

**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 1626

INTRODUCER: Senator Albritton

SUBJECT: Administrative Procedures

DATE: March 23, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ponder	McVane	GO	Pre-meeting
2.			JU	
3.			RC	

---

**I. Summary:**

SB 1626 amends the Administrative Procedures Act (APA) to ensure timely rulemaking and provide a mechanism to ensure agencies reduce unnecessary rules. Specifically, the bill:

- Creates a process called “repromulgation” and defines the term 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;
- Defines the term “technical change” to mean a change limited to correcting grammatical, typographical, or similar errors not affecting the substance of the rule;
- Authorizes a third timeframe for the completion of rulemaking - 180 days after the effective date of the act granting rulemaking authority;
- Requires a notice of intended action be published in the Florida Administrative Register (FAR) for at least 7 days after the publication of the notice of rule development;
- Provides that, after December 31, 2021, material proposed to be incorporated by reference in the notice of intended action be made available as provided in the APA;
- Requires an agency to publish a notice of correction if any information – other than substantive changes to the rule text - required to be included in the notice is omitted or is incorrect;
- Provides that a notice of correction does not affect the timeframes for filing the rule of adoption;
- Requires an agency to provide notice to the Joint Administrative Procedures Committee (JAPC) of any regulatory alternative offered to the agency by the rules ombudsman of the Executive Office of the Governor before filing the rule for adoption;
- Provides that, after December 31, 2021, material proposed to be incorporated by reference in a notice of modification or withdrawal must be made available as provided in the APA;
- Requires the JAPC to notify the Department of State (DOS) if an agency has not withdrawn a rule within 30 days after notice by JAPC that the date for adoption of the rule has expired, and the DOS must publish a notice of withdrawal of the proposed rule;

- Establishes a procedure to renew an emergency rule;
- Requires an emergency rule intended to replace an existing rule with an effective period greater than 90 days, that a note must be added to the history note of the existing rule ;
- Requires emergency rules must be published in the Florida Administrative Code (FAC);
- Authorizes an agency to supersede an emergency rule in effect through adoption of another emergency rule;
- Permits an agency to make technical changes to an emergency rule within the first 7 days after the rule is adopted and must be published in FAR;
- Requires an agency to provide a copy of a petition to initiate rulemaking to the JAPC;
- Requires an agency to provide to the JAPC a copy of any proposal received for a lower cost regulatory alternative before filing the rule for adoption;
- Requires the DOS to publish all material incorporated by reference as part of the FAC for adopted rules and to provide a listing, at the beginning of each agency's section of the FAC, of all forms and material incorporated by reference adopted by rule which are used by the agency;
- Provides that after December 31, 2021, the DOS must require any material incorporated by reference in adopted and repromulgated rules be filed in electronic form;
- Requires the DOS to include the date of any technical changes to a rule in the history note;
- Provide that a technical change does not affect the effective date of the rule and that a technical change made after the adoption of a rule must be published as a notice of correction;
- Authorizes the DOS to prescribe any rule requiring that documents created by an agency which are proposed to be incorporated by reference in a notice of intended action and notice of modification or withdrawal be coded in the same manner as notices of intended action;
- Requires an agency's regulatory plan include a list of rules scheduled for review and repromulgation and a 5 year schedule for the review and repromulgation of all rules existing as of July 1, 2021;
- Requires an agency to take specific action if, in a prior year, a law was identified as a law requiring rulemaking to implement, but a notice of proposed rule was not published; and
- Establish requirements for the regulatory plan.

Agencies are expected to experience increased workload and associated costs as they comply with the repromulgation and new regulatory plan requirements.

The bill will take effect July 1, 2021.

## **II. Present Situation:**

### **Rulemaking**

The Legislature, as the sole branch of government with the inherent power to create laws,<sup>1</sup> may delegate to agencies in the executive branch the quasi-legislative ability, or authority, to create rules.<sup>2</sup> The Administrative Procedure Act (APA)<sup>3</sup> sets forth a uniform set of procedures agencies

---

<sup>1</sup> Article III, s. 1, FLA. CONST.; *see also* art. II, s. 3, FLA. CONST.

<sup>2</sup> *See Whiley v. Scott*, 79 So. 3d 702, 710 (Fla. 2011), stating “[r]ulemaking is a derivative of lawmaking.”

<sup>3</sup> Chapter 120, F.S.

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>4</sup> Rulemaking authority is delegated by the Legislature through statute and authorizes agencies to “adopt, develop, establish, or otherwise create”<sup>5</sup> rules. Usually, the Legislature delegates rulemaking authority to a given agency because an agency has “expertise in a particular area for which they are charged with oversight.”<sup>6</sup> Agencies do not have the discretion in and of themselves to engage in rulemaking.<sup>7</sup> To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>8</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>9</sup>

An agency begins the formal rulemaking process<sup>10</sup> 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.<sup>11</sup> 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 rule.<sup>12</sup> The notice of proposed rule is published by the Department of State (DOS) in the FAR<sup>13</sup> and must contain the full text of the proposed rule or amendment and a summary thereof.<sup>14</sup> Prior to 2012, the FAR was published weekly, resulting in a period of at least seven days between the publication of a notice of rule development and a notice of proposed rule.<sup>15</sup> In 2012, the Legislature changed the FAR from a weekly publication to a publication that is continuously revised and, as a result, eliminated the seven day period between the two notices.<sup>16</sup>

After publication of a notice of proposed rule, an agency must hold a hearing on the proposed rule if a person requests a hearing within 21 days.<sup>17</sup> If, after the hearing is held or after the time for requesting a hearing has expired, the agency does not change the rule, other than a technical change, the agency must file a notice stating no changes have been made to the rule with the Joint Administrative Procedures Committee (JAPC) at least seven days before filing the rule for

---

<sup>4</sup> Section 120.52(16), F.S.

<sup>5</sup> Section 120.52(17), F.S.

<sup>6</sup> *Whiley v. Scott*, 79 So. 3d 702, 711 (Fla. 2011).

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

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

<sup>9</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>10</sup> Alternatively, a person regulated by an agency or having substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule. Section 120.54(7), F.S.

<sup>11</sup> Section 120.54(2), F.S.

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

<sup>13</sup> Section 120.55(1)(b), F.S.

<sup>14</sup> Section 120.54(3)(a), F.S.

<sup>15</sup> Chapter 2012-63, Laws of Fla.

<sup>16</sup> *Id.*

<sup>17</sup> Section 120.54(3)(c), F.S.

adoption.<sup>18</sup> However, if a hearing is requested, the agency may, based upon the comments received at the hearing, publish a notice of change.<sup>19</sup>

If any person timely asserts that the person's substantial interest will be affected and affirmatively demonstrates that the proceeding does not provide adequate opportunity to protect those interests, a separate proceeding may be convened.<sup>20</sup> If an agency determines that the rulemaking proceeding is not adequate to protect the person's interests, it shall suspend the rule making proceeding and convene a separate proceeding.<sup>21</sup> Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

Once an agency has completed the steps of rulemaking, the agency may file for rule adoption with the DOS and the rule becomes effective 20 days later, unless a different date is indicated in the rule.<sup>22</sup> Most adopted rules are published in the Florida Administrative Code (FAC).<sup>23</sup> The validity of a rule or a proposed rule may be challenged at the Division of Administrative Hearings (DOAH)<sup>24</sup> as an invalid delegation of legislative authority.<sup>25</sup>

An invalid delegation of legislative authority is an action that goes beyond the powers, functions, and duties delegated by the Legislature.<sup>26</sup> A rule or proposed rule is an invalid delegation of legislative authority if:

- The agency has materially failed to follow the rulemaking procedures in the APA;
- The agency has exceeded its grant of rulemaking authority;
- The rule enlarges, modifies, or contravenes the specific provisions of the law implemented;
- The rule is vague, fails to establish adequate standards for agency decisions; or vests the agency with unbridled discretion;
- The rule is arbitrary or capricious; or
- The rule imposes regulatory costs on the regulated person, county, or municipality that could have been reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.<sup>27</sup>

An administrative law judge (ALJ) at DOAH hears the rule challenge in a de novo proceeding and, within 30 days of the hearing, makes a determination on the rule's validity based upon a preponderance of the evidence standard.<sup>28</sup> The ALJ's decision constitutes final agency action,

---

<sup>18</sup> Section 120.54(3)(d)1., F.S.

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

<sup>20</sup> Section 120.54(3)(c)2., F.S.

<sup>21</sup> *Id.*

<sup>22</sup> Section 120.54(7)(a), F.S.

<sup>23</sup> Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or a state university rules relating to internal personnel or business and finance are not published in the FAC. Forms are not published in the FAC. Section 120.55(1)(a), F.S. Emergency rules are also not published in the FAC.

<sup>24</sup> 5 DOAH is an agency in the executive branch, administratively housed under the Department of Management Services but not subject to its control. DOAH employs ALJs who serve as neutral arbiters presiding over disputes arising under the APA. Section 120.65, F.S.

<sup>25</sup> Section 120.56(1), F.S.

<sup>26</sup> Section 120.52(8), F.S.

<sup>27</sup> Section 120.52(8)(a)-(f), F.S.

<sup>28</sup> Section 120.56(1)(e), F.S.

which means an agency may not alter the decision after its issuance,<sup>29</sup> but an agency may appeal the decision to the District Court of Appeal where the agency maintains its headquarters (Generally, the First DCA in Leon County).<sup>30</sup>

### ***Petition To Initiate Rulemaking***

As an alternative to the agency initiated process delineated above, a person regulated by the agency or having a substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule.<sup>31</sup> The petitioner must specify the proposed rule and action requested.<sup>32</sup> The agency can either initiate rulemaking or decline to do so; however, if the agency chooses the latter it must issue a written statement of the reasons for the denial.<sup>33</sup>

### ***Publications of Notices – Coding Requirement***

All notices that are required to be published in FAR must be submitted electronically through the DOS's electronic rulemaking website.<sup>34</sup> Rule 1-1.011(2)(c)1., F.A.C., requires that all rule notices submitted for publication in the FAR be coded.

A new rule must be coded by underlining all, all text, including spaces and punctuation.<sup>35</sup> Amended rules must be coded by underlining new text and by striking through deleted text.<sup>36</sup> New text inserted in an amended rule is not to immediately precede remaining text or stricken text.<sup>37</sup> A portion of a word is not to be amended without completely striking through existing text and inserting new text unless the amendment changes the capitalization of the word.<sup>38</sup> Any subsection, paragraph, subparagraph, or sub-subparagraph not being amended shall not be included and be noted as "No change," unless inclusion is necessary to make the publication of the amended rule complete and meaningful.

If an amendment to a rule is so extensive that coding would hinder, rather than assist the understanding of the amendment, the notice must only contain the underlined new text.<sup>39</sup> The rule number and the existing rule title, legal citations and history note lines shall not be underlined. Amendments to the rule title, legal citations, or history notes shall be coded to indicate new or deleted text. A directory line<sup>40</sup> is required to be inserted immediately before the rule number and rule title of the substantially reworded rule and the present text of the rule must not be included in the notice.

---

<sup>29</sup> *Id.*

<sup>30</sup> Section 120.68(2)(a), F.S.

<sup>31</sup> Section 120.54(7)(a), F.S.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Rule 1-1.011, F.A.C.

<sup>35</sup> Example: (1) The petitioner shall contact the agency.

<sup>36</sup> Rule 1-1.011(2)(c)2., F.A.C.

<sup>37</sup> Example of incorrect coding: The petitioner~~arty~~ shall contact the agency head. Example of correct coding: The petitioner~~party~~ shall contact the agency.

<sup>38</sup> Example: Ppetitioner).

<sup>39</sup> Rule 1-1.001(2)(c)3., F.A.C.

<sup>40</sup> "Substantial rewording of Rule \_\_\_\_\_ follows. See Florida Administrative Code for present text."

Rule repeals must be coded by underlining the word “Repealed” in the history note.<sup>41</sup> The full text of the rule is not required to be published in the FAR. Only a reference to the rule number, rule title, legal citations and history notes must be published, provided that the rule summary portion of the notice fully describes the subject matter of the repealed rule text. Partial rule repeals will be treated in the same manner as an amendment.

### **The Statement of Estimated Regulatory Cost & The Lower Cost Regulatory Alternative**

A statement of estimated regulatory cost (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>42</sup> Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.<sup>43</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>44</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>45</sup>

A person substantially affected by a proposed rule may, within 21 days after publication of a notice of adoption, amendment, or repeal of a rule, submit a lower cost regulatory alternative (LCRA).<sup>46</sup> The LCRA must be a good faith written proposal that substantially accomplishes the objectives of the law being implemented.<sup>47</sup> A LCRA may recommend that a rule not be adopted at all, if it explains how the “lower costs and objectives of the law will be achieved by not adopting any rule.”<sup>48</sup> If a LCRA is submitted to an agency, the agency must prepare a SERC if one has not been previously prepared, or revise its prior SERC, and either adopt the LCRA or provide a statement to explain the reasons for rejecting the LCRA.<sup>49</sup> Additionally, if a LCRA is submitted, the 90-day period for filing a rule is extended an additional 21 days.<sup>50</sup> At least 21 days before filing a rule for adoption, an agency that is required to revise a SERC in response to a LCRA must provide the SERC to the person who submitted the LCRA and to JAPC and must provide notice on the agency’s website that it is available to the public.<sup>51</sup> Just as in the case of an agency’s failure to prepare a SERC, an agency’s failure to respond to a LCRA may be raised in a proceeding at DOAH to invalidate a rule as an invalid delegation of legislative authority if its raised within one year of the effective date of the rule and is raised by a person whose substantial interests are affected by the regulatory costs of the rule.<sup>52</sup>

---

<sup>41</sup> Rule 1-1.001(2)(c)4., F.A.C.

<sup>42</sup> Section 120.541(2), F.S.

<sup>43</sup> Section 120.54(3)(b)1., F.S.

<sup>44</sup> *Id.*

<sup>45</sup> Section 120.541(1)(c), F.S.

<sup>46</sup> Section 120.541(1)(a), F.S.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Section 120.541(1)(d), F.S.

<sup>52</sup> Section 120.541(1)(f), F.S.

### **Agency Review of Rules – Annual Regulatory Review**

The APA requires each agency to formally review its rules.<sup>53</sup> Although an agency may amend or repeal the rule, rules generally do not expire or sunset and many agencies have adopted rules that have not been updated in years.

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>54</sup> The plan must also include a list of each additional law not otherwise listed that 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, verifying 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>55</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 the FAR identifying the date of publication of the agency's regulatory plan.<sup>56</sup>

### **Deadline for Rulemaking**

If a newly-enacted law requires implementation of the act by rule, s. 120.54(1)(b), F.S., requires the agency charged with rulemaking to publish notice of rule development by November 1 after enactment for each law identified in the agency's regulatory plan. The notice of proposed rule must be published by April 1 of the year following the regulatory plan. However, agencies are allowed to file extensions to any rulemaking plans/notices under this provision. Thus, this provision does not necessarily ensure that agencies adopt rules mandated by the Legislature in a timely manner.

### **Emergency Rules**

Agencies are authorized to respond to immediate dangers to the public health, safety, or welfare by adopting emergency rules.<sup>57</sup> Emergency rules are not adopted using the same procedures required of other rules.<sup>58</sup> The notice of the emergency rule and the text of the rule is published in the first available issue of the FAR, however, there is no requirement that an emergency rule be published in the FAC.<sup>59</sup> The agency must publish prior to, or contemporaneous with, the rule's promulgation the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare.<sup>60</sup> Emergency rules are effective immediately, or on a date less than 20 days

---

<sup>53</sup> See s. 120.74, F.S.

<sup>54</sup> Section 120.74(1), F.S.

<sup>55</sup> Section 120.74(1)(d), F.S.

<sup>56</sup> Section 120.74(2), F.S.

<sup>57</sup> Section 120.54(4), F.S.

<sup>58</sup> Section 120.54(4)(a)1., F.S.

<sup>59</sup> Section 120.54(4)(a)3, F.S.

<sup>60</sup> *Id.*

after filing if specified in the rule,<sup>61</sup> but are only effective for a period of no longer than 90 days.<sup>62</sup> An emergency rule is not renewable, except when the agency has initiated rulemaking to adopt rules relating to the subject of the emergency rule and a challenge to the proposed rules has been filed and remains pending or the proposed rule is awaiting ratification by the Legislature.<sup>63</sup> The validity of an emergency rule may be challenged at DOAH subject to an expedited filing and hearing schedule.<sup>64</sup>

### **The Rules Ombudsman**

The Governor must appoint a rules ombudsman in the Executive Office of the Governor for the purpose of considering the impact of agency rules on the state citizens and businesses.<sup>65</sup> The duties of the ombudsman include reviewing state agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses;<sup>66</sup> and making recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to business.<sup>67</sup> Each agency must cooperate fully with the rules ombudsman in identifying such rules, and take the necessary steps to waive, modify, or otherwise minimize the adverse effects of any such rules.<sup>68</sup>

### **Joint Administrative Procedures Committee**

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>69</sup> Specifically, JAPC may examine existing rules and must examine each proposed rule 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 that 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 complies with the requirements of the APA and whether the rule does not impose regulatory costs on the regulated person, county, or

---

<sup>61</sup> Section 120.54(4)(d), F.S.

<sup>62</sup> Section 120.54(4)(c), F.S.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Section 288.7015, F.S.

<sup>66</sup> Section 288.7015(2), F.S.

<sup>67</sup> Section 288.7015(3), F.S.

<sup>68</sup> Section 288.7015, F.S.

<sup>69</sup> 2 Fla. Leg. J. Rule 4.6; see also s. 120.545, F.S.



municipality that could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives; or

- The rule will require additional appropriations.<sup>70</sup>

An agency is required to respond to an objection filed by the JAPC that relates to a proposed rule, existing rule, or a SERC.<sup>71</sup>

### **Incorporation by Reference**

The APA allows an agency to incorporate material external to the text of the rule by reference.<sup>72</sup> The material to be incorporated must exist on the date the rule is adopted.<sup>73</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>74</sup> However, an agency rule that incorporates another rule by reference automatically incorporates subsequent amendments to the referenced rule.<sup>75</sup> A rule cannot be amended by reference only.<sup>76</sup> An agency may not incorporate a rule by reference unless:

- The material has been submitted in the prescribed electronic format to the DOS 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 DOS and the agency at which the material is available for public inspection and examination, must be included in the notice.<sup>77</sup>

The DOS has adopted a rule governing the requirements for materials incorporated by reference through an adopted rule.<sup>78</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 DOS 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>79</sup>

### **Florida Administrative Code**

The FAC is an electronic compilation of all rules adopted by each agency and maintained by the DOS.<sup>80</sup> The DOS retains the copyright over the FAC.<sup>81</sup> Each rule in the FAC must cite the grant of rulemaking authority and the specific law implemented, as well as a history note detailing the

---

<sup>70</sup> Section 120.545(1), F.S.

<sup>71</sup> Section 120.545(3), F.S.

<sup>72</sup> Section 120.54(1)(i), F.S.; see also r. 1-1.013, F.A.C.

<sup>73</sup> Section 120.54(1)(i)1., F.S.

<sup>74</sup> *Id.*

<sup>75</sup> Section 120.54(1)(i)2., F.S.

<sup>76</sup> Section 120.54(1)(i)4., F.S.

<sup>77</sup> Section 120.54(1)(i)3., F.S.

<sup>78</sup> Rule 1-1.013, F.A.C.

<sup>79</sup> Rule 1-1.013(5)(d), F.A.C.

<sup>80</sup> Section 120.55(1)(a)1., F.S.

<sup>81</sup> *Id.*

initial promulgation of the rule and any subsequent changes.<sup>82</sup> Rules applicable to only one school district, community college district, or county or state university rules relating to internal personnel or business and finance are not required to be included in the FAC.<sup>83</sup> DOS is required to publish the following information at the beginning of each section of the code concerning an agency:

- The address and telephone number of the executive offices of the agency;
- The manner by which the agency indexes its rules; and
- A listing of all rules of that agency excluded from publication in the FAC and a statement as to where those rules may be inspected.<sup>84</sup>

The DOS is required to adopt rules allowing adopted rules and material incorporated by reference to be filed in electronic form.<sup>85</sup> Further, the DOS is required to prescribe by rule the style and form required for rules, notices, and other materials submitted for filing in the FAC.<sup>86</sup> The DOS requires rules that are being amended to be coded by underlining new text and by striking through deleted text.<sup>87</sup>

### **The Office of Fiscal Accountability and Regulatory Reform**

On January 4, 2011, Governor Scott issued Executive Order Number 11-01 establishing the Office of Fiscal Accountability and Regulatory Reform (OFARR). Executive Order No. 11-01, was superseded by Executive Order 11-72, and then again by Executive Order 11-211. OFARR is tasked with the goal of ensuring that each agency headed by an official serving at the pleasure of the Governor create rules that do not hinder government performance and are fiscally responsible. OFARR reviews proposed and existing rules to, among other things, ensure that they do not unnecessarily restrict entry into a profession or occupation, adversely affects job creation or retention, and contravene statutory rulemaking directives.

### **Office of Legislative Services**

Provision is made by statute for a permanent statutory revision plan to be implemented and maintained under the supervision of the Office of Legislative Services.<sup>88</sup> The Office of Legislative Services (OLS) is tasked recommending the deletion of all laws which have expired, become obsolete, and/or had their effect or served their purpose.<sup>89</sup> Similarly, the OLS is authorized to include duplicative, redundant, or unused statutory rulemaking authority among its recommended repeals in revisers bill recommendations.<sup>90</sup> The OLS is also authorized to:

- Award contracts for editorial work, and for printing, and to pay for such other things as authorized to be performed as part of the statutory revision program;<sup>91</sup>

---

<sup>82</sup> *Id.*

<sup>83</sup> Section 120.55(1)(a)2., F.S.

<sup>84</sup> Section 120.55(1)(a)3., F.S.

<sup>85</sup> Section 120.55(1)(a)5., F.S.

<sup>86</sup> Section 120.55(1)(c), F.S.

<sup>87</sup> Rule 1-1.015(5)(a), F.A.C. referencing r. 1-1.011(3)(c), F.A.C.

<sup>88</sup> Section 11.241, F.S.

<sup>89</sup> Section 11.241(1)(i), F.S.

<sup>90</sup> Section 11.241(5)(j), F.S.

<sup>91</sup> Section 11.241(6), F.S.

- Exchange Florida Statutes, and other available publications, with the officers, boards, and agencies of other states and of the United States, and with other governments;<sup>92</sup> and
- Exercising all other powers, duties, and functions necessary or convenient for properly carrying out the provisions of this law and all other laws relating to statutory revision.<sup>93</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 120.52, F.S., relating to definitions applicable to the APA, to define the following terms:

- “Repromulgation” means 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.
- “Technical change” means a change limited to correcting grammatical, typographical, or similar errors not affecting the substance of the rule.

**Section 2** amends s. 120.54, F.S., relating to rulemaking procedures, to include clarifying language. This section amends s. 120.54(1)(b), F.S., to authorize a third timeframe for the completion of rulemaking - 180 days after the effective date of the act granting rulemaking authority.<sup>94</sup>

This section updates language to include rules repromulgated after December 31, 2020, in the requirements for incorporating material by reference.

This section amends the notice of intended action (notice of intention to adopt, amend, or repeal a rule) to require such notice to include the proposed rule number. Current law requires the notice of intended action be published in the FAR not less than 28 days prior to the intended action. However, there is no timeframe between the publication of the notice of rule development and the notice of intended action/notice of proposed rule. The bill requires that the notice of intended action be published in FAR *for at least 7 days after* the publication of the notice of rule development. This section provides, after December 31, 2021, that material proposed to be incorporated by reference be made available (1) via electronic submission to the DOS and via electronic hyperlink in the FAR;<sup>95</sup> or (2) via a statement of address of locations for public inspection and examination, if posting would be a federal copyright law violation.<sup>96</sup>

This section requires an agency to publish a notice of correction if any information other than substantive changes to the rule text - required to be included in the notice is omitted or is incorrect. A notice of correction does not affect the timeframes for filing the rule of adoption. This section expressly provides that technical changes are not required to be published as a notice of correction.

---

<sup>92</sup> Section 11.241(7), F.S.

<sup>93</sup> Section 11.241(8), F.S.

<sup>94</sup> Prior to 2015, section 120.54, F.S., directed agencies to notice proposed rules within 180 days after the effective date of an act requiring mandatory rulemaking. This provision was removed with the enactment of the annual regulatory provision - s. 120. 74, F.S. Adding the 180-day rulemaking requirement will likely give the JAPC greater oversight authority.

<sup>95</sup> Section 120.(1)(i)3.a., F.S.

<sup>96</sup> Section 120.54(1)(i)3.b., F.S.

Section 2 requires an agency to provide notice to the JAPC of any regulatory alternative offered to the agency by the rules ombudsman of the Executive Office of the Governor before filing the rule for adoption.

This section provides that after December 31, 2021, material proposed to be incorporated by reference in the notice of modification or withdrawal must be made available (1) via electronic submission to the DOS and via electronic hyperlink in the FAR; or (2) via a statement of address of locations for public inspection and examination, if posting would be a federal copyright law violation.

Current law requires an agency to withdraw a rule if not adopted within the APA time limits or otherwise in noncompliance with the statutory rulemaking requirements and publish notice in the next available issue of FAR of such withdrawal. The bill provides that if an agency has not withdrawn a rule within 30 days after notice by the JAPC, the JAPC must notify the DOS that the date for adoption of the rule has expired and the DOS must publish a notice of withdrawal of the proposed rule.

This section provides for a procedure to renew an emergency rule. The bill requires notice of renewal of an emergency rule be published in the FAR before the expiration of the existing emergency rule. The notice of renewal must state the specific facts and reasons for such renewal. This section provides that for emergency rules intended to replace existing rules with an effective period greater than 90 days, a note must be added to the history note of the existing rule which specifically identifies the emergency rule that is intended to supersede the existing rule and includes the date that the emergency rule was filed with the DOS.

This section requires emergency rules must be published in the FAC.

This section authorizes an agency to supersede an emergency rule in effect through adoption of another emergency rule. The specific facts and reasons for adopting the new rule must be stated in the notice. The new rule is in effect during the effective period of the superseded rule.

This section permits an agency to make technical changes to an emergency rule within the first 7 days after the rule is adopted and must be published in FAR.

This section requires an agency to provide a copy of a petition to initiate rulemaking to the JAPC

**Section 3** amends s. 120.541, F.S., to require an agency to provide to the JAPC a copy of any proposal received for a lower cost regulatory alternative before filing the rule for adoption.

**Section 4** creates 120.3435, F.S., to establish a process called “repromulgation,” whereby each agency is required to review its rules for consistency with the powers and duties granted by the agency’s enabling statutes. If after such a review, an agency determines that substantive changes are not required, the agency must repromulgate the rule to reflect the date of the review. The bill provides that all rules adopted or repromulgated on or after July 1, 2021, must be reviewed within 5 years after their respective dates of adoption or repromulgation. Each agency must review its existing rules by July 1, 2026.

An agency, before repromulgation of a rule and upon approval by the agency head or his or her designee, must:

- Publish notice of repromulgation in the FAR, which is not required to include the text of the rule.
- File the rule for repromulgation with the DOS. A rule may not be filed for repromulgation less than 28 days before or more than 90 days after the publication of the notice.

An agency must file the notice of repromulgation with the JAPC at least 14 days before filing the rule for repromulgation. The JAPC must certify whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the JAPC.

This section provides that if a rule is not filed for repromulgation within the timeframe prescribed (not less than 28 days before or more than 90 days after the publication of the notice of repromulgation), the agency must withdraw the rule for repromulgation and give notice of its withdrawal in the next available issue of the FAR.

The bill expressly provides that a repromulgated rule is not subject to challenge as a proposed rule and that the APA's hearing requirements are not applicable to a repromulgated rule.

The bill requires each agency, upon the approval of the agency head or his or her designee, to file with the DOS three certified copies of the repromulgated rule it proposes to adopt and one certified copy of any material incorporated by reference in the rule. The rule is repromulgated upon its filing with the DOS. The DOS must update the history note of the rule in the FAC to reflect the effective date of the repromulgated rule. The bill directs the DOS to adopt rules to implement the repromulgation provisions by December 31, 2021.

**Section 5** amends s. 120.55, F.S., which provides FAC publication requirements for the DOS. This section requires the DOS to publish all material incorporated by reference as part of the FAC for adopted rules. This section also provides that DOS, at the beginning of each agency's section of the FAC, provide a listing of all forms and material incorporated by reference adopted by rule which are used by the agency.

This section also provides clarifying language.

This section requires that after December 31, 2021, the DOS must require any material incorporated by reference in adopted and repromulgated rules be filed in electronic form.

This section requires the DOS to include the date of any technical changes to a rule in the history note of the rule in the FAC. A technical change does not affect the effective date of the rule. A technical change made after the adoption of a rule must be published as a notice of correction.

This section also amends the provision governing FAR to authorize the DOS to prescribe any rule requiring that documents created by an agency which are proposed to be incorporated by reference in a notice of intended action (s. 120.54(3)(a), F.S.) and notice of modification or withdrawal (s. 120.54(3)(d), F.S.) be coded in the same manner as notices of intended action pursuant to s. 120.54(3)(a)1., F.S.(number, title and effective date).

**Section 6** amends s. 120.74, F.S., to require that an agency's regulatory plan include a list of rules scheduled for review and repromulgation and a 5 year schedule for the review and repromulgation of all rules existing as of July 1, 2021. The plan must include any desired update to the prior year's regulatory plan, or a supplement thereof, published in accordance with the APA.

This section provides that if, in a prior year, a law was identified as a law requiring rulemaking to implement, but a notice of proposed rule was not published, the agency must:

- Identify and again list such law, noting the applicable notice of rule development by citation to the FAR; or
- Identify the law, reference the citation to the applicable notice of rule in the FAR, and provide a concise written explanation of the reason the law may be implemented without rulemaking, if the agency determined rulemaking was unnecessary to implement the law.

This section requires the plan to include a list of all statutes and laws, or parts thereof, which grant duplicative, redundant, or unused rulemaking authority, as set out in s. 11.242(5)(j), and a recommendation as to what statutes, laws, or parts thereof, should be repealed. The agency must also provide the list to the Division of Law Revision.

**Sections 7, 8, 9, 10, and 11** amend ss. 120.80, 120.81, 420.9072, 420.9075, and 443.091, F.S., respectively, to correct cross references.

**Section 12** provides that the bill will take effect July 1, 2021.

#### **IV. Constitutional Issues:**

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

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. State Tax or Fee Increases:**

None.

##### **E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

Agencies will likely experience increased workload and associated costs as they comply with the repromulgation and new regulatory plan requirements. The Department of State may experience an indeterminate increase in workload and associated costs in complying with the material incorporated by reference requirements and in publishing a notice of withdrawal pursuant to notification by the Joint Administrative Procedures Committee. The Joint Administrative Procedures Committee may experience increased workload and associated costs in issuing the required notifications related to untimely rulemaking.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Lines 684 to 687 provide:

including any rule requiring that documents created by an agency which are proposed to be incorporated by reference in notices published pursuant to s. 120.54(3)(a) and (d) *be coded* in the same manner as notices published pursuant to s. 120.54(3)(a)1.

The term “coded” is not used within the APA but is used within the DOS’s rule implementing s. 120.54, F.S.<sup>97</sup> It is suggested that an amendment be considered to clarify this language. For example, “be coded as prescribed by department rule.”

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 120.52, 120.54, 120.541, 120.5435, 120.55, 120.74, 120.80, 120.81, 420.9072, 420.9075, and 443.091.

This bill creates section 120.5435 of the Florida Statutes.

---

<sup>97</sup> Rule 1-011, F.A.C.

**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.

---

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---