

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Governmental Oversight and Productivity Committee

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BILL: CS/SB 1196

SPONSOR: Governmental Oversight and Productivity Committee and Senator Posey

SUBJECT: Agency Rules Reform Act of 2005

DATE: April 26, 2005

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	Fav/CS
2.			JU	
3.			WM	
4.			RC	
5.				
6.				

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## I. Summary:

The bill:

- Requires the JAPC to consider comments submitted by interested persons in its review of agency rules and to act as ombudsman to Florida citizens regarding agency rules.
- Requires the JAPC to maintain a continuous review of statutes that authorize agencies to adopt rules, and removes the requirement that the JAPC submit a schedule of its systematic review of the statutes.
- Requires the agency, rather than the petitioner, to provide a copy of a petition for variance or waiver of a rule to the JAPC upon receipt by the agency.
- Requires the agency to provide a copy to the JAPC of the order granting or denying the petition upon rendition of the order.
- Requires agencies to file their annual report, listing the number and type of petitions for variance and waiver and the disposition of all petitions, with the JAPC in addition to the Governor, President of the Senate, and Speaker of the House of Representatives.
- Provides that the JAPC may recommend that legislation be introduced to address its objection to an agency rule when the agency has failed to modify, amend, withdraw, or repeal the rule consistent with the objection.
- Requires the JAPC to undertake a study of its authority and legislative oversight function, and to report any recommendations for legislation to the President of the Senate and Speaker of the House of Representatives by January 1, 2006.

The bill amends the following sections of the Florida Statutes: ss. 11.60, 120.542, and 120.545, and creates an unnumbered section of Florida law.

The bill provides for an effective date of July 1, 2005.

## II. Present Situation:

### Separation of Powers in Florida

The government of the State of Florida is organized according to the doctrine of the separation-of-powers, which is specifically enshrined in Article II, s. 3 of the State Constitution:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The Legislature has further refined this state constitutional provision in s. 20.02(1), F.S., which states:

The State Constitution contemplates the separation of powers within state government among the legislative, executive, and judicial branches of the government. *The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. The executive branch has the purpose of executing the programs and policies adopted by the Legislature and of making policy recommendations to the Legislature.* The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws. [emphasis added.]

Two fundamental prohibitions are contained in the separation of powers doctrine in Florida. The first is that no branch may encroach upon the powers of the other; the second is that no branch may delegate to another branch its constitutionally assigned power.<sup>1</sup> The legislative power includes the authority to determine the public interest and formulate public policy, to make law, and to appropriate state funds.<sup>2</sup>

### The Joint Administrative Procedures Committee and review of agency rules

The Administrative Procedures Act, codified in Chapter 120 of the Florida Statutes, provides for legislative oversight of rules. The Joint Administrative Procedures Committee (JAPC) is created in s. 11.60, F.S., as a legislative check on legislatively-created authority as interpreted by executive agencies. The JAPC is a joint standing legislative committee composed of six members, with three members from each house. Pursuant to s. 11.60(2), F.S., the JAPC is assigned the following duties:

- Maintaining a continuous review of the statutory authority on which each administrative rule is based and, whenever such authority is eliminated or significantly changed by repeal, amendment, holding by a court of last resort, or other factor, advise the agency concerned of the fact;

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<sup>1</sup> *Chiles v. Children A, B, C, D, E, and F*, 589 So. 260 (Fla. 1991);

<sup>2</sup> Article III of the State Constitution; Am. Jur. 2d Constitutional Law s. 275.

- Maintaining a continuous review of administrative rules and identifying and requesting an agency to repeal any rule or any provision of any rule which reiterates or paraphrases any statute for which the statutory authority has been repealed;
- Reviewing administrative rules and advising the agencies concerned of its findings;
- Having the duties prescribed in ch. 120, F.S., for the adoption of rules;
- Generally reviewing agency action pursuant to the operation of the Administrative Procedure Act;
- Annually reporting to the Legislature and recommending needed legislation;
- Consulting with standing committees regarding legislative authority for proposed rules and other matters relating to legislative authority for agency action;
- Adopting rules and regulations necessary for its own organization and operation and for that of its staff, consistent with general law and the rules of each house;
- Having standing to seek judicial review, on behalf of the Legislature or the citizens of the state, of the validity or invalidity of any administrative rule to which the committee has voted an objection and which has not been withdrawn, modified, repealed, or amended to meet the objection;
- Maintaining a continuous review of administrative rulemaking process; and
- Establishing measurement criteria to evaluate whether agencies are complying with the delegation of legislative authority.

Section 120.54(3)(a)4., F.S., requires an agency to furnish the following documents to the JAPC at least 21 days prior to rule adoption: (1) a copy of the proposed rule; (2) a detailed written statement of the facts and circumstances justifying the proposed rule; (3) a copy of the statement of estimated regulatory costs, if required; (4) a statement of the extent to which the proposed rule relates to federal standards rules on the same subject; and (6) a copy of the notice of intent to adopt, amend, or repeal a rule.

Pursuant to s. 120.545, F.S., the JAPC conducts a review of all proposed rules to determine whether: (a) the rule is an invalid exercise of delegated legislative authority; (b) the statutory authority for the rule has been repealed; (c) the rule reiterates or paraphrases statutory material; (d) the rule is in proper form; (e) the notice given prior to adoption was sufficient to give adequate notice of the purpose and effect of the rule; (f) the rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements; (g) the rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements; (h) the rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule; (i) the rule could be made less complex or more easily comprehensible to the general public; (j) the rule does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives; (k) the rule will require additional appropriations; and (l) if the rule is an emergency rule, there exists an emergency justifying the rule, whether the agency has exceeded the scope of its statutory authority, and whether the emergency rule was promulgated in the manner required.

If the JAPC objects to a rule, it must certify the objection to the agency within 5 days of the objection. The JAPC also must notify the Speaker of the House of Representatives and the Senate President of any objection concurrent with certification to the agency.

Upon receipt of the objection, an agency must: (a) modify the proposed rule to meet the JAPC's objection; (b) withdraw the proposed rule; or (c) refuse to modify or withdraw the proposed rule. If the objection is to an existing rule, the agency must notify the committee that: (a) it has elected to amend the rule to meet the objection; (b) it has elected to repeal the rule; or (c) it refuses to amend or repeal the rule.

Pursuant to s. 120.545(10), F.S., if the JAPC objects to an agency rule, and the agency fails to modify, amend, or repeal the rule, the JAPC may submit to the Legislature a recommendation that legislation be introduced to modify or suspend adoption of a proposed rule, or amend or repeal an existing rule.

### **Rule variances and waivers**

Section 120.542, F.S., provides a process by which variances and waivers to administrative rules may be sought and granted. The section authorizes agencies to grant variances and waivers, and provides that they shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute is achieved by other means by the person and when application of the rule would either create a substantial hardship or would violate principles of fairness.

The Administration Commission must adopt rules of procedure for the waiver/variance process, and agencies must advise persons of their remedies under this section. A person who is subject to regulation by agency rule may file a petition with that agency, with a copy to the JAPC, requesting a variance or waiver from the agency rule. Within 15 days the agency must provide notice of the petition to the Department of State, within 30 days the agency must review the petition, and within 90 days the agency must grant or deny the petition, and supply a copy of the order to the JAPC. The statute does not specify when the order must be supplied to the JAPC. Each agency must maintain records relating to disposition of petitions, and yearly report such data to the Governor, the President of the Senate, and the Speaker of the House.

### **Challenges to proposed or existing rules by substantially affected persons**

Section 120.56, F.S., provides that a person who is substantially affected by a rule or proposed rule may file a petition seeking an administrative determination of the invalidity of a rule or proposed rule, on the ground that the rule is an "invalid exercise of delegated legislative authority." This term is defined in s. 120.52(8), F.S., to mean that the rule, ". . . goes beyond the powers, functions, and duties delegated by the Legislature." Subsection (8) further provides that a proposed or existing rule is an "invalid exercise of delegated legislative authority" if any one of the following applies:

- (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
- (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
- (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

- (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
- (e) The rule is arbitrary or capricious;<sup>3</sup> or
- (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

Finally, subsection (8) requires that the rule be authorized by a grant of rulemaking authority and that it implement the specific powers and duties provided by the enabling legislation. In *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*,<sup>4</sup> the court held that, “[t]he authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is explicit enough.”

### III. Effect of Proposed Changes:

**Section 1** amends section 11.60, F.S., to supplement and clarify the duties of the Joint Administrative Procedures Committee (JAPC). The bill adds a duty that the JAPC shall consider comments submitted by interested persons in its review of agency rules, and act as ombudsmen to Florida citizens regarding agency rules. The bill makes clear that the JAPC shall maintain a continuous review of statutes that authorize agencies to adopt rules, by deleting unnecessary language. The bill also deletes language requiring the JAPC to include in its annual report to the Legislature a schedule for its systematic review of existing statutes and a summary of the status of this review, since the review the JAPC undertakes is done in the course of the continuous rule review process.

**Section 2** amends s. 120.542, F.S., to modify the process by which variances and waivers to rules are handled. The bill requires that upon receipt of a petition for variance or waiver of a rule, the agency, rather than the petitioner, shall provide a copy of the petition to the JAPC. The bill requires the agency to provide to the JAPC a copy of the order granting or denying the petition upon rendition of the order, and requires agencies to file their annual report, listing the number and type of petitions for variance and waiver and the disposition of all petitions, with the JAPC in addition to the Governor, President of the Senate, and Speaker of the House of Representatives.

**Section 3** amends s. 120.545(10), F.S., to provide that the JAPC may recommend that legislation be introduced to address its objection to an agency rule when the agency has failed to modify, amend, withdraw, or repeal the rule consistent with the objection. The recommended legislation may include the modification of the proposed rule, the suspension of the rule, the repeal of the rule or portion thereof, or the amendment of legislative authority. The bill removes the limitation that the recommended legislation may include only the modification or suspension of the proposed rule, or the amendment or repeal of the rule, or portion thereof.

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<sup>3</sup> Pursuant to s. 120.52(8)(e), F.S., a rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational.

<sup>4</sup> 773 So.2d 594, 599 (Fla. 1<sup>st</sup> DCA 2000).

**Section 4** requires the JAPC to undertake a study of its authority and legislative oversight function, and submit a report of any recommendations for legislation to the President of the Senate and Speaker of the House of Representatives by January 1, 2006.

**Section 5** provides that the act shall take effect July 1, 2005.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The JAPC may incur costs associated with reviewing rule comments submitted by interested parties, in addition to costs associated with undertaking a study of its authority and legislative oversight function, and reporting those findings. Those costs are indeterminate.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The changes to s. 11.60(4), F.S., brought about by section 1 of this bill are exactly the same as changes to that section caused by section 1 of CS/CS/CS/SB 1010, which was read for the third time and passed as amended by the Florida Senate on April 21, 2005.

## **VIII. Summary of Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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