

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 337 Administrative Procedures

**SPONSOR(S):** State Affairs Committee, Government Operations Subcommittee, McClain

**TIED BILLS:** IDEN./SIM. **BILLS:** SB 536

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 5 N, As CS	Skinner	Toliver
2) Appropriations Committee	17 Y, 5 N	Helpling	Pridgeon
3) State Affairs Committee	23 Y, 0 N, As CS	Skinner	Williamson

### SUMMARY ANALYSIS

The Administrative Procedure Act (APA) sets forth a uniform set of procedures agencies must follow when exercising delegated rulemaking authority. A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms. Agencies do not have the discretion in and of themselves to engage in rulemaking. To adopt a rule, an agency must have a general grant of authority to implement a specific law.

The bill amends the APA rulemaking process and provides a mechanism for agencies to reduce unnecessary rules. In part, the bill:

- Specifies the economic impacts and compliance costs an agency must consider in creating a statement of estimated regulatory costs (SERC) and requires each agency to have a website where each of its SERCs may be viewed.
- Requires an agency, in all notices of rulemaking that include material incorporated by reference, to submit the incorporated material in the prescribed electronic format to the Department of State with the full text available for free public access through an electronic hyperlink. It also requires changes to material incorporated by reference to be in a strike-through and underline format and requires listings in the Florida Administrative Code to make material incorporated by reference more publicly accessible.
- Requires the annual regulatory plan to identify and describe each rule that the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1, and requires agencies to review all of their current rules for consistency with the powers and duties granted by law by a date certain and every 10 years thereafter, and requires certain information be included in the annual regulatory plan.
- Requires an agency to deliver a written explanation upon request by designated persons for failing to comply with the annual regulatory plan requirements.
- Specifies that an adverse impact on small business exists if certain criteria is met.
- Specifies that a lower cost regulatory alternative may be submitted after a notice of proposed rule or a notice of change.
- Requires a notice of rule development and a notice of proposed rule to include certain information.
- Requires the Joint Administrative Procedures Committee to review all existing rules and authorizes it to file an objection in certain instances.

The bill may have a negative fiscal impact on state government. However, the impact is indeterminate and not expected to impact agencies until a later date. See Fiscal Comments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Rulemaking

##### Background

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 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 proposed 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 passed HB 541 (2012) that 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

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<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.

<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. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

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

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

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

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

<sup>14</sup> Section 120.54(3)(a)1., F.S.

<sup>15</sup> Chapter 2012-63, L.O.F.

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

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

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 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>

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>20</sup> The petitioner must specify the proposed rule and action requested.<sup>21</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>22</sup>

Once an agency has completed the steps of rulemaking, the agency may file for rule adoption with DOS and the rule becomes effective 20 days later, unless a different date is indicated in the rule.<sup>23</sup> Most adopted rules are published in the Florida Administrative Code (FAC).<sup>24</sup>

The validity of a rule or a proposed rule may be challenged at the Division of Administrative Hearings (DOAH)<sup>25</sup> as an invalid delegation of legislative authority.<sup>26</sup> An invalid delegation of legislative authority is an action that goes beyond the powers, functions, and duties delegated by the Legislature.<sup>27</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>28</sup>

An administrative law judge (ALJ) at DOAH hears the rule challenge in a de novo proceeding and, within 30 days of the hearing, decides on the rule's validity based upon a preponderance of the evidence standard.<sup>29</sup> The ALJ's decision constitutes final agency action, which means an agency may not alter the decision after its issuance,<sup>30</sup> but an agency may appeal the decision to the District Court of Appeal where the agency maintains its headquarters.<sup>31</sup>

### Effect of the Bill

The bill requires a notice of proposed rule to be filed within 12 months of a notice of rule development. If a notice of proposed rule is not filed within 12 months of the notice of rule development, the agency must withdraw the rule and give notice of the withdrawal in the next issue of the FAR. The bill also

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

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

<sup>20</sup> Section 120.54(7)(a), F.S.

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

<sup>22</sup> *Id.*

<sup>23</sup> Section 120.54(3)(e)6., F.S.

<sup>24</sup> Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or 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>25</sup> 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>26</sup> Section 120.56(1), F.S.

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

<sup>28</sup> Section 120.52(8)(a)-(f), F.S.

<sup>29</sup> Section 120.56(1)(e), F.S.

<sup>30</sup> *Id.*

<sup>31</sup> Section 120.68(2)(a), F.S.

reestablishes the mandatory seven-day period between the publication of a notice of rule development and the publication of a notice of proposed rule in the FAR.

The bill further requires that a proposed rule be withdrawn if, *after issuing a notice of proposed rule*, the agency fails to adopt it within the prescribed timeframes in the APA. Once an agency has exceeded the timeframe to adopt the rule, the bill requires JAPC to notify the agency of the failure. If the agency has not withdrawn the rule within 30 days following the notice, JAPC must notify DOS that the date for adoption of the rule has expired. DOS must then publish a notice of withdrawal of the proposed rule.

The bill requires a notice of rule development and a notice of proposed rule to include the proposed rule number.

The bill provides that if any of the required information for a notice, other than substantive changes to the rule text, is omitted or incorrect, then the agency must publish a notice of correction. A notice of correction does not affect rule adoption filing timeframes. The bill further provides that technical changes are not required to be published as a notice of correction.

The bill requires an agency to file a copy of a petition to initiate rulemaking with JAPC.

The bill defines the term “technical change” to mean a change limited to correcting grammatical, typographical, or similar errors not affecting the substance of the rule.

## **Joint Administrative Procedures Committee (JAPC)**

### Background

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>32</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 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>33</sup>

Upon examining a rule, JAPC may object to the rule.<sup>34</sup> If JAPC notifies an agency that a rule objection is under consideration, the agency may postpone rule adoption to allow for review.<sup>35</sup> If the issue cannot be resolved at the staff level, JAPC prepares a recommendation for formal objection to be presented to

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<sup>32</sup> Fla. Leg. J. Rule 4.6; see also s. 120.545, F.S.

<sup>33</sup> Section 120.545(1), F.S.

<sup>34</sup> Section 120.545(2), F.S.

<sup>35</sup> Joint Administrative Procedures Committee, *A Primer on Florida’s Administrative Procedure Act (2020)*, available at <https://www.japc.state.fl.us/Documents/Publications/PocketGuideFloridaAPA.pdf> (last visited February 23, 2022); See also s. 120.545, F.S.

the committee in a public forum.<sup>36</sup> The agency is advised of the recommended objection and is invited before the committee to argue that the rule is authorized.<sup>37</sup> If the committee concludes that there is no authority for the rule, it votes an objection.<sup>38</sup> If the agency refuses to amend or repeal the rule, JAPC's objection is referenced in a footnote to the rule in the Florida Administrative Code.<sup>39</sup>

### Effect of the Bill

The bill removes the permissive authority of JAPC to examine existing rules and makes such examination mandatory to align with JAPC's mandate to examine proposed rules. The bill also authorizes JAPC to file an objection for the failure of an agency to repeal or amend an existing rule that JAPC identifies as being inconsistent with the powers and duties granted by its enabling statute or having no enabling statute.

### **Statement of Estimated Regulatory Cost**

#### Background

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>40</sup> Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.<sup>41</sup> However, a SERC is required if the proposed rule will have an adverse 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>42</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>43</sup>

A SERC must include:

- A good faith estimate of the number of people and entities affected by the proposed rule;
- A good faith estimate of the cost to the agency and other governmental entities to implement the proposed rule;
- A good faith estimate of transactional costs likely to be incurred by people, entities, and governmental agencies for compliance; and
- An analysis of the proposed rule's impact on small businesses, counties, and municipalities.<sup>44</sup>

The SERC must also include an economic analysis on the likelihood that the proposed rule will have an adverse impact in excess of \$1 million within the first five years of implementation on:

- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness, productivity, or innovation; or
- Regulatory costs, including any transactional costs.<sup>45</sup>

If the economic analysis results in an adverse impact or regulatory costs in excess of \$1 million within five years after implementation of the rule, then the rule must be ratified by the Legislature in order to take effect.<sup>46</sup>

An agency's failure to prepare a SERC can be raised in a proceeding at DOAH to invalidate a rule as an invalid exercise of delegated legislative authority, if it is raised within one year of the effective date of

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

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Section 120.541(2), F.S.

<sup>41</sup> Section 120.54(3)(b)1., F.S.

<sup>42</sup> *Id.*

<sup>43</sup> Section 120.541(1)(c), F.S.

<sup>44</sup> Section 120.541(2)(b)-(e), F.S.

<sup>45</sup> Section 120.541(2)(a), F.S.

<sup>46</sup> Section 120.541(3), F.S.

the rule and is raised by a person whose substantial interests are affected by the regulatory costs of the rule.<sup>47</sup>

### Effect of the Bill

The bill requires each agency to have a website where each of its SERCs may be viewed in their entirety. DOS must include on the FAR website the agency website addresses where the SERCs can be viewed. An agency must provide in its notice of proposed rule the agency website address where the SERC can be viewed. If an agency revises a SERC, it must provide a notice that a revision has been made and include an agency website address where the revision can be viewed for publication on the FAR website.

The bill clarifies the elements an agency must consider in a SERC when evaluating the economic impacts of the rule. Specifically, the bill requires agency estimates of economic, market, and small business impacts likely to result from compliance with the proposed rule to consider elements such as:

- Increased or decreased consumer prices or value of goods and services;
- Increased costs due to obtaining substitute or alternative products or services;
- The value of time expended by business owners and other business personnel to comply with the proposed rule;
- Capital costs incurred to comply with the proposed rule; and
- Other impacts suggested by the rules ombudsman or interested persons.

In addition, the bill replaces the term “transactional costs” with “compliance costs,” requires agencies to consider all direct and indirect costs of compliance, and provides 18 specific types of compliance costs as examples for agencies to consider in their evaluation, including:

- Filing fees;
- Costs of obtaining a license;
- Costs to obtain, install, and maintain equipment necessary for compliance;
- Costs related to accounting, financial, and information management processes, as well as other administrative processes;
- Labor costs;
- Costs of education, training, and testing necessary for compliance; and
- Allocation of administrative and other overhead costs.

The bill allows agencies to survey individuals, businesses, business organizations, counties, and municipalities to collect data helpful to estimate and analyze the costs and impacts of the proposed rule. Each notice of proposed rule must contain a summary of the SERC describing the regulatory impact of the proposed rule in readable language.

## Lower Cost Regulatory Alternative

### Background

A person substantially affected by a proposed rule may, within 21 days after the publication of a notice of adoption, amendment, or repeal of a rule, submit a lower cost regulatory alternative (LCRA).<sup>48</sup> The LCRA must be a written proposal, made in good faith, that substantially accomplishes the objectives of the law being implemented.<sup>49</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>50</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>51</sup> Additionally, if a LCRA is submitted, the 90-day period for filing a rule is extended an additional 21 days.<sup>52</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>53</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 it is 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>54</sup>

### Effect of the Bill

The bill specifies that a LCRA may be submitted after a notice of proposed rule or a notice of change. If submitted after the latter, the LCRA is deemed to have been made in good faith only if the person reasonably believes, and the proposal states the reasons for believing, that the proposed rule as *changed by the notice of change* increases the regulatory costs or creates an adverse impact on small business.

The bill allows an agency receiving a LCRA to have the choice of modifying the proposed rule to reduce regulatory costs in addition to either adopting the LCRA or stating its reasons for rejecting it in favor of the proposed rule. If the rule is modified, the agency must revise its SERC, if one has been prepared. If the agency rejects the LCRA or modifies the proposed rule, the agency must state its reasons for rejecting the LCRA in favor of the proposed or modified rule. When a SERC is revised because a change to a proposed rule increases the projected regulatory costs or the agency modified the rule in response to a LCRA, a summary of the revised SERC must be included in subsequent published rulemaking notices. Under the bill, the revised SERC must be provided to the rules ombudsman, the party that submitted the LCRA, and JAPC, and must be published in the same manner as the original SERC.

The bill requires an agency to provide a copy of a LCRA to JAPC at least 21 days prior to filing the rule for adoption.

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<sup>48</sup> Section 120.541(1)(a), F.S.

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

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Section 120.541(1)(d), F.S.

<sup>54</sup> Section 120.541(1)(f), F.S.

## Emergency Rules

### Background

Agencies are authorized to respond to immediate dangers to the public health, safety, or welfare by adopting emergency rules.<sup>55</sup> Emergency rules are not adopted using the same procedures required of other rules.<sup>56</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>57</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>58</sup> The agency's findings of immediate danger are judicially reviewable.<sup>59</sup> Emergency rules are effective immediately, or on a date less than 20 days after filing if specified in rule,<sup>60</sup> but are only effective for a period of no longer than 90 days.<sup>61</sup> An emergency rule is not renewable, except when the agency has initiated rulemaking to adopt a rule relating to the subject of the emergency rule and a challenge to the proposed rule has been filed and remains pending or the proposed rule is awaiting ratification by the Legislature.<sup>62</sup>

### Effect of the Bill

The bill requires emergency rules to be published in the FAC. The bill also allows an agency to make technical changes to the emergency rule within the first seven days after adoption and in such circumstance, requires a notice of the technical change to be published in the FAC. Further, the bill prohibits an agency from superseding an emergency rule currently in effect. The bill clarifies that an emergency rule is not subject to the legislative ratification process.<sup>63</sup>

## Small Business Impact in Rulemaking

### Background

Each agency, before the adoption, amendment, or repeal of a rule, must consider the impact of the rule on small businesses.<sup>64</sup> If the agency determines that the proposed action will affect small businesses, the agency must send written notice to the rules ombudsman<sup>65</sup> in the Executive Office of the Governor at least 28 days before the intended action.<sup>66</sup> The agency must adopt the regulatory alternatives offered by the rules ombudsman if it finds the alternatives are feasible and consistent with the stated objectives of the proposed rule and would reduce the impact on small businesses.<sup>67</sup>

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<sup>55</sup> Section 120.54(4), F.S.

<sup>56</sup> Section 120.54(4)(a), F.S.

<sup>57</sup> Section 120.54(4)(a)3., F.S.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Section 120.54(4)(d), F.S.

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

<sup>62</sup> *Id.*

<sup>63</sup> In 2011, the Legislature passed two bills, CS/CS/CS/HB 993 (2011) and CS/CS/CS/HB 849 (2011) that contained conflicting provisions concerning the exemption of emergency rules from the legislative ratification process. In one bill, CS/CS/CS/HB 993 (2011), the provision exempting emergency rules in s. 120.541(4), F.S., from the legislative ratification process was expressly included in the bill. In the other, CS/CS/CS/HB 849 (2011), the provision was erroneously deleted, leading to a statutory conflict. In 2013, the Legislature passed CS/CS/SB 1410 (2013), which amended s. 120.541(4), F.S., to correct a cross reference and in the process the bill erroneously continued the omission of the provision exempting emergency rules. This bill corrects those previous errors by reinstating the provision exempting emergency rules from the legislative ratification process.

<sup>64</sup> Section 120.54(3)(b)2., F.S.

<sup>65</sup> The Governor must appoint a rules ombudsman in the Executive Office of the Governor for purposes of considering the impact of agency rules on the state citizens and businesses. The rules ombudsman must carry out the duties related to rule adoption procedures with respect to small businesses; review agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses; and make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to business. 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. Section 288.7015, F.S.

<sup>66</sup> Section 120.54(3)(b)2.b.(I), F.S.

<sup>67</sup> Section 120.54(3)(b)2.b.(II), F.S.



If the agency does not adopt the alternatives offered, before rule adoption or amendment, the agency must file a detailed written statement with JAPC explaining the reasons for failure to adopt such alternatives.<sup>68</sup>

### Effect of the Bill

The bill requires an adverse impact on small business to be found if:

- An owner, officer, operator, or manager of a small business must complete any education, training, or testing to comply with the proposed rule in the first year;
- An owner, officer, operator, or manager of a small business is likely to expend 10 hours or purchase professional advice to understand and comply with the rule in the first year;
- Taxes or fees assessed on transactions are likely to increase by \$500 or more in the aggregate in one year because of the rule;
- Prices charged for goods and services are restricted or are likely to increase because of the rule;
- Specially trained, licensed, or tested employees will be required;
- Operating costs are expected to increase by at least \$1,000 annually; or
- Capital expenditures in excess of \$1,000 are necessary to comply with the rule.

If the rules ombudsman of the Executive Office of the Governor provides a regulatory alternative to the agency to lessen the impact of the rule on small businesses, the bill requires the agency to provide a copy of the regulatory alternative to JAPC at least 21 days before filing the rule for adoption.

### **Incorporation by Reference**

#### Background

The APA allows an agency to incorporate material external to the text of the rule by reference.<sup>69</sup> The material to be incorporated must exist on the date the rule is adopted.<sup>70</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>71</sup> However, an agency rule that incorporates another rule by reference automatically incorporates subsequent amendments to the referenced rule.<sup>72</sup> A rule cannot be amended by reference only.<sup>73</sup> An agency may not incorporate a rule by reference unless:

- The material has been submitted in the prescribed electronic format to 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 DOS and the agency at which the material is available for public inspection and examination, must be included in the notice.<sup>74</sup>

DOS has adopted a rule governing the requirements for materials incorporated by reference through an adopted rule.<sup>75</sup> The rule requires each agency incorporating material by reference in an administrative rule to certify that the materials incorporated have been filed with 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>76</sup>

### Effect of the Bill

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<sup>68</sup> Section 120.54(3)(b)2.b.(III), F.S.

<sup>69</sup> Section 120.54(1)(i)1., F.S.; *see also* r. 1-1.013, F.A.C.

<sup>70</sup> Section 120.54(1)(i)1., F.S.

<sup>71</sup> *Id.*

<sup>72</sup> Section 120.54(1)(i)2., F.S.

<sup>73</sup> Section 120.54(1)(i)4., F.S.

<sup>74</sup> Section 120.54(1)(i)3., F.S.

<sup>75</sup> Rule 1-1.013, F.A.C.

<sup>76</sup> Rule 1-1.013(5)(d), F.A.C.

Beginning December 31, 2022, the bill requires an agency, in all notices of rulemaking, or rule modifications that include material incorporated by reference, to submit the incorporated material in the prescribed electronic format to DOS with the full text available for free public access through an electronic hyperlink. Alternatively, if an agency determines that posting the incorporated material on the internet would constitute a violation of federal copyright law, the agency must include in the notice a statement to that effect, along with the addresses of locations at DOS and the agency at which the material is available for public inspection and examination.

The bill requires DOS to prescribe by rule that material incorporated by reference included in a notice of proposed rule and a notice of change be formatted in such a way that additions to the text appear underlined and deletions appear as text stricken through.

## **Annual Regulatory Review**

### Background

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>77</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.<sup>78</sup> 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>79</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.<sup>80</sup> 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>81</sup>

### Effect of the Bill

The bill replaces the requirement that the annual regulatory plan include a listing of each law it expects to implement with rulemaking with the requirement that the plan identify and describe each rule, by rule number or proposed rule number, that the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1 and ending September 30.

The bill requires the annual regulatory plan to include a schedule for the agency to review its rules for consistency with the powers and duties granted by the enabling statutes. An agency must review all of its rules existing before July 1, 2022, by July 1, 2027. All rules adopted on or after July 1, 2022, and all existing rules reviewed initially by July 1, 2027, must be reviewed every 10 years after their respective dates of adoption or review. The bill requires the schedule to be updated annually to ensure that all rules are reviewed accordingly.

Further, the bill requires the annual regulatory plan to include an index and summary of rules reviewed during the previous year that must be listed by number and title. The index must indicate:

- The rules reviewed that are consistent with the powers and duties granted by the enabling statutes.
- The rules reviewed that require amendments to remove portions that are inconsistent with the enabling statute. A summary of the required amendments and a schedule for the rulemaking must be provided.
- The rules reviewed that will be repealed because there is no enabling statute. A schedule for the repeal of the rules must be provided.

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<sup>77</sup> Section 120.74(1)(a), F.S.

<sup>78</sup> Section 120.74(1)(b), F.S.

<sup>79</sup> Section 120.74(1)(d), F.S.

<sup>80</sup> Section 120.74(2)(a)1., F.S.

<sup>81</sup> Sections 120.74(2)(a)2. and 120.74(2)(a)3., F.S.

- A list of all statutes and laws that grant duplicative, redundant, or unused rulemaking authority, and a recommendation of what statutes or laws should be repealed. The agency must also provide this list to the Division of Law Revision.

The bill requires the annual regulatory plan to contain a declaration that the agency head and the general counsel understand that regulatory accountability is necessary to ensure public confidence in the integrity of state government and to that end, that the agency is diligently working toward reducing the number of regulatory requirements consistent with the agency's rulemaking authority and the laws implemented. The bill requires the declaration to contain the total number of rules adopted and repealed during the previous 12 months, as well as declare that all actions in the prior annual regulatory plan have been completed or are on a schedule to be completed and that all materials incorporated by reference in the rules reviewed are available in the required manner.

The bill further requires an agency to deliver a written explanation upon written demand from JAPC or the chair of any other legislative committee for failing to comply with the annual regulatory requirements. The written explanation must include the reasons for noncompliance and must be submitted to JAPC, the President of the Senate, the Speaker of the House of Representatives, and the chair of any legislative committee requesting the explanation.

## Florida Administrative Code

### Background

The FAC is an electronic compilation of all rules adopted by each agency and maintained by DOS.<sup>82</sup> DOS retains the copyright over the FAC.<sup>83</sup>

Each rule in the FAC must cite the grant of rulemaking authority and the specific law implemented.<sup>84</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>85</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>86</sup>

DOS is required to adopt rules allowing adopted rules and materials incorporated by reference to be filed in electronic form.<sup>87</sup> Further, 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>88</sup> The rule DOS has adopted requires rules that are being amended to be coded by underlining new text and by striking through deleted text.<sup>89</sup>

### Effect of the Bill

The bill requires the FAR be published once daily, by no later than 8 a.m. If, after publication, a rule is corrected and replaced, the FAR must indicate the rule has been republished and indicate DOS has corrected it. The bill also requires the history note appended to each rule include the date of any technical change to the rule and provides such change does not affect the rule's effective date. Further, a technical change made after the adoption of a rule must be published as a notice of correction.

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<sup>82</sup> Section 120.55(1)(a)1., F.S.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Section 120.55(1)(a)2., F.S.

<sup>86</sup> Section 120.55(1)(a)3., F.S.

<sup>87</sup> Section 120.55(1)(a)5., F.S.

<sup>88</sup> Section 120.55(1)(c), F.S.

<sup>89</sup> Rule 1-1.010(5)(a), F.A.C. *referencing* r. 1-1.011(3)(c), F.A.C.

The bill also requires the FAC to contain a complete index to any material incorporated by reference contained in the code and, at the beginning of the section of an agency's code, to contain a listing of all forms and material incorporated by reference adopted by that agency's rules.

**B. SECTION DIRECTORY:**

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

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

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

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

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

Section 6 amends s. 120.74, F.S., relating to agency annual rulemaking and regulatory plans.

Section 7 provides an effective date of July 1, 2022.

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

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

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

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

1. Revenues:

None.

2. Expenditures:

None.

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

None.

**D. FISCAL COMMENTS:**

The bill requires each agency to review its rules; includes additional requirements to comply with notice, publication, and hearing requirements of rules; and includes additional requirements for SERCs. Agencies may be required to expend funds to implement the requirements of the bill. It is unclear whether these new requirements could be absorbed within each agency's existing resources. The bill requires agencies to complete an initial rule review for all existing rules by July 1, 2027, and every 10 years thereafter. It also requires agencies to review rules adopted on or after July 1, 2022, every 10 years after their respective dates of adoption. Agencies should have sufficient time to request additional resources through the Legislative Budget Request process should it be determined additional resources will be required to implement the provisions of the bill. DOS may have additional costs associated with publishing the specified material in the bill.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not provide rulemaking authority nor does it require additional rulemaking authority for DOS to implement any of its provisions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 12, 2022, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment altered the bill in the following ways:

- Removed the requirement that persons responsible for the proposed rule and SERC must be available at a workshop or public hearing;
- Required regulatory alternatives to be provided to JAPC prior to filing the rule for adoption, instead of 21 days before filing;
- Required a notice of correction when certain required information is omitted or incorrect in a notice;
- Required that a notice of technical changes to an emergency rule be published in the FAR;
- Provided a rule is repromulgated upon filing with DOS;
- Required that all rules adopted or repromulgated on or after July 1, 2022, must be reviewed within five years after their respective dates of adoption or repromulgation, and all existing rules must be by July 1, 2027;
- Required that the FAC contain a complete index to any material incorporated by reference;
- Required DOS to publish a listing of all forms and material incorporated by reference adopted by an agency;
- Required that a technical change after rule adoption be published as a notice of correction; and
- Created further requirements for the regulatory plan such as requiring the plan to include a five-year schedule for rule review and repromulgation and requiring a list to be included that consists of duplicative, redundant, or unused rulemaking authority which must be provided to the Division of Law Revision.

On February 23, 2022, the State Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Removed the repromulgation process and replaced it with additional requirements for the annual regulatory plan. The annual regulatory plan now requires agencies to review all of their current rules for consistency with the powers and duties granted by law before July 1, 2027, and requires rules to be reviewed every 10 years thereafter.
- Required an agency to deliver a written explanation upon request by designated persons for failing to comply with the annual regulatory plan requirements.
- Authorized JAPC to file an objection to an agency rule if JAPC identifies a rule as inconsistent with the powers and duties granted by law.
- Required additional items to be included in the plan certification, such as certifying that all actions in the prior annual regulatory plan have been completed or are on schedule to be completed and all materials incorporated by reference in the rules reviewed are available in the required manner.
- Clarified that a notice of proposed rule must be published at least seven days after the publication of the notice of rule development.

- Required an agency to provide a copy of any offered regulatory alternative to JAPC at least 21 days before filing the rule for adoption.
- Clarified that the Florida Administrative Register must be published once daily, not the FAC.

This analysis is drafted to the committee substitute as approved by the State Affairs Committee.