

**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 Budget Committee

**BILL:** CS/CS/SB 1382

**INTRODUCER:** Budget Committee; Governmental Oversight and Accountability Committee; and Senator Bennett

**SUBJECT:** Agency Rulemaking

**DATE:** April 26, 2011      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>McKay</u>	<u>Roberts</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>Martin</u>	<u>Meyer, C.</u>	<u>BC</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| 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., and revises certain rulemaking timeframes to conform those times with other periods required in the rulemaking statute, s. 120.54, F.S. The bill authorizes an agency to modify or withdraw a rule after the rule is filed for adoption, but before it becomes effective, in specified circumstances. The bill also exempts the triennial update to the Florida Building Code, the triennial update of the Florida Fire Prevention Code, the adjustment of tolls, and specified education rules from the requirement of legislative ratification.

This bill substantially amends the following sections of the Florida Statutes: 120.54, 120.541, and 120.56, 120.80, and 120.81.

## 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 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 (ALJ's), 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

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

<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.

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>

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>

### **Impact of Potential Legislative Ratification on Building and Fire Codes**

Where the Building Code is adopted in compliance with the Legislature’s primary intent and protects public health, safety, and welfare at the least cost to the consumer,<sup>17</sup> the resulting direct or indirect regulatory costs are likely to exceed the statutory threshold requiring ratification. The Florida Building Commission currently is completing the third triennial update to the Code and has begun the rulemaking process.<sup>18</sup> Absent the requirement of legislative ratification, the Code would become effective no later than December 31, 2011.<sup>19</sup> However, since the regulatory costs

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<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.

<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 553.72, F.S.

<sup>18</sup> Notice of Proposed Rule 9N-1.001.

<sup>19</sup> Section 553.73(7)(a), F.S.

resulting from the operation of the Code will exceed the level of economic impact requiring legislative ratification, and the Code will not be adopted through rulemaking prior to the end of the regular session of the Legislature, under present law the earliest the Code may be considered for ratification would be during the 2012 regular session.

*The Florida Building Code*

The Florida Building Code (Building Code) is the unified building code applicable statewide as authorized by statute.<sup>20</sup> The overall purpose for the Building Code is to create within a single set of documents uniform standards applicable to all aspects of construction in Florida to provide effective and reasonable protection for public health, safety, and welfare “...at the most reasonable cost to the consumer.”<sup>21</sup> The Florida Building Commission (“Commission”)<sup>22</sup> is responsible for adopting, updating, and general administration of the Building Code. With certain exceptions, enforcement of the Building Code is through duly-authorized state and local agencies.<sup>23</sup>

The law provides detailed sections on legislative intent<sup>24</sup>, Building Code adoption and contents,<sup>25</sup> specific processes for different types of amendments,<sup>26</sup> the triennial comprehensive update conducted by the Commission,<sup>27</sup> and the Commission’s powers.<sup>28</sup> The express intent of the law is for the Commission to use the statutory rulemaking requirements and process<sup>29</sup> for adopting, amending, or updating the Building Code:<sup>30</sup>

553.72 Intent. —

...

(3) It is the intent of the Legislature that the Florida Building Code be adopted, modified, updated, interpreted, and maintained by the Florida Building Commission in accordance with ss. [120.536\(1\)](#) and [120.54](#) and enforced by authorized state and local government enforcement agencies.

This intent is made a specific requirement in the substantive sections on adoption,<sup>31</sup> amendments,<sup>32</sup> and updates.<sup>33</sup> In addition, a large number of substantive bills and amendments are considered by the Legislature each year, keeping the Legislature actively engaged in the process of continual revision.

<sup>20</sup> Chapter 553, part IV, F.S., the Florida Building Code.

<sup>21</sup> Section 553.72(1), F.S.

<sup>22</sup> Section 553.74, F.S.

<sup>23</sup> Section 553.80, F.S.

<sup>24</sup> Section 553.72, F.S.

<sup>25</sup> Section 553.73(1)-(3), F.S.

<sup>26</sup> Section 553.73(3) and (9), F.S.-technical amendments, subsections (4) and (5)-amendments by local authorities, subsection (8)-substantive amendments.

<sup>27</sup> Section 553.73(7), F.S.

<sup>28</sup> Sections 553.74 - 553.77, F.S.

<sup>29</sup> Sections 120.536(1) and 120.54, F.S.

<sup>30</sup> Section 553.72(3), F.S.

<sup>31</sup> Section 553.73(1)(a), F.S.

<sup>32</sup> Section 553.73(3), (8), and (9), F.S.

<sup>33</sup> Section 553.73(7)(a), F.S.

The Commission is required to update the Building Code every 3 years, following the statutory rulemaking process in the APA. The statute also provides a minimum time of 6 months between adoption of the updated Building Code and its effective date.<sup>34</sup> Because the Commission is housed in the Department of Community Affairs (DCA) solely for administrative purposes, DCA publishes the notices required for rulemaking<sup>35</sup> as part of its duties to provide the Commission with administrative and staff support.<sup>36</sup>

The statute imposes detailed requirements the Commission must follow to adopt, amend, review, and update the Building Code in addition to following APA procedural requirements.<sup>37</sup> The resulting Building Code contains or incorporates the laws and rules pertaining to all major aspects of public and private building construction in Florida, from broad areas including design, physical construction, modification, repair, and even demolition,<sup>38</sup> to specific matters from structural and mechanical systems to elevators and coastal construction standards.<sup>39</sup> The Building Code must reference without change the Florida Fire Prevention and Life Safety Codes adopted by Department of Financial Services rule.<sup>40</sup> When updating the Building Code, the Commission is required to create the Building Code's foundation by incorporating the most current versions of a number of standard codes, such as the International Plumbing Code and the National Electrical Code.<sup>41</sup> The entire process of updating the Building Code is subject to extensive statutory direction,<sup>42</sup> continual legislative revision, and the procedural protections of the APA rulemaking process.<sup>43</sup>

#### *The Florida Fire Prevention Code*

One of the key components of the Florida Building Code cross-references to the separately-adopted Florida Fire Prevention Code (Fire Code). The State Fire Marshall is required to adopt a new edition of the Fire Code every 3 years through the rulemaking provisions of the APA.<sup>44</sup> The triennial update of the Fire Code is coordinated with that of the Building Code in order to prevent undue burdens on businesses and consumers.<sup>45</sup> As part of the triennial update, the State Fire Marshall notifies each municipal, county, and special district fire department of the pending review and update. The local officials are required to provide copies of their local fire code amendments no later than 120 days before the date the State Fire Marshall is to adopt the triennial updates, in order for the Fire Marshall to determine whether the local provisions comply with the law.<sup>46</sup> Under present law, local fire code amendments are effective only until the adoption of the next triennial review.<sup>47</sup>

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<sup>34</sup> Section 553.73(7)(e), F.S.

<sup>35</sup> Notice of proposed rule 9N-1.001, to adopt the 2010 updates to the Code, published by DCA on January 7, 2011, at <https://www.flrules.org/gateway/ruleNo.asp?id=9N-1.001>.

<sup>36</sup> Section 553.75(3), F.S.

<sup>37</sup> Section 553.73, F.S.

<sup>38</sup> Section 553.73(1)(a), F.S.

<sup>39</sup> Section 553.73(2), F.S.

<sup>40</sup> Section 553.73(1)(c), F.S.

<sup>41</sup> Section 553.73(7)(a), F.S.

<sup>42</sup> Chapter 553, part IV, F.S.

<sup>43</sup> Sections 120.54 and 120.56, F.S.

<sup>44</sup> Section 633.0215(1), F.S.

<sup>45</sup> 3/16/2011 memorandum from the State Fire Marshall's office, on file with staff of the House Rulemaking & Regulation Subcommittee.

<sup>46</sup> Section 633.0215(3)(a), F.S.

<sup>47</sup> Section 633.0215(3)(b), F.S.

### III. Effect of Proposed Changes:

**Section 1** amends s. 120.54, F.S., to 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, and requires an agency to expressly include legislative ratification in the statutory description of those contingencies affecting when a rule becomes effective.

The bill also authorizes an agency to modify or withdraw a rule after the rule is filed for adoption, but before it becomes effective, in the following circumstances:

- The Joint Administrative Procedures Committee (JAPC) objects to the rule;
- After entry of a final order in a rule challenge;
- When the rule requires ratification and more than 90 days have passed since the rule was filed for adoption without the Legislature ratifying the rule; or
- When JAPC notifies the agency that an objection to the rule is being considered, in which case the rule may be modified to extend the effective date by not more than 60 days.

**Sections 2 and 3** amend ss. 120.541 and 120.56, F.S., to resolve the timing conflicts created in the 2010 law by 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>48</sup> and
- 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.

**Section 4** amends s. 120.80, F.S., to exempt the following from the legislative ratification requirement:

- adoption of amendments and the triennial update to the Florida Building Code;
- the triennial update of the Florida Fire Prevention Code,
- the adjustment of tolls pursuant to s. 338.165(3), F.S.

**Section 5** amends s. 120.81, F.S., to exempt rules adopted pursuant to ss. 1012.22, 1012.27, 1012.34, 1012.335, F.S., from the legislative ratification requirement.

**Section 6** provides that the bill takes effect upon becoming a law.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

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<sup>48</sup> Section 120.54(3)(e)2., F.S.

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 could 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 Budget on April 25, 2011:**

The committee substitute authorizes an agency to modify or withdraw a rule after the rule is filed for adoption, but before it becomes effective, in specified circumstances. The CS also exempts the triennial update to the Florida Building Code, the triennial update of the Florida Fire Prevention Code, the adjustment of tolls, and specified education rules from the requirement of legislative ratification.

**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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