

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 941 Administrative Procedures  
**SPONSOR(S):** Oversight, Transparency & Administration Subcommittee; Moraitis, Jr.  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1410

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee	12 Y, 0 N, As CS	Toliver	Harrington
2) Government Operations & Technology Appropriations Subcommittee			
3) Government Accountability Committee			

### SUMMARY ANALYSIS

The Administrative Procedure Act sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms. Agencies do not have the discretion in and of themselves to engage in rulemaking. To adopt a rule, an agency must have a general grant of authority to implement a specific law. Once a rule is adopted, the rule continues to remain in effect until amended or repealed. Annually, an agency must verify that it regularly reviews all of its rules to determine if the rules remain consistent with the agency's rulemaking authority and the laws implemented.

The bill requires each agency to periodically review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If, after reviewing a rule, the agency determines that substantive changes to update a rule are not required, the agency must repromulgate the rule to reflect the date of the review. The agency, before repromulgation of the rule and upon the approval of its agency head, must:

- Publish a notice of repromulgation in the Florida Administrative Register; and
- File the rule with the Department of State (department). The rule may not be filed for repromulgation less than 28 days before or more than 90 days after the publication of the notice of repromulgation. If the agency fails to meet this time limit, it must withdraw the rule for repromulgation.

The bill provides that each agency, upon approval of the agency head, is required to submit three certified copies of the repromulgated rule it proposes to adopt with the department and one certified copy of any material incorporated by reference in the rule. The bill requires the department to adopt rules to implement the bill's repromulgation provisions by December 31, 2018.

The bill requires that, after December 31, 2018, all notices of rulemaking, repromulgated rules, or rule modifications that include material incorporated by reference to submit the material in the prescribed electronic format to the department with the full text available for free public access through an electronic hyperlink from the rule making the reference in the Florida Administrative Code. Alternatively, if an agency determines that posting the material incorporated by reference on the Internet would constitute a violation of federal copyright law, the agency must include in the notice a statement to that effect, along with the address of locations at the department and the agency at which the material is available for public inspection and examination.

The bill requires the Division of Administrative Hearing (DOAH) to serve all documents on all parties of record electronically. Parties to a proceeding at DOAH who file electronically are relieved of any requirement to serve other parties so long as those persons are registered for electronic filing.

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0941a.OTA

DATE: 1/24/2018

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

###### Rulemaking

The Administrative Procedure Act<sup>1</sup> sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>2</sup> Rulemaking authority is delegated by the Legislature through statute and authorizes agencies to “adopt, develop, establish, or otherwise create”<sup>3</sup> rules. Agencies do not have the discretion in and of themselves to engage in rulemaking.<sup>4</sup> To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>5</sup> The grant of rulemaking authority itself need not be detailed. The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>6</sup>

An agency begins the formal rulemaking process by filing a notice of rule development of proposed rules in the Florida Administrative Register (FAR) indicating the subject area to be addressed by the rule development and including a short, plain explanation of the purpose and effect of the rule. The notice may include the preliminary text of the proposed rule, but it is not necessary. Such notice is required for all rulemaking, except for rule repeals. Next, an agency must file, upon approval of the agency head, a notice of proposed rulemaking.<sup>7</sup> The notice is published by the Department of State (department) in the FAR<sup>8</sup> and must contain the full text of the proposed rule or amendment and a summary thereof.<sup>9</sup> If a person requests a hearing within 21 days following the publication of the notice, that agency must hold a hearing.<sup>10</sup> The agency, based upon the comments received at the hearing, can publish a notice of change.<sup>11</sup> The agency then files for rule adoption with the department and the rule becomes effective 20 days later, unless a different date is indicated in the rule.<sup>12</sup> The rule is then published in the Florida Administrative Code (FAC).

###### Small Business Impact in Rulemaking

Each agency, before the adoption, amendment, or repeal of a rule, is required to consider the impact of the rule on small businesses.<sup>13</sup> If the agency determines that the proposed action will affect small businesses, the agency must send written notice to the rules ombudsman in the Executive Office of the Governor at least 28 days before the intended action.<sup>14</sup> The agency must adopt the regulatory alternatives offered by the rules ombudsman if it finds the alternatives are feasible and consistent with the stated objectives of the proposed rule and which would reduce the impact on small businesses.<sup>15</sup>

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<sup>1</sup> Chapter 120, F.S.

<sup>2</sup> Section 120.52(16), F.S.

<sup>3</sup> Section 120.52(17), F.S.

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

<sup>5</sup> Sections 120.52(8) and 120.536(1), F.S.

<sup>6</sup> *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).

<sup>7</sup> Section 120.54(3)(a)1., F.S.

<sup>8</sup> Section 120.55(1)(b), F.S.

<sup>9</sup> Section 120.54(3)(a)1., F.S.

<sup>10</sup> Section 120.54(3)(c), F.S.

<sup>11</sup> Section 120.54(3)(d)1., F.S.

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

<sup>13</sup> Section 120.54(3)(b)2., F.S.

<sup>14</sup> Section 120.54(3)(b)2.b.(I), F.S.

<sup>15</sup> Section 120.54(3)(b)2.b.(II), F.S.

If the agency does not adopt the alternatives offered it must, before rule adoption or amendment, file a detailed written statement with Joint Administrative Procedures Committee (JAPC) explaining the reasons for failure to adopt such alternatives.<sup>16</sup>

### Incorporation by Reference

The APA allows an agency to incorporate material external to the text of the rule by reference.<sup>17</sup> The material to be incorporated must exist on the date that the rule is adopted.<sup>18</sup> If, after the rule has been adopted, the agency wishes to alter the material incorporated by reference the rule itself must be amended for the change to be effective.<sup>19</sup> However, an agency rule that incorporates another rule by reference automatically incorporates subsequent amendments to the referenced rule.<sup>20</sup> A rule cannot be amended by reference only.<sup>21</sup> An agency may not incorporate a rule by reference unless:

- The material has been submitted in the prescribed electronic format to the department and the full text of the material can be made available for free public access through an electronic hyperlink from the rule making the reference in the FAC; or
- The agency has determined that posting the material publicly on the Internet would constitute a violation of federal copyright law, in which case a statement stating such, along with the address of locations at the department and the agency at which the material is available for public inspection and examination, must be included in the notice.<sup>22</sup>

The department has adopted a rule governing the requirements for materials incorporated by reference.<sup>23</sup> The rule requires each agency incorporating material by reference in an administrative rule to certify that the materials incorporated have been filed with the department electronically or, if the agency claims the posting of the material would constitute a violation of federal copyright law, the location where the public may view the material.<sup>24</sup>

### Joint Administrative Procedures Committee (JAPC)

JAPC is a standing committee of the Legislature established by joint rule and created to maintain a continuous review of administrative rules, the statutory authority upon which those rules are based, and the administrative rulemaking process.<sup>25</sup> Specifically, JAPC is required to examine each proposed rule and its accompanying material to determine whether:

- The rule is an invalid exercise of delegated legislative authority;
- The statutory authority for the rule has been repealed;
- The rule reiterates or paraphrases statutory material;
- The rule is in proper form;
- The notice given prior to adoption was sufficient;
- The rule is consistent with expressed legislative intent;
- The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements;
- The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule;
- The rule could be made less complex or more easily comprehensible to the general public;
- The rule's Statement of Estimated Regulatory Cost (SERC) complies with the requirements of the APA and whether the rule does not impose regulatory costs on the regulated person,

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<sup>16</sup> Section 120.54(3)(b)2.b.(III), F.S.

<sup>17</sup> Section 120.54(1)(i), F.S.; *see also* Fla. Admin. Code R. 1-1.013.

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

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

<sup>20</sup> Section 120.54(1)(i)2., F.S.

<sup>21</sup> Section 120.54(1)(i)4., F.S.

<sup>22</sup> Section 120.54(1)(i)3., F.S.

<sup>23</sup> Fla. Admin. Code R. 1-1.013.

<sup>24</sup> Fla. Admin. Code R. 1-1.013(5)(d).

<sup>25</sup> Fla. Leg. J. Rule 4.6; *see also* s. 120.545, F.S.

- county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives; and
- The rule will require additional appropriations.<sup>26</sup>

### Statement of Estimated Regulatory Cost (SERC)

A SERC is an agency estimate of the potential impact of a proposed rule on the public, particularly the potential costs to the public of complying with the rule as well as to the agency and other governmental entities to implement the rule.<sup>27</sup> Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.<sup>28</sup> However, a SERC is required if the proposed rule will have a negative impact on small businesses or increase regulatory costs by more than \$200,000 in the aggregate within one year after implementation of the rule.<sup>29</sup>

If the agency revises a rule before adoption and the revision increases the regulatory costs of the rule, the agency must revise the SERC to reflect that alteration.<sup>30</sup> At least 21 days before filing a rule for adoption, an agency that is required to revise a SERC must provide the statement to the person who submitted the lower cost regulatory alternative and to JAPC and must provide notice on the agency's website that it is available to the public.<sup>31</sup>

### Annual Regulatory Review

Annually, each agency must prepare a regulatory plan that includes a list of each law enacted during the previous 12 months which creates or modifies the duties or authority of the agency and state whether the agency must adopt rules to implement the newly adopted laws.<sup>32</sup> The plan must also include a list of each additional law not otherwise listed which the agency expects to implement by rulemaking before the following July 1, except emergency rules. The plan must include a certification by the agency head, or, if the agency head is a collegial body, the presiding officer, and the individual acting as principal legal advisor to the agency verifying the persons have reviewed the plan and verifying that the agency regularly reviews all of its rules and identifying the period during which all rules have most recently been reviewed to determine if the rules remain consistent with the agency's rulemaking authority and the laws implemented.<sup>33</sup> By October 1 of each year, the plan must be published on the agency's website or on another state website established for publication of administrative law records with a hyperlink to the plan. The agency must also deliver a copy of the certification to JAPC and publish a notice in FAR identifying the date of publication of the agency's regulatory plan.<sup>34</sup>

### Electronic Filing

Current law provides that a party represented by an attorney in a proceeding before the Division of Administrative Hearings (DOAH) is required to file all documents electronically through DOAH's website.<sup>35</sup> However, if a party is not represented by an attorney, he or she must file documents through DOAH's website "whenever possible."<sup>36</sup>

### **Effect of the Bill**

The bill requires each agency to periodically review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If, after reviewing a rule, the agency determines that

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<sup>26</sup> Section 120.545(1), F.S.

<sup>27</sup> Section 120.541(2), F.S.

<sup>28</sup> Section 120.54(3)(b)1., F.S.

<sup>29</sup> Section 120.54(3)(b)1., F.S.

<sup>30</sup> Section 120.541(1)(c), F.S.

<sup>31</sup> Section 120.541(1)(d), F.S.

<sup>32</sup> Section 120.74(1), F.S.

<sup>33</sup> Section 120.74(1)(d), F.S.

<sup>34</sup> Section 120.74(2), F.S.

<sup>35</sup> Section 120.52(5), F.S.

<sup>36</sup> *Id.*

substantive changes to update a rule are not required, the agency must repromulgate the rule to reflect the date of the review. The bill defines “repromulgate” to mean the publication and adoption of an existing rule following an agency’s review of the rule for consistency with the power and duties granted by its enabling statute. The agency, before repromulgation of the rule and upon the approval of its agency head, must:

- Publish a notice of repromulgation in the FAR, which is not required to include the text of the rule;
- File the rule with the department. The rule may not be filed for repromulgation less than 28 days before or more than 90 days after the publication of the notice. If the agency fails to meet this time limit, it must withdraw the rule for repromulgation and give notice of the withdrawal in the next available issue of the FAR.

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

The bill provides that each agency, upon approval of the agency head, is required to submit three certified copies of the repromulgated rule it proposes to adopt with the department and one certified copy of any material incorporated by reference in the rule. The repromulgated rule is adopted upon its being filed with the department and becomes effective 20 days later. The department then must update the history note of the rule in the FAC to reflect the effective date. The bill requires the department to adopt rules to implement the bill’s repromulgation provisions by December 31, 2018.

The bill requires that, after December 31, 2018, all notices of rulemaking, repromulgated rules, or rule modifications that include material incorporated by reference to submit the material in the prescribed electronic format to the department with the full text available for free public access through an electronic hyperlink from the rule making the reference in the Florida Administrative Code. Alternatively, if an agency determines that posting the material incorporated by reference on the Internet would constitute a violation of federal copyright law, the agency must include in the notice a statement to that effect, along with the address of locations at the department and the agency at which the material is available for public inspection and examination.

The bill requires an agency to provide a copy of any proposal for a lower cost regulatory alternative to JAPC at least 21 days before filing the rule for adoption.

The bill requires DOAH to serve all documents on all parties of record electronically. Parties to a proceeding at DOAH who file electronically are relieved of any requirement to serve other parties so long as those persons are registered for electronic filing.

Lastly, the bill makes changes to cross-references to correspond to changes made by the bill.

## B. SECTION DIRECTORY:

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

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

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

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

Section 5 amends s. 120.55, F.S., relating to publication requirements in the APA.

Section 6 amends s. 120.569, F.S., relating to agency decisions affecting substantial interests.

Section 7 amends s. 120.08, F.S., relating to exceptions for certain agencies from APA requirements.

Section 8 amends s. 120.81, F.S., relating to exceptions for certain general areas from APA requirements.

Section 9 amends s. 420.9072, F.S., relating to the state housing initiative program.

Section 10 amends s. 420.9075, F.S., relating to local housing assistance plans.

Section 11 amends s. 443.091, F.S., relating to unemployment benefit eligibility conditions.

Section 12 provides an effective date of July 1, 2018.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

See Fiscal Comments.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **D. FISCAL COMMENTS:**

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

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

The bill creates new rulemaking authority for the department. It requires the department to adopt rules relating to the repromulgation of administrative rules.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 23, 2018, the Oversight, Transparency & Administration Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment removed a section of the bill that prohibited JAPC from being able to petition an agency to repeal a rule. The amendment also made technical changes.

The analysis is drafted to the committee substitute as passed by the Oversight, Transparency & Administration Subcommittee.