CARLTON FIELDS

The Administrative Procedures Act Amendments of 2012: Repealing Rules, Controlling Rulemaking, and Moving Administrative Notices to the Web

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Early in his first term, Governor Rick Scott announced a goal of reducing the number of rules adopted by state agencies and exercising more direct supervision and control over future rulemaking. The 2012 Legislature took steps toward achieving those goals through its adoption of Committee Substitute for House Bill 7055 ("HB 7055") and House Bill 7029 ("HB 7029"), both of which amend the Administrative Procedures Act ("the APA"), Florida Statutes Chapter 120. A third bill amending the APA, House Bill 541 ("HB 541"), transitions the State to a web-based platform for providing notices of rulemaking, decisions, and other agency actions. While only HB 7029 has been submitted to the Governor for signature at the time of this posting, the Governor is not expected to veto any of the three bills. This article summarizes each bill and provides an analysis of their possible impacts. **HB 7055 (effective July 1, 2012)** Soon after Governor Rick Scott took office, he issued executive orders requiring all agencies under his direct supervision to submit all proposed rules for approval by the Office of Fiscal Accountability and Regulatory Reform ("OFARR"). OFARR is housed within the Executive Office of the Governor. In *Whiley v. Scott*, the majority of the Florida Supreme Court found those executive orders to be in derogation of the separation of powers between the legislative and executive branches. Since agencies' authority to engage in rulemaking is derived from express legislative delegations, the Governor did not have the power to control that rulemaking. The Court acknowledged, however, that the supervision over rulemaking the Governor had attempted through executive orders could be accomplished through either an express delegation from the Legislature or through amendment of the APA. In response, HB 7055 both criticizes the basis upon

which the Supreme Court ruled and enacts both suggested cures identified by the Court. HB 7055 amends the definition of "agency head" to add the statement that an agency head remains subject to the direct supervision of the Governor or other governmental body with the authority to appoint the agency head. For example, the secretary of the Department of Management Services, who is appointed solely by the Governor, remains subject to the Governor's supervision and direction, while the executive director of the Department of Law Enforcement, who is appointed by the Cabinet, remains subject to the Cabinet's supervision and direction. HB 7055 also adds section 120.515 to the APA. That new section expresses the legislative intent that the APA is not intended to limit the authority of the executive branch. The new section also states that the exercise of specific direction and supervision by an appointing authority over an agency head does not constitute a further delegation of authority assigned to the agency head by the Legislature. Variations of this intent are restated elsewhere in HB 7055, through revisions to sections 20.02, 20.03, and 20.05 of the Florida Statutes. The Governor will undoubtedly rely upon HB 7055 to resurrect the requirement that rules proposed for adoption by agencies under his direct supervision be submitted to and approved by OFARR. It remains to be seen whether the Cabinet will follow suit for those agencies that fall under its joint supervision. In addition to this response to the *Whiley* decision, HB 7055 mandates that duplicative, redundant, and unused statutory provisions delegating rulemaking authority are to be removed from Florida Statutes through reviser's bills. A statute granting rulemaking authority is considered "unused" if no rule relying upon the provision is adopted for five or more years after the provision first goes into effect. HB 7055 also repeals a number of such duplicative, redundant, and unused statutes. **HB 7029 (effective upon becoming law)** HB 7029 continues the rule-repealing theme. Specifically, HB 7029 adds new sections 120.536 and 120.555. The former provides for the automatic nullification of a rule or portion of a rule if the statutes implemented by the rule are repealed. When only a portion of a rule loses its statutory authority by repeal, the responsible agency is required to publish notice of rule development within 180 days after the repeal becomes effective in order to remove the nullified language. The effective date of a summary repeal is established by another new section, section 120.555(5). If the agency fails to meet that deadline, the entire rule becomes unenforceable until the notice is published. Section 120.536 further provides that a rule will be treated as being of uncertain enforceability if either of the following occur: 1) the Division of Administrative Hearings invalidates a rule due to the repeal of a statute; or 2) the Joint Administrative Procedure Committee provides notice that the repeal of a statute has created doubt regarding a rule's force and effect. The new section 120.555 creates a procedure for the summary removal of rules from the Florida Administrative Code ("the Code"). The process is initiated by the Department of State ("DOS"). When the DOS doubts whether a rule continues to be in effect, it must request from the responsible agency (of if the agency no longer exists, the Governor) a statement regarding the rule's status. A copy of that request must be published in the Florida Administrative Register ("the Register"). Notably, while HB 7029 refers to the Florida Administrative Weekly, HB 541 changes the name of that publication as discussed below. If the agency fails to respond within 90 days or responds that the rule is no longer in effect, DOS must publish notice in the Register that the rule will be summarily repealed and removed from the Code. Petitions challenging that summary repeal must

be filed within 21 days after notice is published. A rule is considered repealed upon expiration of the 21 days if no petition is filed or, if a petition is filed, upon entry of a decision finding that the rule is no longer in effect. HB 7029 expressly nullifies a significant number of bills that the Legislature considers nullified, including certain rules of the water management districts and several agencies that no longer exist (the Departments of Commerce, Health and Rehabilitative Services, and Labor and Employment Security; the Health Program Office; and the Advisory Council on Intergovernmental Relations). The Departments of Health and Education are directed to determine whether some portions of the nullified rules of the former Department of Health and Rehabilitative Services and the former Department of Labor and Employment Security, respectively, should be reenacted. Both HB 7029 and HB 7055 continue an initiative of both the Legislative leadership and the Governor to reduce the number of rules in the Code and, in particular, to remove unnecessary rules. By providing a summary process for repeal of rules after the authorizing statutes are repealed, the bill provides a streamlined mechanism for the removal of rules that are no longer effective. **HB 541 (effective October 1, 2012)** HB 541 replaces the Florida Administrative Weekly ("the FAW"), the weekly publication long used for all required notices of rulemaking, agency decisions, agency meetings and pending agency proceedings, with the Register. The Florida Statutes will be revised to replace all references to the FAW with references to the Register. Although HB 541 allows DOS to contract with a third party for the publication of a printed version of the Register to be available by subscription, DOS is only required to maintain the Register as an on-line publication. In addition to this difference in format, the Register is to be updated continuously, in contrast to the weekly publication of the FAW. HB 541 also relieves DOS of the obligation to print a hard copy version of the Code. The Code will be maintained as a continuously revised electronic publication, available without charge on DOS's website. The practical effect of these changes is that notices of proposed rules, as well as other notices that commence the running of time periods for filing petitions or taking other steps in response to the noticed agency action, can be "published" on any business day. The FAW, in contrast, was published each Friday, with the exception of Fridays that fell on state holidays. Prior to the adoption of HB 541, the APA required that both the Code and the FAW be published in both a printed format, for which a fee was charged, and in an electronic version that was accessible without charge. By removing the requirement for hard copy versions, HB 541 undoubtedly reduces the costs associated with the publications, without significantly impacting the public. Replacing the once-a-week FAW with the continuously updated Register requires greater diligence by those who monitor agency rulemaking and other actions. For example, one of the deadlines for challenging a proposed rule is currently 20 days after notice of changes to a proposed rule is published in the FAW. Agencies had to file their notices with DOS at least 10 days prior to the date the notice was published. Thus, someone following the development of a rule generally knew when the notice of rulemaking would be published and, if in doubt, had merely to check the FAW each Friday. Since the Register will be continuously posted and revised, a notice of proposed changes could be published at any time, on any day of the week. Consequently, without careful and frequent monitoring of the DOS website, valuable time needed to determine whether to challenge a rule could be lost. Section 120.55(2)(c) continues to require that the DOS provide an automated email notification service through which

subscribers can receive notices relating to subjects designated by the subscriber. With the transition to the Register, that email notification becomes increasingly valuable. However, it is the notice appearing in the Register, rather than any notice received through this email subscription that begins the time periods for initiating administrative challenges or requesting administrative hearings. For example, a subscriber may sign up to be notified on one subject, but not another. That omission may result in the subscriber not receiving an email notification that he or she really needed. Further, the email notification may be delayed due to technical or other reasons. While the email notice may provide a safety net, it will not diminish the importance of carefully monitoring the Register itself.
Resources *Whiley v. Scott,* __ So. 3d __, 2011 WL 3568804 (Fla. Aug. 16, 2011).

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