HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCSMB for CS/CS/HB 993 & HB 7239 Rulemaking and Administrative Procedures
SPONSOR(S): Government Operations Subcommittee, Rulemaking & Regulation Subcommittee, Roberson, K., Gaetz
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rules & Calendar Committee		Miller	Birtman

SUMMARY ANALYSIS

The bill amends agency rulemaking procedures under the Administrative Procedure Act, and revises various provisions to align with legislative ratification requirements enacted in 2010. Certain rulemaking timeframes are conformed to other periods required in the statutory rulemaking process. The bill also provides for withdrawal of rules that are not effective because they were not ratified and exempts certain rulemaking from ratification requirements.

The bill also does the following:

- Requires agencies to include in each notice of rulemaking whether the proposed rule requires legislative ratification;
- Expressly includes legislative ratification in the description of factors controlling when an adopted rule takes effect;
- Resolves a timing conflict created by Chapter 2010-279, Laws of Florida, by restoring certain time deadlines to the pre-2010 provisions;
- Exempts emergency rulemaking, rules adopting federal standards, rules adjusting certain tolls, and rules implementing the 2011 Student Success Act from the requirements to prepare a statement of estimated regulatory costs and submission for legislative ratification;
- Provides a procedure for agencies to withdraw rules prior to becoming effective if the rule is invalidated by a final order or is timely submitted to the Legislature but not ratified in the regular session;
- Excludes from the ratification requirement the triennial update of the Florida Building Code and the triennial update of the Florida Fire Prevention Code.

The bill creates a one-time process requiring all agencies to undertake a comprehensive review of the economic impact of their respective rules effective on or before November 16, 2010. This follows the pattern of the review of statutory authority conducted after the 1996 substantive amendments to the Administrative Procedures Act (APA). Additionally, the bill requires each agency to identify all revenue rules and all rules under which the agency requires data reporting from external sources. The report will include the statutes authorizing the data collection, how the data is used by the agency, and the policies advanced by the program.

The bill creates s. 120.74(3), requiring agencies annually to report to the Legislature their intended rulemaking for the next fiscal year, excluding emergency rulemaking, and s. 120.74(4), modifying existing reporting requirements during the comprehensive review period.

New s. 120.745 creates the comprehensive review and reporting for older rules, including preparation of economic analyses to identify all rules that meet the same criteria that, for rules proposed after 11/16/2010, would require legislative ratification.

The comprehensive review will continue through the 2014 regular session of the Legislature to provide sufficient time for the agencies to conduct the review and for public participation, legislative consideration of the reports, and any action the Legislature chooses to take. The bill provides that the section creating the one time review is automatically repealed.

The bill also creates s. 120.7455, stating the Legislature may conduct an internet-based public survey about the impact of rules, laws, ordinance, and regulations on the ability of Floridians to engage in lawful conduct.

This new section also provides use immunity from prosecution or enforcement actions for participating in the survey as well as protection from retaliatory agency enforcement actions arising out of a person's providing information to the Legislature.

The bill has an indeterminate, but insignificant, fiscal impact.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

I. ***Rulemaking and Legislative Ratification***

Background

HB 1565 was passed during the 2010 regular session but was vetoed by the Governor. On November 16, 2010, the Legislature, in special session, voted to override that veto and the bill became law as Chapter 2010-279, Laws of Florida. The law created s. 120.541(3), F.S., requiring submission of rules with certain economic impacts for ratification by the Legislature before taking effect.

The law also lengthened the time (from 21 days to 45 days) before an agency could adopt a rule after revising a required economic analysis and lengthened the time (from 20 days to 44 days) for a person to challenge the validity of a rule after the agency prepared the required economic analysis.[1] These changes created a potential timing conflict with existing provisions which allowed only 21 days to bring a challenge before the agency could file for final rule adoption if the economic analysis was not revised.

Under current law, an agency begins the formal rulemaking process by filing a notice of the proposed rule.[2] The notice is published by the Department of State in the Florida Administrative Weekly[3] and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC), if one is prepared, and procedures for a party to request a public hearing on the proposed rule.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[4] Prior to the 2010 revision, the law provided only two conditions[5] before a rule takes effect; after the revision, legislative ratification became the third.[6] A rule filed for adoption may be modified or withdrawn before taking effect only in response to an objection from the Joint Administrative Procedures Committee of the Legislature (JAPC) or to extend the effective date for up to 60 days while the agency considers a JAPC objection.[7] Once a rule goes into effect an agency may repeal the rule only through the usual procedures for rulemaking.[8]

An agency may repeal an effective rule only through the usual procedures for rule making.[8] Newly-elected statewide executive officials are required to follow this process even if a careful initial review of programs within their respective jurisdictions discloses a number of rules which are obsolete or inconsistent with the policies of the elected official.

Rules must be filed for adoption no earlier than 28 days and not later than 90 days after the agency publishes the notice of proposed rule; however, the later deadline may change depending on different

[1] Chapter 2010-279, Laws Of Florida, created s. 120.541(1)(d), providing 45 days for an agency to make available a revised statement of estimated regulatory costs ("SERC"), and amended s. 120.56(2)(a), F.S., to provide 44 days from delivery of the revised SERC for a party to file a petition challenging the proposed rule.
[2] Section 120.54(3)(a)1., F.S.
[3] Section 120.55(1)(b)2., F.S.
[4] Section 120.54(3)(e)6., F.S. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.
[5] *Id.* A rule took effect either 20 days after being filed for adoption or on a date specified by statute. Rules not required to be filed with the Department of State took effect when adopted by the agency head or on a date specified by rule or statute.
[6] Section 120.541(3), F.S.
[7] Section 120.54(3)(d)3., F.S.
[8] Section 120.54(3)(d)5., F.S.

factors.[9] To ensure completion of the rulemaking process, Chapter 120, F.S., the Administrative Procedure Act (APA), provides different times in which a party may challenge a proposed rule.[10] If an agency is required to prepare a SERC the rule cannot be filed for adoption until 21 days after the SERC is provided to parties and made publicly available.[11] The 2010 revision did not alter this requirement but created new paragraph s. 120.541(1)(d), F.S., delaying adoption of a rule for 45 days after the agency makes a *revised* SERC available and, in such cases, providing 44 days for a party to challenge a proposed rule.[12] These revised times conflict with the various 21 day timeframes provided for different aspects of rulemaking, such as requesting a hearing and submitting materials responding to the rulemaking notice,[13] filing notices of substantial changes due to an objection from JAPC,[14] or filing a rule for adoption if no objections are received in 21 days.[15]

Proposed Changes

Technical Revisions

The bill requires an agency's notice of proposed rulemaking under s. 120.54(3)(a)1., F.S., to include a statement as to whether, based on the statement of the estimated regulatory costs, the proposed rule is expected to require legislative ratification before the rule takes effect.

The bill resolves the timing conflicts created in the 2010 law by reversing the changes as follows:

- Instead of allowing 45 days, the bill requires submission of a revised SERC at least 21 days before the rule is filed for adoption; thus, conforming the time with that for adopting a rule after providing an original SERC.
- The bill reverts to 20 days the time for challenging a proposed rule after the agency provides a SERC or a revised SERC; thus, requiring the challenge to be brought during the usual waiting period of 28 days before the rule may be filed for adoption.

The requirement for legislative ratification adopted in 2010 created potential conflicts within the existing rulemaking procedures of the APA. Because of a statutory delay between filing a rule for adoption and the time a rule takes effect, current law allows an agency to withdraw the rule from further consideration only if the JAPC objects to the rule.[16] A rule in effect cannot be withdrawn but only repealed through the standard rulemaking process.[17]

The new requirement for legislative ratification creates the possibility that an agency may adopt a rule that is never ratified, leaving an agency with no authority to withdraw or repeal the ineffective rule. Additionally, if a challenge to the rule brought subsequent to adoption results in a final order in which the agency would prefer to correct the rule, the agency could take no action.

A rule projected to have a specific economic impact exceeding $1 million in the aggregate over 5 years[18] must be ratified by the Legislature before taking effect.[19] A rule must be filed for adoption before it may take effect[20] and cannot be filed for adoption until completion of the rulemaking process.[21]

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[9] Section 120.54(3)(e)2, F.S. The 90 day period is extended for an additional 21 days if a party submits a lower cost regulatory alternative to a proposed rule and the agency is compelled to prepare a SERC if one was not previously done. Section 120.541(1)(a), F.S., as amended by Chapter 2010-279, s. 2, L.O.F.

[10] Section 120.56(2)(a), F.S. Originally, a party had 20 days after a SERC or revised SERC was made available in which to challenge a proposed rule.

[11] Section 120.54(3)(e)2., F.S.

[12] Section 120.56(2)(a), F.S., as amended by Chapter 2010-279, s. 3, L.O.F.

[13] Section 120.54(3)(c)1., F.S.

[14] Section 120.54(d)1., F.S.

[15] Section 120.54(3)(e)6., F.S.

[16] Section 120.54(3)(d)3., F.S.

[17] Section 120.54(3)(d)5., F.S.

[18] Section 120.541(2)(a), F.S.

[19] Section 120.541(3), F.S.

[20] Section 120.54(3)(e)6., F.S.

[21] Section 120.54(3)(e), F.S.

As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Another issue occurs when a rule takes effect without being submitted for legislative ratification but is later found by final adjudication or administrative order to be invalid because its actual economic effect showed that ratification was required. Because the rule met the statutory criteria mandating submission, but was never ratified, it never went into effect and the agency could not rely on it. In essence, an agency has an adopted rule that cannot be modified or possibly repealed.

Effect of Bill: Technical Revisions

The bill resolves these issues by authorizing:

- Withdrawal or modification of the rule in response to an objection by JAPC;
- Withdrawal or modification of the rule in response to a final order, not subject to further appeal, entered in a rule challenge brought after adoption but before the rule takes effect;
- Withdrawal, but not modification, if the rule requires ratification and more than 90 days have passed since the rule was filed for adoption without the Legislature ratifying the rule; and
- JAPC notifies the agency that an objection to the rule is being considered, in which case the rule may be modified to extend the effective date by not more than 60 days.

The bill expressly includes legislative ratification in the statutory description of those contingencies affecting when a rule becomes effective.

Exemption to SERC and Ratification Requirements

The bill exempts the adoption of emergency rules, rules adopting federal standards, the adjustment of certain tolls, and rulemaking required under Ch. 2011-01, the Student Success Act, from the requirements for preparation of a SERC and legislative ratification.

Emergency Rules

Agencies are authorized to respond to immediate dangers to the public health, safety, or welfare, by adopting emergency rules.[22] Emergency rules are not adopted with the formalities required for usual rulemaking[23] but the action must be necessary to protect the public.[24] Prompt publication is required and prompt judicial review is available to test the agency's findings and basis for the emergency rule.[25] Emergency rules typically are effective immediately[26] upon filing but are of limited duration (up to 90 days), encouraging an agency to begin regular rulemaking to adopt a permanent rule on the same subject.[27] Emergency rules may not be renewed unless regular rulemaking is initiated to adopt a permanent rule and a challenge is pending to the proposed rule or the proposed rule is pending legislative ratification.[28]

Prior to enactment of Chapter 2010-279, L.O.F., the regular rulemaking procedure expressly excluded the adoption of emergency rules from the requirement to prepare a SERC.[29] The 2010 act created an internal inconsistency by excluding SERCs prepared for emergency rules from the comprehensive economic analysis[30] required for regular rulemaking, implying SERCs would be required for emergency

[22] Section 120.54(4), F.S.
[23] Section 120.54(4)(a), F.S., which expressly requires adoption of emergency rules to afford the procedural protection provided under other (unspecified) statutes, the Florida Constitution, or the U.S. Constitution.
[24] Section 120.54(4)(a)2., F.S.
[25] Section 120.54(4)(a)3., F.S.
[26] Section 120.54(4)(d), F.S.
[27] Section 120.54(4)(c), F.S.
[28] *Id.*
[29] Section 120.54(3)(b), F.S.
[30] Section 120.541(2)(a), F.S.

rules.[31] Presently, one section of the APA now states emergency rulemaking does not require preparation of a SERC[32] while another section implies a modified SERC is required.[33]

The public policy behind emergency rulemaking differs from the concerns supporting preparation of SERCs and mandating legislative ratification. Keys to both of these requirements are time and deliberation of action, neither of which is available in a true emergency as recognized in the statute authorizing emergency rulemaking.[34] Because of the prior exclusion of emergency rulemaking from the SERC requirement, and because a permanent rule proposed to replace a similar emergency rule is subject to the full SERC and ratification requirements, the language adopted in 2010 should be conformed with the existing sections to eliminate this inconsistency.

Rules Adopting Federal Standards

Agencies authorized to implement, operate, or enforce federal programs frequently adopt rules substantially similar to the federal regulations created for such programs under federal law. The APA provides a separate, streamlined procedure for adopting such federal regulations in s. 120.54(6), F.S. This process permits an agency to implement the federal regulations and respond more promptly to changes in the federal law. An objection filed by a substantially affected person will require the agency to follow the standard rulemaking procedure under s. 120.54(3), F.S., unless the rule is not materially different from the federal regulation.[35]

The current language of s. 120.541(1)(b), F.S., requires the preparation of a SERC for any proposed rule which adversely affects small businesses or will increase regulatory costs by more than $200,000 in the aggregate during the first year the rule is effective. No distinction is made for emergency rules or rules adopting federal standards. The current language of s. 120.541(4), F.S., exempts both emergency rulemaking and adoption of rules incorporating federal standards only from the comprehensive economic analysis required for a SERC. The reference in the statute to "paragraph (2)(a)" appears to be inadvertent, creating both an inconsistency in the language and an inference these types of rulemaking will comply with the SERC requirement in s. 120.54(3)(b), F.S.

Adjustment of Tolls

Section 338.155(1), F.S., authorizes the Department of Transportation (DOT) to adopt rules relating to the payment, collection, and enforcement of tolls. Section 338.165(3), F.S., requires DOT, including the turnpike enterprise, to index toll rates on existing toll facilities "to the annual Consumer Price Index or similar inflation indicators." Toll rate adjustments for inflation may be made no more frequently than once a year and must be made no less frequently than once every 5 years. The bill exempts the indexing of toll rates from the statutory requirements for preparing SERCs and for legislative ratification. The adjustment of toll rates would remain subject to the procedure and scrutiny in the rulemaking process but the concern for additional legislative scrutiny imposed by ratification appears to be met by the standards imposed under the substantive statutes implemented by DOT rule.

Rulemaking Under the Student Success Act

Chapter 2011-01, Laws of Florida, the Student Success Act, significantly changed methods of evaluation and accountability in public education, including the compensation and retention of teachers. The act authorized rulemaking under several statute sections, including s. 1012.22, s. 1012.27, s. 1012.34, 1012.335, and s. 1012.795, F.S. As the act addresses a number of timelines required under the federal "Race to the Top" education program, and the required rulemaking must accord with the

[31] "The Adoption of Federal Standards as it Relates to Preparation of a Statement of Estimated Regulatory Costs and Legislative Ratification," Memorandum from Department of Health to staff of the Rulemaking & Regulation Subcommittee (March 3, 2011), on file with staff of the Rulemaking & Regulation Subcommittee.
[32] Section 120.54(3)(b), F.S.
[33] Section 120.541(4), F.S.
[34] Section 120.54(4), F.S.
[35] Section 120.54(6)(c), F.S.

procedures required under the APA, exempting rulemaking under these sections from the SERC and ratification requirements will enable timely implementation of the Act's requirements.

Effect of Bill: Exemptions to SERC and Ratification Requirements

The bill exempts the following both from the requirement of preparing a SERC and from legislative ratification:

- Emergency rulemaking under s. 120.54(4), F.S.;
- Rulemaking to adopt federal standards, pursuant to s. 120.54(6), F.S.;
- The adjustment of tolls under s. 338.165(3), F.S.;
- Rulemaking under the various sections created or affected by Ch. 2011-01, LOF, the Student Success Act.

Exemption Only to Required Legislative Ratification

Current law requires legislative ratification of all rules exceeding the statutory economic impact threshold. Mandatory updates to the Florida Building Code and the Florida Fire Prevention Code are required to be adopted every 3 years[36] and are developed with significant involvement of the Legislature and its substantive committees, business and industry representatives, local and state government, and the general public. In conjunction with these triennial updates, both codes are continually reviewed and revised by their respective authorities.[37] Other rules involve state adoption of federal standards for operation of programs involving significant federal oversight due to funding sources or implementation of federal law and are adopted under a procedure separate from regular rulemaking.[38] These types of rules are subject to economic scrutiny in the rulemaking process; but, the concern for additional legislative scrutiny imposed by ratification appears to be met by the standards imposed under the substantive statutes being implemented by rule.

The Florida Building Code

The Florida Building Code (Building Code) is the unified building code applicable statewide as authorized by statute.[39] The overall purpose for the Building Code is to create within a single set of documents uniform standards applicable to all aspects of construction in Florida to provide effective and reasonable protection for public health, safety, and welfare "…at the most reasonable cost to the consumer."[40] The Florida Building Commission ("Commission")[41] is responsible for adopting, updating, and general administration of the Building Code. With certain exceptions, enforcement of the Building Code is through duly-authorized state and local agencies.[42]

The law provides detailed sections on legislative intent[43], Building Code adoption and contents,[44] specific processes for different types of amendments,[45] the triennial comprehensive update conducted by the Commission,[46] and the Commission's powers.[47] The express intent of the law is for the

[36] Sections 553.73(7)(a) and 633.0215(1), F.S.
[37] Sections 553.73 and 633.0215, F.S.
[38] Section 120.54(6), F.S.
[39] Chapter 553, part IV, F.S., the Florida Building Code.
[40] Section 553.72(1), F.S.
[41] Section 553.74, F.S.
[42] Section 553.80, F.S.
[43] Section 553.72, F.S.
[44] Section 553.73(1)-(3), F.S.
[45] Section 553.73(3) and (9), F.S.-technical amendments, subsections (4) and (5)-amendments by local authorities, subsection (8)-substantive amendments.
[46] Section 553.73(7), F.S.
[47] Sections 553.74 - 553.77, F.S.

Commission to use the statutory rulemaking requirements and process[48] for adopting, amending, or updating the Building Code:[49]

> 553.72 Intent. —
> …
> (3) It is the intent of the Legislature that the Florida Building Code be adopted, modified, updated, interpreted, and maintained by the Florida Building Commission in accordance with ss. 120.536(1) and 120.54 and enforced by authorized state and local government enforcement agencies.

This intent is made a specific requirement in the substantive sections on adoption,[50] amendments,[51] and updates.[52] In addition, a large number of substantive bills and amendments are considered by the Legislature each year, keeping the Legislature actively engaged in the process of continual revision.

The Commission is required to update the Building Code every 3 years, using the APA rulemaking process. The statute also provides a minimum time of 6 months between adoption of the updated Building Code and its effective date.[53] Because the Commission is housed in the Department of Community Affairs (DCA) solely for administrative purposes, DCA publishes the notices required for rulemaking[54] as part of its duties to provide the Commission with administrative and staff support.[55]

The statute imposes detailed requirements the Commission must follow to adopt, amend, review, and update the Building Code in addition to following APA procedural requirements.[56] The resulting Building Code contains or incorporates the laws and rules pertaining to all major aspects of public and private building construction in Florida, from broad areas including design, physical construction, modification, repair, and even demolition,[57] to specific matters from structural and mechanical systems to elevators and coastal construction standards.[58] The Building Code must reference without change the Florida Fire Prevention and Life Safety Codes adopted by Department of Financial Services rule.[59] When updating the Building Code, the Commission is required to create the Building Code's foundation by incorporating the most current versions of a number of standard codes, such as the International Plumbing Code and the National Electrical Code.[60] The entire process of updating the Building Code is subject to extensive statutory direction,[61] continual legislative revision, and the procedural protections of the APA rulemaking process.[62]

The Florida Fire Prevention Code

One of the key components of the Florida Building Code cross-references to the separately-adopted Florida Fire Prevention Code (Fire Code). The State Fire Marshall is required to adopt a new edition of the Fire Code every 3 years through the rulemaking provisions of the APA.[63] The triennial update of the Fire Code is coordinated with that of the Building Code in order to prevent undue burdens on

[48] Sections 120.536(1) and 120.54, F.S. Chapter 120, F.S., is Florida's Administrative Procedure Act or "APA".
[49] Section 553.72(3), F.S.
[50] Section 553.73(1)(a), F.S.
[51] Section 553.73(3), (8), and (9), F.S.
[52] Section 553.73(7)(a), F.S.
[53] Section 553.73(7)(e), F.S.
[54] Notice of proposed rule 9N-1.001, to adopt the 2010 updates to the Code, published by DCA on January 7, 2011, at https://www.flrules.org/gateway/ruleNo.asp?id=9N-1.001.
[55] Section 553.75(3), F.S.
[56] Section 553.73, F.S.
[57] Section 553.73(1)(a), F.S.
[58] Section 553.73(2), F.S.
[59] Section 553.73(1)(c), F.S.
[60] Section 553.73(7)(a), F.S.
[61] Chapter 553, part IV, F.S.
[62] Sections 120.54 and 120.56, F.S.
[63] Section 633.0215(1), F.S.

businesses and consumers.[64] As part of the triennial update, the State Fire Marshall notifies each municipal, county, and special district fire department of the pending review and update. The local officials are required to provide copies of their local fire code amendments no later than 120 days before the date the State Fire Marshall is to adopt the triennial updates, in order for the Fire Marshall to determine whether the local provisions comply with the law.[65] Under present law, local fire code amendments are effective only until the adoption of the next triennial review.[66]

Impact of Potential Legislative Ratification on Building and Fire Codes

DCA estimates compliance by businesses and consumers simply with the local construction permitting requirements resulting from the existence and enforcement of the Building Code readily exceed an aggregate of $1 million over 5 years.[67] As the Building Code is adopted in compliance with legislative intent and protects public health, safety, and welfare at the least cost to the consumer,[68] the resulting direct or indirect regulatory costs are likely to exceed the statutory threshold requiring ratification.

The Commission currently is completing the third triennial update to the Code and has begun the rulemaking process.[69] DCA anticipates the rule incorporating the final version of the updated Code will be ready to file for adoption after May 6 but before June 30, 2011.[70] Absent the requirement of legislative ratification, the Code would become effective no later than December 31, 2011.[71] However, since the regulatory costs resulting from the operation of the Code will exceed the level of economic impact requiring legislative ratification, and the Code will not be adopted through rulemaking prior to the end of the regular session of the Legislature, under present law the earliest the Code may be considered for ratification would be during the 2012 regular session.

The State Fire Marshall concurrently is preparing the triennial update of the Fire Code for adoption at the same time as the Building Code update.[72]

Effect of Bill: Exemption Only From Ratification

The bill exempts rulemaking amendments and triennial updates to the Florida Building Code and Florida Fire Prevention Code from the requirement of legislative ratification. Rulemaking for these provisions will remain subject to the preparation of a comprehensive SERC and economic analysis in addition to the other procedural requirements of the APA.

II. *Rulemaking and Economic Review*

Rulemaking Authority

The APA establishes the process for administrative rulemaking. With the enactment of HB 1565 in November, 2010,[73] the Legislature amended the APA to control more closely the adoption of rules with significant economic impacts.

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[74] Rulemaking authority is delegated by the Legislature[75] through statute and authorizes an

[64] 3/16/2011 memorandum from the State Fire Marshall's office, on file with staff of the Rulemaking & Regulation Subcommittee.
[65] Section 633.0215(3)(a), F.S.
[66] Section 633.0215(3)(b), F.S.
[67] 3/11/2011conversation with Jim Richmond, Asst. Gen. Counsel, DCA, general counsel for Florida Building Commission.
[68] Section 553.72, F.S.
[69] Notice of Proposed Rule 9N-1.001; see note 58, above.
[70] *See* note 67, above.
[71] Section 553.73(7)(a), F.S.
[72] See note 64, above.
[73] Ch. 2010-279, LOF.
[74] Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region,* 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

agency to "adopt, develop, establish, or otherwise create"[76] a rule. Agencies do not have discretion whether to engage in rulemaking.[77] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[78] The grant of rulemaking authority itself need not be detailed.[79] 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.[80]

The rulemaking requirements of the APA apply to "agencies," defined by s. 120.52(1), F.S. Agencies include executive branch entities acting pursuant to powers other than those derived from the constitution. In addition to the Governor and Cabinet officers, the APA applies to a wide variety of entities with statewide or regional authority, such as all departments and entities specified in s. 20.04, F.S., the Board of Governors of the State University System, and regional water supply authorities, to local entities such as school districts or those specifically made subject to the APA.[81]

The development of the APA parallels the Legislature's refinement of the strictures regulating the exercise of delegated authority by executive branch agencies. The initial version of the APA in 1974 provided a process for public adoption and adjudication of agency rules.[82] A year later the Legislature first required agencies to provide a statement of estimated economic impact in the notice of initial rulemaking.[83] By the early 1990s the Legislature became increasingly concerned about the economic costs of agency rules and amended the APA to compel preparation of economic impact statements under certain circumstances.[84]

The Legislature also determined greater clarity was required to guide and constrain agencies in exercising delegated authority. A comprehensive revision of the APA became law in 1996[85] expressly limiting rulemaking only to those areas where agencies had both the power to make rules and a substantive statute providing specific guidelines for those rules. To ensure all agency rules conformed with this standard of authority, the Legislature required every agency to review the express legal authority for each rule of the agency and to repeal those which lacked proper authority, over a period of three years.[86] Further clarification of the rulemaking authority was enacted in 1999 and the process for reviewing the substantive authority for rules was extended into 2001.[87]

These initial review requirements were fulfilled and the reporting requirement was modified into an ongoing requirement. Under s. 120.74, F.S., agencies now are required to review their rules and perform the following:

- Identify and correct deficiencies;
- Clarify and simplify rules;
- Delete obsolete or unnecessary rules;
- Delete rules that are redundant of statutes;

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[75] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).
[76] Section 120.52(17), F.S.
[77] Section 120.54(1)(a), F.S.
[78] Section 120.52(8) & s. 120.536(1), F.S.
[79] *Save the Manatee Club, Inc.*, supra at 599.
[80] *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).
[81] The comprehensive list of entities is found in the definition at s. 120.52(1), F.S. There are certain exclusions for municipalities and municipality-created entities.
[82] Ch. 74-310, Laws of Florida.
[83] Ch. 75-191, s. 3, Laws of Florida, amending s. 120.54(1), F.S. (Supp. 1974).
[84] Ch. 92-166, s. 4, Laws of Florida, amending s. 120.54(2)(b), F.S. (1991). See also Patricia Nelson, "Now What Do We Do? An Agency Perspective on Rulemaking After HB 1565 (and Executive Order 2011-01)," The Florida Bar Administrative Law Section Newsletter, Vol. XXXII, No. 3 (March 2011). The article presents a good overview of the history of economic analysis under the APA and presents one agency's approach to implementing the requirements of s. 120.541(2)(a), F.S.
[85] Ch. 96-159, Laws of Florida.
[86] Ch. 96-159, s. 9, Laws of Florida.
[87] Ch. 99-379, s. 3, Laws of Florida.

- Improve efficiency, reduce paperwork, decrease costs to government and the private sector;
- Confer with agencies having concurrent jurisdiction and determine whether their rules can be coordinated; and
- Determine whether rules should be amended or repealed to reduce the impact on small business while meeting the stated objectives of the proposed rule.[88]

By October 1 of each odd-numbered year, each agency must file a report with the Speaker, the President, the Joint Administrative Procedures Committee (JAPC), and each substantive committee of the Legislature, certifying compliance with the statute and providing the following information:

- Changes made to the agency's rules as a result of the review;
- Recommended statutory changes to promote efficiency, reduce paperwork, or decrease costs to government and the private sector;
- The economic impact of the rules on small business;
- The types of cases or disputes in which the agency is involved which should be conducted under the summary hearing process described in s. 120.574, F.S.[89]

Background: Economic Review of Rules

With the development of stricter standards for exercising rulemaking authority the Legislature also imposed more comprehensive requirements for agencies to address the economic effect of their rules. By 1992 the Legislature had imposed specific elements for inclusion in economic impact statements, developed criteria for agencies to follow in considering the impact of a rule on small businesses, and required agencies to tier their rules in order to lessen economic impacts on small business.[90] The 1996 act expanded the criteria both for considering the impact on small business as well as preparing a more comprehensive statement of estimated regulatory costs.[91] Agencies also were required to consider lower cost alternatives to the proposed rule.[92] Preparation of a statement of estimated regulatory costs (SERC) was mandatory only in response to the filing of a lower cost alternative by a substantially affected party.[93]

Statutory amendments in 2008 mandated preparation of a SERC if the agency's rule would affect small businesses.[94] In the same act the Legislature created the Small Business Regulatory Advisory Council[95] (SBRAC). The primary role of SBRAC is to review existing and proposed agency rules and to advocate for minimizing adverse impacts and economic hardship on small businesses.[96]

The enactment of HB 1565 further increased legislative oversight of agency rulemaking by creating specific economic thresholds for stricter accountability. For all rulemaking initiated on or after November 17, 2010, s. 120.54(3)(b)1. and s. 120.541(1)(b), F.S., require agencies to prepare a SERC if the proposed rule either will have an adverse impact on small businesses or if the rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in the first year after the rule is implemented. Section 120.541(2)(a), F.S., now requires a complete SERC to include an economic analysis addressing whether the rule is likely to have one of three specific impacts, directly or indirectly, in excess of $1 million in the aggregate within 5 years of going into effect:

- An adverse impact on economic growth, private sector job creation or employment, or private sector employment;

[88] Section 120.74(1), F.S.
[89] Section 120.74(2), F.S. Section 120.574, F.S., provides a summary procedure for administrative hearings if the parties agree.
[90] Section 120.54(2), F.S. (Supp. 1992).
[91] Ch. 96-159, s. 10, Laws of Florida.
[92] Section 120.54(3)(b)2.b., F.S. (Supp. 1996).
[93] Ch. 96-159, s. 11, Laws of Florida, creating s. 120.541, F.S.
[94] Ch. 2008-149, s. 7, Laws of Florida, amending s. 120.54(3)(b)1., F.S.
[95] Section 288.7001, F.S.
[96] Section 288.7001(3)(c), F.S.

- An adverse impact on business competitiveness, including competition with interstate firms, productivity, or innovation; or

- An increase in regulatory costs, including transactional costs.

The criteria under s. 120.541(2)(a), F.S., creates the threshold for required legislative ratification under s. 120.541(3), F.S. If the economic analysis required for the SERC finds the rule is likely to have one of the foregoing impacts, the rule cannot become effective unless submitted to the Speaker and the President and ratified by the Legislature.

The requirements of HB 1565 apply only to rules which had not become effective as of November 17, 2010, or are proposed for adoption after that date.[97] Rules which went into effect between July 1, 2008 and November 16, 2010, were subject to greater scrutiny about their potential costs to small businesses and Florida's economy due to the increased criteria for statutory review and the participation of SBRAC. For rules which went into effect before July 1, 2008, agencies only had to prepare a SERC if a party offered a lower cost alternative or the rule impacted small businesses.

Governor Scott's first executive order[98] created the Office of Fiscal Accountability and Regulatory Reform (OFARR) and mandated each agency under the Governor's authority to conduct a comprehensive review of all that agency's rules. To date the Governor's agencies have identified over 750 rules which may be repealed.[99] While certain economic factors are included in this review, Executive Order 2011-01 does not compel the same level of analysis required for a SERC under s. 120.54(3)(b) and s. 120.541(2), F.S.[100]

Effect of Bill: Review of Existing Rules with Significant Economic Effect

The bill improves legislative oversight of administrative rulemaking with three modifications of the APA:

- The bill adds subsection 120.74(3), requiring agencies annually to prepare a regulatory plan of projected rulemaking, excluding emergency rulemaking, and to report these plans to the Legislature. Subsection 120.74(4) is also added to adjust certain reporting requirements to coordinate with the reports required under new s. 120.745.

- The bill creates s. 120.745, requiring all agencies to conduct a comprehensive review of their rules, identify those rules in effect on or before November 16, 2010 (the day before the ratification requirement went into effect) which have one of the significant economic impacts of over $1 million as stated in s. 120.541(2)(a), F.S., complete modified economic reviews of all such rules over a two year period, and provide annual reports to the Legislature. Agencies must also identify and justify rules requiring data submissions from third parties. This provision will expire on July 1, 2014.

- The bill creates s. 120.7455, establishing the format for a Legislative project to gather information on burdensome administrative rules and providing use immunity and protections from agency retaliation to those parties who participate in the survey. This provision will continue in effect in order to preserve the provided immunity and protections.

Section 120.74(3): Annual Regulatory Plan and Report

Section 120.74, F.S., requires agencies to conduct a biennial review of their rules and report on specific topics to the Speaker, President, and JAPC. Section 5 of EO 2011-01 requires each agency under the

[97] The APA distinguishes between a rule being "adopted" and being enforceable or "effective." s. 120.54(3)(e)6, F.S. Before a rule becomes "effective" the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.
[98] EO 2011-01.
[99] Presentation of Patricia Nelson, Deputy Director of OFARR, at March 23, 2011 meeting of Rulemaking & Regulation Subcommittee.
[100] Id.

authority of the Governor to prepare by July 1 of each year a regulatory plan identifying rulemaking the agency expects to pursue in the next fiscal year. The bill codifies this reporting planning requirement for all agencies and provides for annual reporting to the Speaker, President, and JAPC.

Section 120.74(4): Modification of Biennial Reporting Requirement During Effective Period of s. 120.745

The comprehensive review provided in new s. 120.745 coincides with the biennial reviews and reports required under s. 120.74, F.S. This new subsection (4) avoids duplication of effort on the part of the agencies by integrating elements of the report due in 2011 with the more comprehensive report due under s. 120.745(4) and by suspending the biennial report in 2013 due to the detailed reports due in 2012 and 2013 under s. 120.745(6).

Section 120.745: Comprehensive Rule Review with Emphasis on Economic Effects

After the 1996 substantive amendments to the APA, the Legislature adopted a one-time review process for all existing rules. Agencies were given a specific time in which to review their rules for compliance with the substantive law authorizing the rule. Similarly, the bill requires a review of existing rules to ensure conformity with the Legislature's expressed intent to minimize the adverse impacts of agency rulemaking on Florida's economy.

The review and reporting process begins in 2011 and ends in 2013. All agencies will be required to review and categorize their rules and provide a comprehensive report to the Speaker, President, and JAPC by December 1, 2011. For rules in effect on or before November 16, 2010, which the agency wants to retain without amendment, and which have or are projected to have one of the $1 million fiscal impacts delineated in s. 120.541(2)(a), F.S., the agencies are required to divide such rules into two reporting groups: one group to be analyzed and reported by December 1, 2012 (Group 1), and the other by December 1, 2013 (Group 2). For each rule in these Groups the agency shall prepare a compliance economic review incorporating specific information required by the new statute. The bill provides for periods of public comment on the rules to be listed in Group 1 or Group 2 and on the resulting economic reviews, including opportunities to suggest lower cost regulatory alternatives to the existing rule. Comprehensive reports of these economic reviews will be due to the Speaker, President, and JAPC by the above dates. The Legislature thus will receive updated economic evaluations of older rules and may decide what action to take, if any.

The APA definition of "agency" includes most state governmental entities, including constitutionally-created bodies such as the Fish and Wildlife Conservation Commission and regional bodies such as water management districts. Most local governments are exempt but some may be included by special law.[101] Section 120.745(1)(a) will exclude local governments with jurisdiction in only one county or less[102] from the comprehensive review process. This recognizes the disparity in resources available to these local governmental units as opposed to entities receiving state funding and which enact rules having a regional or statewide impact.

By definition the bill includes in the required review only those rules required to be published in the Florida Administrative Code.[103] Rules identified for repeal or amendment will not require the economic reviews created under the bill because either action requires compliance with the current economic analysis procedures in the APA.[104]

In addition to the review and identification of rules by December 1, 2011 based on economic effects, agencies must identify those rules defined as having an impact on state revenues. Agencies must also

[101] Section 120.52(1), F.S.
[102] Section 120.52(1)(c), F.S. The statute excludes from the APA officers and governmental entities with jurisdiction over one county or less unless the officer or entity is expressly made subject to the APA by general law, special law, or existing judicial decision. The full definition of "agency" also excludes a number of specific entities, principally municipalities.
[103] Section 120.55(1), F.S.
[104] Section 120.54(3)(d)5., Fla. Stat.

identify and support defined "data collection rules" which they intend to retain. A number of agency rules require non-governmental entities such as service providers or workers compensation insurance carriers to report certain data to the agency. Because of the economic impact on Florida businesses of these various data reporting requirements, the bill requires each agency to report all rules mandating such data reporting. The December 1, 2011 report will include the statutes authorizing the data collection, how the data is used by the agency, and the policies supporting continuation of the program.

The bill requires public notice of completing reports, listing of rules in Group 1 or Group 2, completing compliance economic reviews, and resolving public objections. Proposed s. 120.745(7) provides exclusive publication requirements, relying primarily on electronic postings on the websites of the agencies. Publication required under s. 120.745 will be deemed complete as of the date the required notice, determination or report is published on the agency's website. Agencies must post the full text of documents required under s. 120.745 using links on their respective websites. Once a week each agency will provide the Department of State with copies of all notices published in the previous week on the agency's Internet website for publication in the Florida Administrative Weekly.

To avoid unnecessary duplication of effort, the bill exempts from the compliance economic review those rules for which the agency completed the review process implemented under EO 2011-01, but only if the review under EO 2011-01 found the rule did not:

- Adversely affect the availability of business services;
- Adversely affect job creation or retention;
- Place unreasonable restrictions on access to employment; or
- Impose a significant regulatory related cost.

Further, an agency's certification of its biennial review under s. 120.74, F.S., may omit any information included in the reports provided under s. 120.745, the reporting date is extended to December, 2011, and the biennial reporting requirement is excluded for 2013. To further assist agencies in preparing the report required in 2011, the bill provides instructions on a model reporting format. These provisions are intended to streamline the review and reporting process for agencies.

To monitor and enforce compliance with the new statute's review and reporting requirements, proposed s. 120.745(8) requires each agency head to file with JAPC written certifications of compliance with key reporting requirements. Under the bill, agencies which fail to timely file these written certifications will have all rulemaking authority suspended until the certification is properly filed.

The bill provides agencies with an alternative to the detailed review and economic analysis process. No later than October 1, 2011, agencies may choose to cooperate with the review process conducted through OFARR. The agency head must certify this choice to JAPC. The agency's data collection and revenue rules still must be identified by December 1, 2011, but the final report of economic analyses for rules having a significant regulatory cost or economic impact, as identified by OFARR, will not be due until December 1, 2013. This alternative eliminates any duplication of work already undertaken by OFARR under Executive Order 2011-1.

The review proceeds through the 2014 regular session of the Legislature to provide sufficient time for the agencies to conduct the comprehensive review and for public participation, legislative consideration of the reports, and any action the Legislature chooses to take. The bill excludes agency proceedings to repeal rules identified under s. 120.745 from the requirement to prepare a statement of estimated regulatory costs under s. 120.54 and s. 120.541.[105]

Timeline for Review and Reporting

The following summarizes the timeline of required reporting under s. 120.745.

[105] Under s. 120.54(3)(d)e, F.S., agencies must use the same procedure to repeal rules as to adopt them, including the potential for mandatory preparation of a statement of estimated regulatory costs under s. 120.54 and s. 120.541, F.S.

Completion Date	GROUP 1 RULES	GROUP 2 RULES
10/1/2001	Agencies to certify with JAPC option to cooperate with OFARR review.	
12/1/2011	*Agencies cooperating with OFARR review: publish results including identification of data collection & revenue rules*	
	Agencies not in OFARR review: File reports of results of biennial s. 120.74 review & review under s. 120.745(3). • Report includes: o All rules defined in s. 120.745 as "revenue rules." o All "data collection rules," together with authorizing statute(s), uses of date reported, and policies supporting continuation of reporting program. o Rules to be repealed. o Rules to be amended. o Each rule effective on or before 11/16/2010, which the agency does not plan to repeal or amend before 12/31/2012, and which probably will have one of the effects in s. 120.541(2)(a) for the 5 year period beginning 1/1/2010. o Rules included in Group 1 and those included in Group 2. • Publish list of Group 1 and Group 2 Rules. • Begin consideration of objections to non-inclusion of rules in economic review schedule. • Written certification of completion by agency head.	Agencies not in OFARR review: Publish list of Group 2 Rules.
5/1/2012	Agencies not in OFARR review: complete compliance economic reviews for Group 1. • Submit to SBRAC • Publish notice of Group 1 Rules for which compliance economic reviews were prepared • Begin public input of Lower Cost Regulatory Alternatives (LCRA) on Group 1 economic reviews.	
6/1/2012	D/L for public objections to non-inclusion of rules in economic review schedule.	
6/15/2012	D/L for public to submit Lower Cost Regulatory LCRA for any Group 1 Rule.	
6/21/2012	Latest day for Agencies not in OFARR review to publish determination on public objections to non-inclusion of rules in economic review schedule.	
7/1/2012	• Latest day for Agencies not in OFARR review to publish notice of correcting report in response to sustaining an objection to non-inclusion in economic review schedule. • Written certification of completion of all objection determinations by agency head.	
	<u>All Agencies</u>: First annual regulatory plan submission under s. 120.74(3).	
8/1/2012	D/L for SBRAC to submit LCRAs	

Completion Date	GROUP 1 RULES	GROUP 2 RULES
12/1/2012	• Agencies not in OFARR review: publish final reports of Group 1 compliance economic reviews. • Written certification of completion by agency head. • Begin 120.54 rulemaking for Group 1 Rules listed for amendment or repeal.	
5/1/2013	Last week of 2013 Regular Session during which: • Legislature may review reports of Group 1 rule reviews. • Legislature may act with respect to retained Group 1 rules.	Agencies not in OFARR review: complete compliance economic reviews for Group 2. • Submit to SBRAC • Publish notice of rules for which compliance economic reviews were prepared, period for public input. • Written certification of compliance by agency head.
6/15/2013		D/L for public to submit Lower Cost Regulatory Alternatives for any Group 2 rule (LCRA)
7/1/2013	***All Agencies: Second annual regulatory plan submission under s. 120.74(3).***	
8/1/2013		D/L for SBRAC to submit LCRAs
10/1/2013	*Agencies opting to cooperate with OFARR review: Head of agency to certify in writing the agency completed all economic estimates required under s. 120.745(9)(b).*	
12/1/2013	*Agencies opting to cooperate with OFARR review: Publication of reports for economic estimates required under s. 120.745(9)(b).*	
		Agencies not in OFARR review: publish final reports of Group 2 compliance economic reviews. • Written certification of compliance by agency head. • Begin 120.54 rulemaking for Group 2 Rules listed for amendment or repeal.
5/1/2014		Last week of 2014 Regular Session during which: • Legislature may review reports of Group 2 rule reviews. • Legislature may act with respect to retained Group 2 rules.
7/1/2014	***s. 120.745 stands repealed by terms of the act unless extended by the Legislature.***	

Section 120.7455: Legislative survey of Regulatory Impacts

The bill creates s. 120.7455, providing notice that from the effective date of the act to July 1, 2014, the Legislature may implement an internet-based public survey on the impact of regulatory rules in Florida, including the number and nature of regulations and permitting requirements affecting Floridians. Types of information which may be requested include the name of the business as registered in Florida, the number and identification of the agencies regulating the respondent's lawful activities, the number of permits, licenses, or registrations required for the respondent to engage in a lawful activity, and laws, rules, ordinances, or regulations the respondent alleges to be unreasonably burdensome. To

encourage participation and candor in any such survey, the bill provides use immunity from prosecution based on either the act of responding or the information provided. The bill also protects survey respondents from retaliatory acts of an agency based on providing or withholding information in the survey by allowing evidence of retaliatory conduct in mitigation of any proposed sanction, authorizing the presiding judge to award the minimum sanctions authorized by the Legislature.

Self-Repeal: the bill provides s. 120.745 will stand repealed as of July 1, 2014.

B. SECTION DIRECTORY:

Section 1: Amends s. 120.54, F.S., as amended by chapter 210-279, L.O.F., to clarify the procedures for standard rulemaking by requiring agencies to state in the notice of proposed rule whether ratification will be necessary; to expressly note ratification as a contingency for the rule to become effective; to authorize agencies to modify or withdraw a rule after entry of a final order in a challenge to the rule brought after the rule was filed for adoption but before it became effective, to withdraw a rule when the rule requires ratification and more than 90 days have passed since the rule was filed for adoption without the Legislature ratifying the rule, or to withdraw or modify a rule if the committee notifies the agency that an objection to the rule is being considered, in which case the rule may be modified to extend the effective date by not more than 60 days.

Section 2: Amends s. 120.541, F.S., to restore the time period for delaying rule adoption after an agency revises a SERC to that in effect prior to enactment of chapter 2010-279, L.O.F. Exempts emergency rulemaking and rulemaking to adopt federal standards from s. 120.541, including the SERC and legislative ratification requirements.

Section 3: Amends s. 120.56, F.S., to reverse the 2010 change for a party to challenge a proposed rule after preparation of a SERC to conform to other relevant time periods in the existing law.

Section 4: Creates new s. 120.74(3), requiring all agencies to adopt an annual regulatory plan and file the plan with the Speaker, President, and JAPC. Creates new s. 120.74(4), modifying the biennial review and reporting requirements of s. 120.74, F.S., for the years 2011 and 2013.

Section 5: Creates new s. 120.745, requiring all agencies to review all of their rules in effect on or before November 16, 2010, and submit such rules meeting the $1 million over 5 years criteria in s. 120.541(2)(a), F.S., for legislative consideration.

120.745(1): Creates specific definitions for review process. Excludes certain local governmental entities from the comprehensive review requirement.

120.745(2): Requires each defined agency to perform an Enhanced Biennial Review of all rules in effect. Combines the review and report due under s. 120.74 with a one-time review of all rules in effect on or before 11/16/2010. Requires identifying and dividing those requiring further economic review into Groups 1 and 2. Extends biennial review reporting date to December 1, 2011.

120.745(3): Specifies the form and content of report of Enhanced Biennial Review and requires publication in the manner provided in s. 120.745(7).. Requires publication of separate lists of Group 1 and Group 2 rules, and directions on how and where to file objections.

120.745(4): Creates process for public objection of agency decision on whether rule should be designated for economic review. Provides the agency's decision is final on whether rule is subject to compliance economic review.

120.745(5): Requires compliance economic analysis for all rules listed in Group 1 or Group 2 as probably exceeding the $ 1 million thresholds in s. 120.541(2)(a), F.S. Provides for publication of completed reviews and period for public submission of lower cost regulatory alternatives. Exempts certain rules reviewed under the Governor's EO 2011-01 unless certain specific adverse effects are found in the course of such review. Requires filing of comprehensive final reports with the Speaker,

President, and JAPC: by December 1, 2012 for Group 1 rules; by December 1, 2013, for Group 2 rules. For rules designated for repeal or amendment in Group 1 or 2 reports, requires initiating of proceedings. Exempts agency proceedings to repeal rules identified in reports filed under s. 120.745(5) from the requirement to prepare a statement of estimated regulatory costs.

120.745(6): References authority of Legislature to choose whether to act on information reported.

120.745(7): Creates specific provisions for notice and publication under the act. Includes specific directives for Internet URL addresses for publications of reports, determinations and notices.

120.745(8): Provides an agency's rulemaking authority is suspended for failing to meet a reporting deadline under the section. Rulemaking authority resumes upon proper compliance with the reporting requirements. The time for any response to a report of the agency is tolled during the period of a suspension.

120.745(9): Exempts agencies which choose to cooperate with the rule review process developed and managed by OFARR from certain reporting requirements and timelines.

120.745(10): Provides s. 120.745 is repealed effective on July 1, 2014.

Section 6: Creates s. 120.7455, providing for Internet-based public survey to collect information on rules, laws, ordinances, and regulations which impact the lawful activities of respondents, including unreasonably burdensome rules. Provides for use immunity and protection from retaliatory agency conduct for survey participants.

Section 7: Leaves unchanged the legal status of any rule determined to be invalid. This prevents any agency from using the process of review and submission to the Legislature to override a legal decision invalidating a rule.

Section 8: Creates s. 120.80(16)(d), exempting amendments and triennial updates to the Florida Building Code from the ratification requirement of s. 120.541(3). Creates s. 120.80(17), exempting amendments and triennial updates to the Florida Fire Prevention Code from the ratification requirement of s. 120.541(3). Creates s. 120.80(18), exempting adjustments of tolls by the Department of Transportation from the SERC and ratification requirements.

Section 9: Creates s. 120.81(1)(l), exempting rulemaking to implement Ch. 2011-01, LOF, the Student Success Act, from the requirements of preparing a SERC and submission for legislative ratification.

Section 10: Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The impact on revenues in both FY 2011-2012 and FY 2012-2013 is indeterminate, but insignificant. The bill authorizes no new revenue sources and existing revenues would not be increased by these clarifications of administrative procedure and the rule review process.

2. Expenditures:

   Requiring disclosure in the rulemaking notice of whether the proposed rule may require ratification will have an indeterminate, but insignificant, impact on agency expenditures. Agencies currently must include in the rulemaking notice a summary of the SERC, if one was prepared,[106] and must prepare a SERC if the proposed rule will adversely affect small business or increase regulatory

[106] Section 120.54(3)(a)1., F.S.

costs more than $200,000 in the aggregate within 1 year of implementation.[107] As agencies have a duty to address the fiscal impact of a proposed rule, and already incur the expense pertaining to the preparation of a SERC, the information is available to determine whether legislative ratification will be required. The bill thus requires reporting an element the supporting data for which should exist.

Clarifying the rulemaking procedures by including ratification as a separate contingency for the rule to become effective only states current law and imposes no additional tasks or expenditures. Reverting the times for filing for adoption (from 45 to 21 days) or challenging a proposed rule (from 44 to 20 days) after the agency provides a revised SERC conforms these processes to existing law.

Clarifying the exclusion of emergency rulemaking from the SERC and ratification requirements should not impact agency expenditures as SERCs were not previously required. The remaining exemptions created in the bill should be expense neutral.

Costs of review to agencies are indeterminate. By reducing duplication of activities for the agencies which completed reviews under existing OFARR guidelines and integrating the 2011 report with the review already required under s. 120.74, F.S., the costs for the comprehensive review in 2011 should be reduced. The agencies will experience increased costs in completing a compliance economic analysis required for each rule being retained without amendment and which is likely to meet the criteria of s. 120.541(2)(a), F.S. An estimate of any significant compliance review costs should be available for consideration in the 2012 Regular Session and ought to be included in agency budgets for FY-2013 and FY-2014. The cost of reporting will be reduced in 2013 by eliminating the rules review and report under s. 120.74, F.S., for that year. The available alternative of cooperating in an expanded review process with OFARR should further reduce potential costs.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Many local governments are not subject to Chapter 120, the Administrative Procedures Act.[108] For local governments subject to rulemaking under Chapter 120, the bill clarifies existing procedural requirements. The impact on revenues in both FY 2011-2012 and FY 2012-2013 is indeterminate but insignificant. The bill authorizes no new revenue sources and existing revenues would not be increased by these clarifications of administrative procedure.

2. Expenditures:

The analysis in section II.A.2 is applicable to those local governments subject to the review, analysis, and reporting requirements under s. 120.745. The impact on expenditures is indeterminate, but insignificant.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill imposes no new direct economic impacts on the private sector.

D. FISCAL COMMENTS:

No additional fiscal comments.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

[107] Section 120.54(3)(b)1., F.S.
[108] Section 120.52(1), F.S.

The bill imposes no duty on a municipality or county to expend funds or take action requiring the expenditure of funds. The bill neither reduces the authority for municipalities or counties to raise funds nor reduces the municipality/county share of state taxes.

Local governments subject to the APA are under the economic review requirements for rulemaking in s. 120.54 and 120.541, F.S., the ratification requirement of s. 120.541(3), F.S., and the biennial review and reporting requirement of s. 120.74, F.S. The required comprehensive review in s. 120.745 is an extension of the regulatory oversight to which these entities already are subject. Excluding smaller governmental entities, with jurisdiction over one county or less, prevents the imposition of a statewide comprehensive process solely due to the ancillary effect of a special law.

2. Other: No other constitutional issues appear.

Use immunity is not uncommon in criminal investigations and in Congressional investigations.[109] General law may limit the power of the state to use evidence or prosecute violators of laws and rules.

The bill changes the time for a party to challenge a proposed rule after the agency provides a SERC from 44 to 20 days. This may impact businesses outside the state intending to bring such challenges but treats all objecting parties the same regardless of where located.

B. RULE-MAKING AUTHORITY:

The bill revises and clarifies existing rulemaking procedures for all agencies under the APA. No rulemaking authority is provided.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

CS/CS/HB 993

Rulemaking & Regulation Subcommittee
On March 23, 2011, the Rulemaking & Regulation Subcommittee adopted 5 amendments to the original bill.

Amendment 1: Exempted emergency rulemaking from the SERC and ratification requirements of s. 120.54(3) and 120.541, F.S. The amendment revised Section 1 of the original bill to clarify the exclusion of emergency rulemaking from the SERC requirement in s. 120.54(3), F.S. The amendment also created new s. 120.54(5), completely excluding emergency rulemaking from the SERC and ratification requirements.

Amendment 2: Amended s.120.54(3)(d), F.S., authorizing agencies to withdraw or modify rules as a result of a final order in a challenge brought during the period between rule adoption and rule effectiveness, to withdraw rules submitted for ratification which are left unratified, and to summarily repeal rules found invalid because they were never submitted for legislative ratification.

Amendment 3/As amended by Amendment 4: This amendment was adopted after being revised by amendment-to-amendment 4, which exempted rules adopting federal standards, the triennial updates to the Florida Building Code, and the triennial updates to the Florida Fire Prevention Code from legislative ratification.

Amendment 5: Created the summary rule repeal process to be used by statewide elected officials within the first 6 months of an elected term. Provided for notice, opportunity for public objection to proposed

[109] See, 18 U.S.C. §§ 6001 *et seq*. (Federal statutory provisions.) For a concise discussion of the issues see, *The Power To Compel Testimony and Disclosure*, found on 4/7/11, at http://supreme.justia.com/constitution/amendment-05/08-power-to-compel-testimony-and-disclosure.html.

repeals, and judicial review. Avoiding any question about delegation of executive authority, the amendment prevents any statewide elected official from delegating this authority.

Amendment 6: Changes the effective date of the bill to upon becoming a law.

The Rulemaking & Regulation Subcommittee then passed the bill as a committee substitute, incorporating the amendments previously described.

Government Operations Subcommittee

On April 1, 2011, the Government Operations Subcommittee adopted a strike-all amendment to CS/HB 993 and passed the bill as a committee substitute. The committee substitute differs from CS/HB 993 in the following ways:

- Changes the circumstances under which a rule may be withdrawn or modified.
- Revises legislative findings related to newly elected statewide executive officers to include authority to initiate oversight of all rulemaking in agencies under their respective control.
- Adds a definition of "repealing authority".
- Revises provisions in the notice of repeal to require, among other things, notice of rules under review for repeal by March 1 of the inaugural year or in 2011 within 30 days of the effective date of the bill, and requires that repeal of rules may not be effective earlier than March 31 in the inaugural period.
- Revises provisions under judicial review requirements delineating elements that are part of the record for review.

HB 7239

On April 5, 2010, the Rulemaking & Regulatory Subcommittee adopted a strike-all amendment which differed from the initial published draft of PCB RRS 11-02a. Changes included:

- Adjusting the required filing of annual regulatory plans by agencies with the Speaker, the President, and JAPC to begin in 2012;
- Revising and reducing the elements to be included in the compliance economic reviews to be performed under the bill and requiring the 5 year period for the estimate described under s. 120.541(2), F.S., to begin on January 1, 2010;
- Deleting language indicating the legislative purpose for the section as redundant of terms of proposed s. 120.745;
- Streamlining the initial process for reviewing and categorizing an agency's rules to better integrate the required 2011 report with the requirements of s. 120.74;
- Revising the period for public objections to the listing of rules scheduled for further economic review to 6 months for all interested parties;
- Streamlining the compliance economic review process by exempting from further economic review those rules for which the Governor's Office of Fiscal Accountability and Regulatory Reform (OFARR) review found no specified adverse economic consequences and by revising the substantial reporting requirements to make the reports uniform for 2012 and 2013;
- Revising certain publication requirements;
- Deleting a provision for automatic repeal of rules reported as appropriate for repeal and restructuring an exemption from both the SERC requirement of s. 120.54 and all of s. 120.541, F.S., for proceedings to repeal rules identified by the reports required under s. 120.745;
- Renumbering the sections.