacted legislation and typically supersedes prior laws. Secondly, the new act is more likely to relate to a specific grant of authority rather than a general "suspension." This issue relates to all grants of rulemaking authority enacted after January 12, 2016 (the commencement of the Regular Session for 2016).

Lines 32-36 appear to place an additional burden on subsequent legislatures when enacting legislation granting rulemaking authority. Under this bill, if the subsequent legislature wants the grant of rulemaking authority to be permanent, the bill authorizing (or reauthorizing) the rulemaking authority must specifically state that it is of a permanent nature. Typically, when a law is enacted it is presumed to be of a permanent nature unless modified or repealed by a subsequent legislature. In a similar circumstance relating to the authorization and reauthorization of state trust funds, the State Constitution was amended to place the time limitation on the duration of the trust fund and require the legislature to reauthorize the trust fund beyond that time period.[40]

[40] Article III, Section 19(f), Florida Constitution, adopted in 1992, stated:

> (2) State trust funds in existence before the effective date of this subsection shall terminate not more than four years after the effective date of this subsection. State trust funds created after the effective date of this subsection shall terminate not more than four years after the effective date of the act authorizing the creation of the trust fund. By law the legislature may set a shorter time period for which any trust fund is authorized.

That provision was been subsequently amended 2005, CS/SJR 2144) to read:

> (2) State trust funds shall terminate not more than four years after the effective date of the act authorizing the **initial** creation of the trust fund. By law the legislature may set a shorter time period for which any trust fund is authorized. {emphasis added}

The overall impact of this legislation might be challenged as inconsistent with constitutional principles. If all rulemaking is suspended and a rule can only become effective if ratified by the Legislature, this legislation as applied might be challenged as unconstitutional. Depending upon how the ratification process is conducted, it may (a) be inadequate in terms of the constitutionally required notice for legislation; (b) lend itself to impermissible logrolling, or (c) violate the principles of separation of powers.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate. For some rules, suspension may create uncertainty for individuals and businesses concerning the legal requirements for certain actions.

C. Government Sector Impact:

Indeterminate. There may be fewer rule challenges during the period when rulemaking has been suspended, but then a sharp increase in challenges when rulemaking is reauthorized.

VI. Technical Deficiencies:

Lines 37-40 may create confusion. While lines 26-36 of the bill "suspend" current and new grants of rulemaking authority, lines 37-40 appear to allow the rulemaking process to continue through the adoption process but prevent the rule from becoming effective. Then, the rule must be ratified by the Legislature to become effective.

Lines 40-45 permit the Governor to delay the suspension of the rulemaking authority for up to 90 days upon a written declaration of a public necessity. The term "public necessity" is not defined. This delay allows rules to become effective rather than subjected to the legislative ratification process. Since no clear standards are provided to the Governor for declaring a public necessity, the legal status of the rules becoming effective during the delay period become unclear. An opponent of such a rule would presumably have the ability to challenge the "public necessity."

Lines 46-50 of the bill exempt from the suspension provisions "rulemaking necessary to maintain the financial or legal integrity of any financial obligation of the state or its agencies, or political subdivisions." It is unclear as to what this exemption is intended to preserve. If this language is intended to exempt rulemaking authority associated with programs related to the flow of federal dollars, the language is ambiguous and may be inadequate. It is unclear whether a rule setting a fee that is used to support appropriations might be deemed as necessary to maintain a financial obligation.

Lines 51-52 provides that "rules lawfully adopted remain in effect during any suspension of rulemaking authority under this subsection." If an agency determines a rule is no longer necessary, or the underlying legal authority has changed without a subsequent grant of rulemaking authority, the agency will not be permitted to modify the rule, and the taxpayers affected by the rule may be negatively impacted.

VII. Related Issues:

In practical terms this bill may have significant impacts on state agencies, the Executive Office of the Governor, and the Legislature. This bill suspends all agencies' current rulemaking authority on July 1, 2019. This suspension takes place shortly after the 2018 General Election at which the Governor, 120 members of the Florida House of Representatives and at least 20 members of the Florida Senate will be elected. Because of a transitioning executive branch leadership in most agencies, it is unclear whether the state agencies will be positioned adequately to make recommendations as to the rulemaking authority that should be reauthorized. With the legislative elections, it is unclear whether the legislation necessary to reauthorize rulemaking authority will be ready for consideration by the new legislative members. In combination, rulemaking authority may be suspend until the 2020 Regular Session or later leading to significant issues for agencies and potentially frustration of the legislature regarding the inability of agencies to implement timely those newly enacted laws that rely on existing (but suspended) rulemaking authority.

VIII. Statutes Affected:

This bill substantially amends section 120.536 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.