

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 Appropriations Subcommittee on General Government

BILL: PCS/CS/SB 1150 (342336)

INTRODUCER: Appropriations Subcommittee on General Government; Governmental Oversight and Accountability Committee; and Senator Bean

SUBJECT: Legislative Reauthorization of Agency Rulemaking Authority

DATE: March 2, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Peacock</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>DeLoach</u>	<u>AGG</u>	<u>Recommend: Fav/CS</u>
3.	_____	_____	<u>FP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/CS/SB 1150 amends s. 120.536, F.S., to suspend any new rulemaking authority four 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, 2020, until reauthorized by general law.

The bill provides that reauthorization of rulemaking authority remains in effect until July 1 of the fourth calendar year in 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 written declaration of public necessity delaying a suspension for 90 days.

The bill authorizes the creation of a joint legislative committee for purposes of overseeing the review of rulemaking authority and provides that agencies may submit a written notice annually to the Legislature of any agency rulemaking authority subject to suspension within the next two years.

Rules lawfully adopted remain in effect during suspension of rulemaking authority.

The bill 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 amends s. 120.54, F.S., to revise the limitations with respect to the timeframe that an emergency rule may be effective.

The bill has an indeterminate fiscal impact on state funds.

The bill takes effect July 1, 2016.

II. Present Situation:

Administrative Procedure Act

Chapter 120, F.S., 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 certain other enumerated government entities. 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 Governor⁴ 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

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.

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, challenges to agency reliance on unadopted rules,⁶ and 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 statement⁸ or settles a dispute through mediation.⁹

Administrative Rulemaking

The APA governs all rulemaking by state agencies except when a specific exemption applies. Rulemaking authority is delegated by the legislature¹⁰ and authorizes 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 through 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 revised¹⁸ 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

⁶ Section 120.56, F.S.

⁷ Section 120.569, F.S.

⁸ Section 120.565, F.S.

⁹ Section 120.573, F.S.

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).

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

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 Register²⁵ 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

A SERC must include an economic analysis of whether a rule within the five year period after the rule goes into effect by showing:²⁸

- Is likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.²⁹
- Is likely to have an adverse impact on business competitiveness,³⁰ productivity, or innovation.³¹
- 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 five year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

²¹ *McDonald v. Dep't of Banking & Fin.*, 346 So.2d 569, 581 (Fla. 1st DCA 1977), articulated this principle which subsequently has been 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).

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.

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 effect³⁴ and cannot be filed for adoption until completion of the rulemaking process.³⁵

Proposed rules also must be formally reviewed by the 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 estimates and other matters.³⁷ An agency must formally respond to the 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

Administrative Procedures Committee

Section 1.01(16), F.S., provides that the term “Administrative Procedures Committee” means a committee designated by joint rule of the Legislature or by agreement between the President of the Senate and the Speaker of the House of Representatives. The Joint Administrative Procedures Committee (JAPC), a joint standing committee of the legislature created by Rule 4.1 of the Joint Rules of the Florida Legislature, is composed of no fewer than five and no more than seven members from each house, as appointed by the President of the Senate and the Speaker of the House. The primary function of the JAPC is to generally review agency action pursuant to the operation of ch. 120, F.S., the APA, particularly as these actions relate to the rulemaking process. The JAPC’s responsibilities include ensuring that rules adopted by the executive branch agencies do not create new law, but rather stay within the authority specifically delegated by the legislature.

Joint Rule 4.6 charges the JAPC with maintaining a continuous review of agency rules and the statutory authority upon which they are based. The JAPC reviews proposed rules and may review existing rules to determine whether they are within delegated legislative authority and notifies the agency if its authority is eliminated or significantly changed by repeal, amendment or holding of a court of last resort. Following each session of the legislature, the JAPC reviews each new law and determines whether the law will have a probable effect on an agency's rules. The JAPC also constantly monitors judicial decisions relating to administrative law and advises agencies whether its statutory rulemaking authority or its rules are affected by these decisions.

³³ Section 120.54(3)(e)6., F.S. Before a rule becomes enforceable, and 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.

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.

Section 120.545, F.S., provides additional authority for the review of rules and sets out the procedures in the event of a JAPC objection to a rule. If the reviewing attorneys have concerns that a proposed or existing rule may not be authorized or exceeds the delegated rulemaking authority, the agency responsible for the rule is contacted. Often, an agency agrees that there is no authority for the rule and withdraws or amends the rule to address the JAPC staff's concerns. If there is disagreement about whether or not there is authority for the rule, the rule is scheduled for consideration by the full committee. The agency may appear before the committee and present argument and evidence in support of its rule. If, after hearing the agency's argument, the committee does not find statutory authority for the rule, the committee may vote to file an objection and the agency has a statutory period in which to respond. If the agency refuses to modify or withdraw a rule to which the committee has objected, public notice of the objection is given and a notation accompanies the rule when it appears in the Florida Administrative Code.

III. Effect of Proposed Changes:

Section 1 amends s. 120.536, F.S., to suspend all existing rulemaking authority on July 1, 2020, and to suspend all new rulemaking authority four years after its enactment unless the Legislature reauthorizes the rulemaking authority by general law.

A reauthorization of rulemaking authority remains in effect until July 1 of the fourth calendar year following the year in which the reauthorization occurs, unless another date is specified in the law reauthorizing rulemaking, after which the reauthorization expires and the rulemaking authority is suspended until again reauthorized by general law.

The bill allows an agency to continue or initiate rulemaking proceedings during a suspension, but a rule adopted during a suspension of authority does not take effect until ratified by the Legislature.

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

Subject to the rules of the Senate and the House of Representatives, the President of the Senate and the Speaker of the House of Representatives may appoint a joint committee for the purposes of overseeing the review of rulemaking authority. The presiding officers may agree on a one year and a four year plan for review of rulemaking authority. The joint committee must report its recommendations to the President of the Senate and the Speaker of the House of Representatives each year on or before the convening of the regular session of the Legislature.

An agency may give notice by October 1 of each year to the Legislature of any agency rulemaking authority that is subject to suspension within the next two years. This notice must be in writing and delivered to the presiding officer of the Legislature and the chair and vice chair of any joint committee appointed pursuant to this section. This notice may include recommendations on reauthorization of, repeal of, or amendment to existing rulemaking authority. An agency may combine multiple notices for administrative convenience.

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

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.

Section 2 amends s. 120.54, F.S., to revise the timeframe when an emergency rule may be effective. An emergency rule may be effective longer than 90 days and is renewable if the agency determines that the immediate danger remains and continues to require emergency action. Also, a condition delaying implementation of the rule includes rules that have been filed for adoption and are awaiting ratification by the Legislature in accordance with any law requiring such ratification.

Section 3 provides an effective date of July 1, 2016.

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:

The overall impact of this legislation might be challenged as inconsistent with constitutional principles due to the following:

- Notice of laws amended. The bill generally suspends each current statutory grant of rulemaking authority without identifying those laws modified. Since a grant of rulemaking authority may be drafted many different ways, it may be difficult to determine whether a particular law has been suspended by this legislation.
- Separation of powers (legislative ratification of executive actions). Typically, when the Legislature delegates authority to the executive branch, the Legislature may not require ratification of those actions. In limited situations (relating to the cost of implementation of a particular rule), the Legislature has mandated the legislative ratification of a particular rule that meets a certain statutory threshold. Under this legislation, absent any other legislative action, all rules may be subject to ratification by the Legislature.
- Unlawful delegation of authority to the executive branch.

- The legislation does not provide any standard (other than “public necessity”) under which the Governor is permitted to delay the suspension of rulemaking authority (which is the same as delaying the effective date of a law).
- The legislation exempts from suspension certain rules “necessary to maintain the financial or legal integrity of any financial obligation of the state.” The legislation does not give standards for identifying such rules or delegate to any person that duty.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

PCS/CS/SB 1150 has an indeterminate fiscal impact. For some rules, suspension may create uncertainty for individuals and business concerning the legal requirements for certain actions.

C. Government Sector Impact:

The bill has an indeterminate fiscal impact on state funds. There may be fewer rule challenges during the period when rulemaking has been suspended, but a sharp increase in challenges when rulemaking is reauthorized.

VI. Technical Deficiencies:

Lines 49-52 may create confusion. While lines 37-42 of the bill “suspend” current and new grants of rulemaking authority, lines 49-52 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 52-57 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 79-80 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.

Lines 83-85 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.

VII. Related Issues:

Depending upon how the ratification process is conducted, that process may: (a) be inadequate in terms of the constitutionally required notice for legislation; or (b) lend itself to impermissible logrolling (violate the single subject requirements of the State Constitution).

VIII. Statutes Affected:

The bill substantially amends sections 120.536 and 120.54 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

Recommended CS/CS by Appropriations Subcommittee on General Government on February 29, 2016:

The committee substitute:

- Deletes provisions requiring the Administrative Procedures Committee to submit recommendations to the President of the Senate and the Speaker of the House of Representatives on a process to periodically review rulemaking authority granted to state agencies;
- Suspends any new rulemaking authority four years after the effective date of the law authorizing rulemaking until reauthorized by general law;
- Authorizes appointment of joint legislative committee for purposes of overseeing the review of rulemaking authority;
- Authorizes agencies to provide annual written notice to the Legislature of any agency rulemaking authority subject to suspension within the next two years and provides requirements for such notice;
- Revises limitations regarding timeframe that an emergency rule may be effective; and
- Changes effective date from taking effect upon becoming a law to July 1, 2016.

CS by Governmental Oversight and Accountability on February 16, 2016:

- Deletes provisions of original bill regarding suspension of any new rulemaking authority for 3 years after the effective date of the law authorizing rulemaking until reauthorized by general law;
- Requires the Administrative Procedures Committee to submit recommendations by March 1, 2017, to the President of the Senate and the Speaker of the House of Representatives on a process to periodically review rulemaking authority granted to state agencies;

- Requires such legislative recommendations to outline a process similar to the Open Government Sunset Review Act, set forth in s. 119.15, F.S., including the expiration of rulemaking authority until reauthorized by the Legislature; and
- Changes effective date from July 1, 2016, to taking effect upon becoming a law.

B. Amendments:

None.