

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 993 Rulemaking

SPONSOR(S): Government Operations Subcommittee, Rulemaking & Regulation Subcommittee, Roberson

TIED BILLS: **IDEN./SIM. BILLS:** SB 1382

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking & Regulation Subcommittee	9 Y, 5 N, As CS	Miller	Rubottom
2) Government Operations Subcommittee	12 Y, 1 N, As CS	McDonald	Williamson
3) Rules & Calendar Committee			

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, exempts certain rulemaking from ratification requirements, and creates a summary process for statewide elected officers to direct the repeal of specific rules within the first 6 months of an elective term.

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;
- Exempts emergency rulemaking from the requirements to prepare a statement of estimated regulatory costs; and
- Excludes from the ratification requirement emergency rules and rules adopting federal standards, the triennial update of the Florida Building Code, and the triennial update of the Florida Fire Prevention Code.

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:

Overview

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, L.O.F. 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 Weekly³ 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 conditions⁵ 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

An agency may repeal an effective rule only through the usual procedures for rulemaking.⁸ Newly-elected statewide executive officials⁹ are required to follow this process even if a careful initial review of programs within their respective jurisdictions discloses a number of rules that 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 factors.¹⁰ To ensure completion of the rulemaking process, Chapter 120, F.S., the Administrative

¹ Chapter 2010-279, L.O.F., 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.

⁹ The Governor, Chief Financial Officer, Attorney General, and Commissioner of Agriculture.

¹⁰ 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.

Procedure Act (APA), provides different times in which a party may challenge a proposed rule.¹¹ 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.¹² 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.¹³ 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,¹⁴ filing notices of substantial changes due to an objection from JAPC,¹⁵ or filing a rule for adoption if no objections are received in 21 days.¹⁶

Notice Requirements

The bill requires an agency's notice of proposed rulemaking 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.

Timing Conflicts

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 bill reduces from 44 days to 20 days the time in which a substantially affected person may seek an administrative determination of the invalidity of a rule after the SERC or the revised SERC is available.

Legislative Ratification

Background

The process for legislative ratification adopted in 2010 created potential conflicts within the existing rulemaking procedures of the APA. Because of the delay between filing a rule for adoption and the rule taking effect, current law allows an agency to withdraw the rule from further consideration only if the JAPC objects to the rule.¹⁷ A rule in effect cannot be withdrawn but only repealed through the standard rulemaking process.¹⁸

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 years¹⁹ must be ratified by the Legislature before taking effect.²⁰ A rule must be filed for adoption before it may take effect²¹ and cannot be filed for adoption until completion of the rulemaking process.²²

¹¹ 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.

¹² Section 120.54(3)(e)2., F.S.

¹³ Section 120.56(2)(a), F.S., as amended by Chapter 2010-279, s. 3, L.O.F.

¹⁴ Section 120.54(3)(c)1., F.S.

¹⁵ Section 120.54(d)1., F.S.

¹⁶ Section 120.54(3)(e)6., F.S.

¹⁷ Section 120.54(3)(d)3., F.S.

¹⁸ Section 120.54(3)(d)5., F.S.

¹⁹ Section 120.541(2)(a), F.S.

²⁰ Section 120.541(3), F.S.

²¹ Section 120.54(3)(e)6., F.S.

²² Section 120.54(3)(e), F.S.

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

The bill resolves these issues by authorizing withdrawal or modification of rules when:

- JAPC objects to the rule;
- A final order, not subject to further appeal, is entered in a rule challenge brought after adoption but before the rule takes effect;
- 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.

It also resolves these issues by authorizing a summary process for an agency to repeal a rule by public notice if the rule was found invalid because it should have been submitted for ratification.

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

Emergency Rules

Background

Agencies are authorized to respond to immediate dangers to the public health, safety, or welfare, by adopting emergency rules.²³ Emergency rules are not adopted with the formalities required for usual rulemaking²⁴ but the action must be necessary to protect the public.²⁵ Prompt publication is required and prompt judicial review is available to test the agency's findings and basis for the emergency rule.²⁶ Emergency rules typically are effective immediately²⁷ upon filing but are of limited duration (up to 90 days), encouraging an agency to promptly begin regular rulemaking to adopt a permanent rule on the same subject.²⁸ 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.²⁹

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.³⁰ The 2010 act created an internal inconsistency by excluding SERCs prepared for emergency rules from the comprehensive economic analysis³¹ required for regular rulemaking, implying SERCs would be required for emergency rules.³² Presently, one section of the APA now states emergency rulemaking does not require preparation of a SERC³³ while another section implies a modified SERC is required.³⁴

²³ Section 120.54(4), F.S.

²⁴ 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.

²⁵ Section 120.54(4)(a)2., F.S.

²⁶ Section 120.54(4)(a)3., F.S.

²⁷ Section 120.54(4)(d), F.S.

²⁸ Section 120.54(4)(c), F.S.

²⁹ *Id.*

³⁰ Section 120.54(3)(b), F.S.

³¹ Section 120.541(2)(a), F.S.

³² "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.

³³ Section 120.54(3)(b), F.S.

³⁴ Section 120.541(4), F.S.

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.³⁵ 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.

Effect of Bill

The bill exempts emergency rulemaking from the requirement to prepare a SERC and the requirement for legislative ratification.

Exemptions to Required Legislative Ratification

Background

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 years³⁶ 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. 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.³⁷ 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.³⁸ 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."³⁹ The Florida Building Commission ("Commission")⁴⁰ 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.⁴¹

The law provides detailed sections on legislative intent⁴², Building Code adoption and contents,⁴³ specific processes for different types of amendments,⁴⁴ the triennial comprehensive update conducted by the Commission,⁴⁵ and the Commission's powers.⁴⁶ The express intent of the law is for the Commission to use the statutory rulemaking requirements and process⁴⁷ for adopting, amending, or updating the Building Code.⁴⁸

³⁵ Section 120.54(4), F.S.

³⁶ Sections 553.73(7)(a) and 633.0215(1), F.S.

³⁷ Section 120.54(6), F.S.

³⁸ Chapter 553, part IV, F.S., the Florida Building Code.

³⁹ Section 553.72(1), F.S.

⁴⁰ Section 553.74, F.S.

⁴¹ Section 553.80, F.S.

⁴² Section 553.72, F.S.

⁴³ Section 553.73(1)-(3), F.S.

⁴⁴ Section 553.73(3) and (9), F.S.-technical amendments, subsections (4) and (5)-amendments by local authorities, subsection (8)-substantive amendments.

⁴⁵ Section 553.73(7), F.S.

⁴⁶ Sections 553.74 - 553.77, F.S.

⁴⁷ Sections 120.536(1) and 120.54, F.S. Chapter 120, F.S., is Florida's Administrative Procedure Act or "APA".

⁴⁸ Section 553.72(3), F.S.

...

(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,⁴⁹ amendments,⁵⁰ and updates.⁵¹ 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, following the statutory rulemaking process in the APA. The statute also provides a minimum time of 6 months between adoption of the updated Building Code and its effective date.⁵² Because the Commission is housed in the Department of Community Affairs (DCA) solely for administrative purposes, DCA publishes the notices required for rulemaking⁵³ as part of its duties to provide the Commission with administrative and staff support.⁵⁴

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.⁵⁵ 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,⁵⁶ to specific matters from structural and mechanical systems to elevators and coastal construction standards.⁵⁷ The Building Code must reference without change the Florida Fire Prevention and Life Safety Codes adopted by Department of Financial Services rule.⁵⁸ 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.⁵⁹ The entire process of updating the Building Code is subject to extensive statutory direction,⁶⁰ continual legislative revision, and the procedural protections of the APA rulemaking process.⁶¹

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.⁶² The triennial update of the Fire Code is coordinated with that of the Building Code in order to prevent undue burdens on businesses and consumers.⁶³ 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

⁴⁹ Section 553.73(1)(a), F.S.

⁵⁰ Section 553.73(3), (8), and (9), F.S.

⁵¹ Section 553.73(7)(a), F.S.

⁵² Section 553.73(7)(e), F.S.

⁵³ 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>.

⁵⁴ Section 553.75(3), F.S.

⁵⁵ Section 553.73, F.S.

⁵⁶ Section 553.73(1)(a), F.S.

⁵⁷ Section 553.73(2), F.S.

⁵⁸ Section 553.73(1)(c), F.S.

⁵⁹ Section 553.73(7)(a), F.S.

⁶⁰ Chapter 553, part IV, F.S.

⁶¹ Sections 120.54 and 120.56, F.S.

⁶² Section 633.0215(1), F.S.

⁶³ 3/16/2011 memorandum from the State Fire Marshall's office, on file with staff of the Rulemaking & Regulation Subcommittee.

determine whether the local provisions comply with the law.⁶⁴ Under present law, local fire code amendments are effective only until the adoption of the next triennial review.⁶⁵

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.⁶⁶ Where the Building Code is adopted in compliance with the Legislature's primary intent and protects public health, safety, and welfare at the least cost to the consumer,⁶⁷ 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.⁶⁸ 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, 2011.⁶⁹ Absent the requirement of legislative ratification, the Code would become effective no later than December 31, 2011.⁷⁰ 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.⁷¹

Effect of Bill

The bill creates the following exemptions for required legislative ratification:

- Rules adopting federal standards.
- The triennial update of the Building Code.
- The triennial update of the Fire Code from required legislative ratification.

These rules are still subject to the preparation of a comprehensive SERC and economic analysis.

Special Rule Review and Repeal Authorization – Inaugural Period of Elected Term

Background

A rule in effect may be repealed only through the standard rulemaking process.⁷² This includes public notice of the proposed action and the opportunity for members of the public who have a substantial interest in the repeal to participate or even bring a legal challenge.⁷³ Following the standard process requires a minimum of 28 days from publication of the notice of the proposed repeal to the time the actual repeal may be adopted.⁷⁴ With the required statutory waiting periods, the earliest a rule repeal may take effect is 48 days from publication of the notice of proposed repeal.⁷⁵ Depending on the amount and nature of requested public participation, the period to repeal a rule could exceed 90 days.

⁶⁴ Section 633.0215(3)(a), F.S.

⁶⁵ Section 633.0215(3)(b), F.S.

⁶⁶ 3/11/2011 conversation with Jim Richmond, Asst. Gen. Counsel, DCA, general counsel for Florida Building Commission.

⁶⁷ Section 553.72, F.S.

⁶⁸ Notice of Proposed Rule 9N-1.001; see note 58, above.

⁶⁹ See note 67, above.

⁷⁰ Section 553.73(7)(a), F.S.

⁷¹ See note 64, above.

⁷² Section 120.54(3)(d)5., F.S.

⁷³ Sections 120.54(3) and 120.56(2), F.S.

⁷⁴ Section 120.54(3)(e)2., F.S.

⁷⁵ Section 120.54(3)(e)6., F.S. If the repeal of a rule results in one of the significant economic consequences, it is possible such repeal would require submission for legislative ratification.

Effect of Bill

The bill creates limited authorization and a summary process for statewide elected executive officers⁷⁶ to repeal rules within the first 6 months of an elected term. Key points of the process are:

- Legislative findings that newly elected statewide executive officers should have full authority to initiate oversight of all rulemaking of agencies under their supervision or control; that requiring the usual rulemaking process may unnecessarily delay the efforts of such officers to review and revise the programs and policies over which they have jurisdiction.
- Authorization of a specified summary procedure to repeal rules.
- Statewide elected executive officers may only use this summary process during the first 6 months of their elected terms.
- For each rule or part of a rule to be repealed, the statewide elected executive officers must make a written finding directing the repeal.
- The written finding and a written notice of intent to repeal must be published on the website of the agency that adopted the rule or part of the rule to be repealed, and in the Florida Administrative Weekly.
- The repeal of a rule or part of a rule must be complete 15 days after publication of the written notice on the agency's website, but may not be effective earlier than March 31 in the inaugural period.
- A substantially-affected party may file with the agency a written objection within 14 days of publication of the written notice on the agency's website.
- If an objection is filed, the repeal is not effective until the statewide elected executive officers publish the written ruling on the objection.
- Sections of the APA governing rulemaking, dispute resolution, hearings, and judicial enforcement do not apply to the summary repeal process. An objecting party is not entitled to a hearing but has a limited right to appeal a decision overruling the objection to the First District Court of Appeals.
- A failure to object is treated as approving the repeal and a waiver of rights to any judicial review.
- Authority to direct repeal by summary process cannot be delegated but must be exercised by the statewide elected executive officers with sole authority over the agency, the Governor and Cabinet for Cabinet agencies, or all the statewide elected executive officers with joint authority over an agency (but less than the whole Cabinet).
- The summary procedure is only available until the 30th of June following the beginning of the elected term for the statewide elected executive officer.

Office of Fiscal Accountability and Regulatory Reform

Background

The Governor's first executive order⁷⁷ 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.⁷⁸ Initiating the standard rulemaking process to repeal each of these rules would delay repeal for at least 48 days.

Effect of Bill

Accordingly, the bill provides its terms become effective when signed into law so that the summary process would be available to all statewide elected officials during in their respective elected terms.

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

⁷⁶ The Governor, Chief Financial Officer, Attorney General, and Commissioner of Agriculture.

⁷⁷ EO 11-01.

⁷⁸ Presentation of Patricia Nelson, Deputy Director of OFARR, at March 23, 2011 meeting of Rulemaking & Regulation Subcommittee.

exempt emergency rulemaking from the requirement to prepare a SERC; 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, 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 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; to authorize a summary process for agencies to withdraw rules which were not submitted for ratification but later found invalid because they should have been submitted for ratification.

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.; to exempt rules adopting federal standards, the triennial update of the Florida Building Code, and the triennial update of the Florida Fire Prevention Code from the requirement of legislative ratification; to exclude emergency rulemaking from the required SERC and legislative ratification.

Section 3: Creates s. 120.547, F.S., to authorize a summary procedure for statewide elected officials to direct the review of rulemaking and the repeal of rules in agencies under their respective authority, commencing with the beginning of the official's elected term and ending on the following June 30.

Section 4: 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 5: 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.

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,⁷⁹ and must prepare a SERC if the proposed rule will adversely affect small business or increase regulatory costs more than \$200,000 in the aggregate within 1 year of implementation.⁸⁰ 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. Exempting rules adopting federal standards, the Florida Building Code, and the Florida Fire Prevention Code from

⁷⁹ Section 120.54(3)(a)1., F.S.

⁸⁰ Section 120.54(3)(b)1., F.S.

the ratification requirement should be expense neutral as those rulemaking processes do not require any expenditure.

Providing agencies a summary process to withdraw rules not ratified by the Legislature or to repeal rules found invalid for failing to be ratified will reduce agency expenditures that may be necessary to prevent such rules from interfering with proper implementation of statutes. Providing elected statewide officials with a summary process to repeal rules in the first six months of an elected term would save the cost of formal rule repeal procedures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Many local governments are not subject to Chapter 120, the Administrative Procedures Act.⁸¹ 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 Chapter 120 rulemaking. 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:

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.

2. Other:

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.

⁸¹ Section 120.52(1), F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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 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.