

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 791 Regulatory Reform
SPONSOR(S): Diaz, Jr. and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1268

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee	7 Y, 3 N	Toliver	Harrington
2) Appropriations Committee			
3) Government Accountability Committee			

SUMMARY ANALYSIS

The Administrative Procedure Act (APA) 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. Rulemaking authority is delegated by the Legislature through statute and authorizes agencies to “adopt, develop, establish, or otherwise create” rules. 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 by rulemaking. 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.

The bill creates a Red Tape Reduction Advisory Council (Council) within the Executive Office of the Governor. The Council is required to annually review the Florida Administrative Code (FAC) to determine whether any rules are duplicative, obsolete, especially burdensome to business, or disproportionately affect businesses with fewer than 100 employees or revenue below \$5 million. If the Council finds a rule that meets one or more of these criteria and it can be repealed or amended with minimal impact on public health, safety, and welfare, the Council must recommend repealing or amending the rule. The Council must provide an annual report of its rule recommendations to the Governor, the President of the Senate, the Speaker of the House of Representatives, and to Joint Administrative Procedures Committee (JAPC) for the purposes of publishing the report in the FAC.

The bill requires JAPC to establish a regulatory baseline in the APA. The regulatory baseline is the total number of agency rules that are in effect on January 1, 2019. Once established, a proposed rule may not cause the total number of rules in the FAC to exceed the regulatory baseline. If an agency proposes a rule that would exceed the regulatory baseline, the agency must submit a rule replacement request (RRR). A RRR is a request to create a rule after the establishment of the regulatory baseline by proposing to repeal one or more existing rules to maintain the regulatory baseline. An agency may request that a proposed rule be exempted from the regulatory baseline by submitting an exemption request with the RRR to JAPC. However, JAPC may not approve an exemption request or a RRR that provides fewer than two rules for repeal or replacement until the total number of rules in FAC is 35 percent below the regulatory baseline. JAPC must submit an annual report providing the percentage reduction in the total number of rules compared to the regulatory baseline to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The bill further requires that each agency’s annual regulatory plan identify existing rules that may be appropriate for future repeal to maintain the regulatory baseline.

Lastly, the bill requires JAPC to examine each existing rule for compliance with the APA every four years.

The bill may have an indeterminate 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: h0791a.OTA

DATE: 1/30/2018

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Rulemaking

The Administrative Procedure Act (APA)¹ 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.² Rulemaking authority is delegated by the Legislature through statute and authorizes agencies to “adopt, develop, establish, or otherwise create”³ rules. Agencies do not have the discretion in and of themselves to engage in rulemaking.⁴ To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.⁵ 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.⁶

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.⁷ The notice is published by the Department of State (department) in the FAR⁸ and must contain the full text of the proposed rule or amendment and a summary thereof.⁹ If a person requests a hearing within 21 days following the publication of the notice, that agency must hold a hearing.¹⁰ The agency, based upon the comments received at the hearing, can publish a notice of change.¹¹ 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.¹² The rule is then published in the Florida Administrative Code (FAC).

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.¹³ Specifically, JAPC may examine any existing rule and is required to examine each proposed rule and its accompanying material and each emergency rule to determine whether:

- The rule is an invalid exercise of delegated legislative authority;
- The statutory authority for the rule has been repealed;

¹ Chapter 120, F.S.

² Section 120.52(16), F.S.

³ Section 120.52(17), F.S.

⁴ Section 120.54(1)(a), F.S.

⁵ Sections 120.52(8) and 120.536(1), F.S.

⁶ *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).

⁷ Section 120.54(3)(a)1., F.S.

⁸ Section 120.55(1)(b), F.S.

⁹ Section 120.54(3)(a)1., F.S.

¹⁰ Section 120.54(3)(c), F.S.

¹¹ Section 120.54(3)(d)1., F.S.

¹² Section 120.54(3)(e)6., F.S.

¹³ Fla. Leg. J. Rule 4.6; *see also* s. 120.545, F.S.

- 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, 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.¹⁴

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.¹⁵ Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹

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.²⁰ 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.²¹ 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.²²

¹⁴ Section 120.545(1), F.S.

¹⁵ Section 120.541(2), F.S.

¹⁶ Section 120.54(3)(b)1., F.S.

¹⁷ Section 120.54(3)(b)1., F.S.

¹⁸ Section 120.541(1)(c), F.S.

¹⁹ Section 120.541(1)(d), F.S.

²⁰ Section 120.74(1), F.S.

²¹ Section 120.74(1)(d), F.S.

²² Section 120.74(2), F.S.

Effect of the Bill

The bill creates a Red Tape Reduction Advisory Council (Council) within the Executive Office of the Governor. The council consists of nine members, who must be residents of the state:

- Five members appointed by the Governor;
- Two members appointed by the President of the Senate; and
- Two members appointed by the Speaker of the House of Representatives.

The members are appointed for four year terms and the bill establishes a method by which the terms are staggered. Members may be reappointed but may not serve on the Council for more than eight consecutive years. The members must elect a chair and vice chair of the Council at the first meeting of the body, which must be held by August 1, 2018. Thereafter the Council must meet at the call of the chair at least quarterly. A majority of the membership of the Council constitutes a quorum. The bill prohibits a member from receiving a commission, fee, or financial benefit in connection with serving on the Council but may be reimbursed for per diem and travel expenses.

The Council is required to annually review the FAC to determine whether any rules are duplicative, obsolete, especially burdensome to business, or disproportionately affect businesses with fewer than 100 employees or revenue below \$5 million. If the Council finds a rule that meets one or more of these criteria and it can be repealed or amended with minimal impact on public health, safety, and welfare, the Council must recommend repealing or amending the rule. The Council must provide an annual report of its rule recommendations to the Governor, the President of the Senate, the Speaker of the House of Representatives, and to JAPC for the purposes of publishing the report in the FAC.

The bill requires JAPC to establish a regulatory baseline. The regulatory baseline is the total number of agency rules that are in effect on January 1, 2019. Once established, a proposed rule may not cause the total number of rules in the FAC to exceed the regulatory baseline. If an agency proposes a rule that would exceed the regulatory baseline, the agency must submit a rule replacement request (RRR). A RRR is a request to create a rule after the establishment of the regulatory baseline by proposing to repeal one or more existing rules to maintain the regulatory baseline. Each RRR must include the proposed rule and the law authorizing it, its purpose, and the rule to be repealed to maintain the regulatory baseline. JAPC must examine each proposed rule and its RRR to determine whether it complies with the APA. JAPC may approve the proposed rule if it complies with the APA and if does not cause the total number of rules to exceed the regulatory baseline. If approved, the proposed rule and the rule repeal will take effect simultaneously.

An agency may request that a proposed rule be exempted from the regulatory baseline by submitting an exemption request with the RRR to JAPC. The exemption request must include a detailed explanation of why the proposed rule should be exempt, including why the rule is necessary to protect public health, safety, and welfare. However, JAPC may not approve an exemption request or a RRR that provides fewer than two rules for repeal or replacement until the total number of rules in FAC is 35 percent below the regulatory baseline. JAPC must submit an annual report providing the percentage reduction in the total number of rules compared to the regulatory baseline to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The bill requires the Department of State to include in the FAC the regulatory baseline, all changes made to the total number of rules since the establishment of the regulatory baseline, a plain language description of the purpose of each rule, and the report created annually by the Council. The bill further requires that each agency's annual regulatory plan include an identification of existing rules that may be appropriate for future repeal to maintain the regulatory baseline.

Lastly, the bill requires JAPC to examine each existing rule for compliance with the APA every four years.

B. SECTION DIRECTORY:

Section 1 creates s. 14.35, F.S., establishing a Red Tape Reduction Advisory Council.

Section 2 amends s. 120.52, F.S., relating to definitions applicable to the APA.

Section 3 amends s. 120.54, F.S., relating to rulemaking.

Section 4 amends s. 120.545, F.S., relating to JAPC review of agency rules.

Section 5 creates s. 120.546, F.S., relating to the regulatory baseline.

Section 6 amends s. 120.55, F.S., relating to publication under the APA.

Section 7 amends s. 120.74, F.S., relating to the annual regulatory plan of agencies.

Section 8 amends s. 120.80, F.S., correcting a cross reference.

Section 9 amends s. 120.81, F.S., correcting a cross reference.

Section 10 amends s. 420.9072, F.S., correcting a cross reference.

Section 11 amends s. 420.9075, F.S., correcting a cross reference.

Section 12 amends s. 443.091, F.S., correcting a cross reference.

Section 13 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:

Indeterminate. The bill may require state agencies expend additional resources in complying with its rule repeal requirements. During the rulemaking process each agency would now be required to take

an additional step of locating a rule to be repealed or requesting an exemption. It is unknown whether this impact can be absorbed into agency's existing budgets.

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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Comments

The Department of Juvenile Justice has opined that the bill may limit the ability of agencies to receive federal funding if that federal funding is predicated on the agency creating certain rules to comply with federal requirements.²³

The Office of Financial Regulation (OFR) is concerned that the bill's mandatory rule replacement process does not make exceptions for newly created statutory requirements going forward.²⁴ Additionally OFR opined that the Council's quarterly meetings could substantially delay rulemaking.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

²³ 2018 Agency Bill Analysis of HB 791, DEPARTMENT OF JUVENILE JUSTICE, on file with the Oversight, Transparency & Administration Subcommittee.

²⁴ 2018 Agency Bill Analysis of HB 791, OFFICE OF FINANCIAL REGULATION, on file with the Oversight, Transparency & Administration Subcommittee.