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Department of Transportation

RULE DEVELOPMENT AND ADOPTION

PURPOSE:

This procedure describes the Department's process for proposing, drafting, and filing new rules, amended rules, or repeals of existing rules under the ***Administrative Procedure Act (Chapter 120, Florida Statutes)***.

AUTHORITY:

Sections 20.23(3)(a) and 334.048(3), Florida Statutes (F.S.)

SCOPE:

All offices involved in rule development.

BACKGROUND:

Rulemaking is a process governed by ***Section 120.54, F.S.***, whereby Department policies and regulatory requirements that meet the definition of a rule as defined in ***Section 120.52, F.S.***, are published and become part of the ***Florida Administrative Code (F.A.C.)***. Although they cannot conflict with statutes, rules have the effect of law. Formal rulemaking is the process whereby rules in the ***F.A.C.*** are adopted, amended, or repealed.

Certain statutes require the adoption of a rule. ***Section 120.54(1)(b), F.S.***, requires the Department to begin development by November 1 and formally propose rules by April 1 of the year following an act of the Legislature requiring the rulemaking, unless the act provides otherwise.

Standard Department forms must be adopted as part of a rule if they must be completed by members of the public and they impose any requirement or solicit any information that is not specifically required by a rule or statute.

All Department rules are found in ***Volume 4, Title 14, F.A.C.***, a current copy of which is kept in the library of the Office of the General Counsel and can be viewed on the Internet

at the Department of State website <http://www.flrules.org/>. **Title 14** of the **F.A.C.** is divided into "chapters" (such as **Chapter 14-10**) and each individual section within a chapter is called a "rule" (such as **Rule 14-10.004**).

NOTE: All time frames stated in this procedure are in calendar days.

1. DETERMINING THE NEED FOR RULE AMENDMENT, ADOPTION, OR REPEAL

1.1 When any office determines that a rule amendment, adoption, or repeal is desired or necessary, a written request for rule amendment, adoption, or repeal should be made to the appropriate office in Central Office responsible for the subject matter involved (responsible office). Rulemaking can involve the adoption of new rules, the amendment or consolidation of existing rules, or the repeal of existing rules. In addition, rulemaking is necessary when changes are proposed to standard Department forms or manuals containing forms that have been incorporated into a rule.

1.2 The responsible office shall determine whether the requested rule amendment, adoption, or repeal is necessary or desired, and shall obtain approval from the appropriate Assistant Secretary prior to pursuing formal rule action. The Administrative Law Section of the Office of the General Counsel will provide advice as to the legal authority to adopt the proposed rule or amendment and as to the existence of rules already covering the same subject matter.

1.3 Pursuant to **Section 120.54(1)(b), F.S.**, when a law is passed which requires implementation by adoption of a rule, such rules shall begin development by November 1 of the year of the legislation and be drafted and formally proposed by April 1 of the following year.

2. DRAFTING PROPOSED RULES, RULE AMENDMENTS, OR RULE REPEALS

2.1 The initial draft of the proposed rule or amendment will be prepared by the responsible office.

2.2 When drafting amendments to a current rule, the latest version of the rule will be obtained from <http://infonet.fdot.gov/facchapter14/>. These rules can be copied and pasted into a usable word processing format.

2.3 New rule text will be underlined. Proposed amendments to a current rule should be typed in double-spaced text, underlining added material and striking through material being deleted. New language should be inserted prior to the language it is replacing. The sequence of sections of a rule can be changed and rules can be completely

rewritten, but each new rule will require a new number assigned. Numbers are assigned according to **Rule 1-1.008, F.A.C.**

2.4 For minor editorial amendments, the new proposed text can be handwritten on a double-spaced text or printed page of the current rule and the Office of the General Counsel will code the rule (type in text and add underlining and strike-through).

2.5 The Chief Counsel of the Administrative Law Section will assign an attorney to review the draft rule for legal authorities, and revise, edit, and format as needed.

2.6 Only the version of the document that existed on the date of the rule adoption will be incorporated into the rule.

NOTE: In the case of incorporation of a federal publication, there is a specific provision that can be used to adopt the federal publication and subsequent amendments under the provisions of **Section 120.54, F.S.** This type of amendment is an exception to the normal rulemaking described in other areas of this procedure. The provisions of **Section 120.54(6), F.S.**, require a special Notice of Rulemaking in the **Florida Administrative Register (F.A.R.)**, a required waiting period to receive written comments, and filing at least 21 days prior to filing the rule with the Department of State. There is no requirement for a Notice of Rule Development. Because these types of amendments merely incorporate an existing federal publication, the amendment can become effective immediately upon filing with the Department of State.

2.7 Department policies and procedures must be consistent with rules.

2.8 Rule language should avoid unnecessarily complex and technical language and should succinctly set out the policy, procedure, or criteria to be applied. When a rule amendment is proposed, the responsible office shall consider whether the current rule should be reorganized or clarified to improve the overall structure and readability of the rule. Rules will be written in plain language.

2.9 In the case of a rule repeal, the actual rule text need not be typed. Instead, the responsible office will identify the rule(s) to be repealed.

2.10 The responsible office will coordinate the draft rule with all appropriate offices, including Central Office and the appropriate District functional area prior to being forwarded to the Administrative Law Section with a written request for the rule adoption, amendment, or repeal. Such coordination will include, at a minimum, informal solicitation of comments regarding potential rule provisions from all Central Office and District offices that implement Department policy in the affected area. All rules with financial implications must be reviewed by the Office of Comptroller. Any related forms or manuals referred to in the proposed new rule or rule amendment will be developed

and approved by the Forms and Procedures Office prior to submission of the rule to the Administrative Law Section.

3. NOTICE OF RULE DEVELOPMENT

3.1 *Section 120.54(2)(a), F.S.*, requires the Department to publish a **Notice of Rule Development** prior to initiating rulemaking for new rules and rule amendments. A **Notice of Rule Development** begins the rulemaking process by advising the public that the Department is at the stage of developing a rule and inviting public participation in the process. A Notice of Rule Development is not required for emergency rules and rule repeals.

3.2 The responsible office may invite the public (particularly those most affected) to be involved in the development of Department rules and regulatory requirements that are intended to be reflected in rules. Normally, meetings with representatives of the public should be held pursuant to noticed public workshops.

3.3 The following procedures apply to publishing a **Notice of Rule Development**:

- (1) Upon request of the responsible office, the Administrative Law Section will prepare a **Notice of Rule Development** for publication in the **F.A.R.** which will comply with the specific format and requirements of **Rule 1-1, F.A.C.** The Administrative Law Section will prepare all notices, obtain approval from the Secretary, and arrange for timely publication in the **F.A.R.**
- (2) The General Counsel will obtain written authorization from the Secretary to publish a **Notice of Rule Development**.
- (3) The **Notice of Rule Development** will be published in the **F.A.R.** not less than 14 days prior to the scheduled date of any workshop listed in the notice and shall indicate the subject area which will be addressed, the agency contact person, and the place, date, and time of any scheduled workshop.

3.4 The **F.A.R. Notice of Rule Development** will include one of the following statements regarding workshops (ALL CAPS):

- (1) Pre-Scheduled, but not held unless requested in writing:
IF REQUESTED IN WRITING AND NOT DEEMED UNNECESSARY BY
THE AGENCY HEAD, A RULE DEVELOPMENT WORKSHOP WILL BE
HELD AT THE TIME, DATE, AND PLACE SHOWN BELOW:
TIME AND DATE:
PLACE(S):

- (2) Opportunity to request, but not scheduled unless requested in writing: IF REQUESTED IN WRITING AND NOT DEEMED UNNECESSARY BY THE AGENCY HEAD, A RULE DEVELOPMENT WORKSHOP WILL BE NOTICED IN THE NEXT AVAILABLE FLORIDA ADMINISTRATIVE REGISTER.
- (3) If a workshop is going to be held even if not requested:
A RULE DEVELOPMENT WORKSHOP WILL BE HELD AT THE TIME, DATE, AND PLACE SHOWN BELOW:
TIME AND DATE:
PLACE:
- (4) If it has been determined by the Secretary that there is no reason to conduct a workshop:
A RULE DEVELOPMENT WORKSHOP HAS BEEN DETERMINED TO BE UNNECESSARY BECAUSE (INSERT REASON).

3.5 The *Notice of Rule Development* will include information on who to contact for a copy of a draft rule that has been developed.

3.6 The rule development process has no deadline for final action and there is flexibility in scheduling events.

4. PUBLIC WORKSHOPS

4.1 The responsible office is also in charge of coordinating the location(s) and timing of the workshop(s) and should work with the Administrative Law Section to identify the time and place for workshops.

4.2 If requested in writing by any affected person, a rule development workshop must be held unless the Secretary explains in writing that such workshops need not be held.

4.3 After receipt of a request for a workshop from any affected person, if the responsible office requests that a workshop not be held, written justification must be provided to the Administrative Law Section. The General Counsel will then make a recommendation on the request to the Secretary.

4.4 If a request for additional workshop locations is filed within 14 days after publication of the *Notice of Rule Development*, the Administrative Law Section will coordinate with the responsible office to schedule and publish notices of additional workshops.

4.5 When a workshop is to be held, the responsible office will coordinate with the Administrative Law Section to ensure that the persons responsible for the rule are in attendance. The workshop should be attended by Department personnel who are able to explain the Department's proposal and respond to questions or comments from members of the public. Copies of any draft rule text, forms, and any other incorporated documents should be available for review at the workshop. An agenda of items for discussion should be developed if rule text has not been drafted.

5. PUBLICATION OF NOTICE OF RULEMAKING

5.1 After a rule is developed with any input received from the public and affected offices, a **Notice of Rulemaking** is published in the **F.A.R.** The Administrative Law Section is responsible for assuring that the proposed rule meets the proper format, style, and numbering requirements, for preparing the proposed rule for publication, and for meeting all deadlines for submission to the **F.A.R.** These requirements and publication submission deadlines are established by the Department of State, Bureau of Administrative Code, in **Chapter 1-1, F.A.C.** The **Notice of Rulemaking** includes a full copy of the rule text and a specific cross-reference to the **Notice of Rule Development**, citing the specific issue of the **F.A.R.** in which the **Notice of Rule Development** was published.

5.2 Rulemaking operates under statutory criteria that set minimum and maximum time frames. A rule must be filed for adoption within 90 days after the **Notice of Rulemaking** is published, unless one or more of the statutory exceptions (discussed in Section 12.1) extends that deadline.

5.3 The responsible office shall provide to the Administrative Law Section copies of all manuals incorporated by reference in the proposed rule for filing with the Joint Administrative Procedures Committee (JAPC) at the time the rule is submitted for publication of the **Notice of Rulemaking** in the **F.A.R.** The official version of forms to be incorporated by reference will be provided by the Forms and Procedures Office upon request from the Administrative Law Section. Any incorporated material that is protected by copyright must be provided with an explanation that copyright laws prevent its distribution in the **F.A.C.**

6. STATEMENT OF ESTIMATED REGULATORY COSTS

6.1 **Section 120.541, F.S.**, requires that a statement of estimated regulatory costs be prepared if a substantially affected person submits a good faith written proposal for lower cost regulatory alternative to the Department within 21 days after publication of the **Notice of Rulemaking** or if the rule is anticipated to increase regulatory cost to small businesses in excess of \$200,000 over the first year or a total of \$1,000,000 over five years. The responsible office shall provide the Administrative Law Section with information

demonstrating whether a **Statement of Estimated Regulatory Costs (SERC)** will be required for the proposed rule. If required, a **SERC** must be completed 21 days prior to the official submittal of the rule for filing with the Department of State.

6.2 Section 120.541, F.S., contains the specific requirements for a **SERC**. Preparation of a **SERC** will require collection of extensive amounts of information from outside sources and in most cases, a survey of affected businesses. If there may be a high level of controversy over a proposed rule, the responsible office should coordinate with the Administrative Law Section at an early date to determine if data should be collected for a **SERC**.

6.3 The Administrative Law Section will coordinate with the responsible office regarding the type of information needed and the manner of collection.

7. JOINT ADMINISTRATIVE PROCEDURES COMMITTEE REVIEW

7.1 At the time the **Notice of Rulemaking** is submitted for publication in **F.A.R.**, the Administrative Law Section will submit copies of the proposed rule, the **SERC** (if required), the detailed statement of justifying facts or circumstances, any incorporated federal rules and regulations, and all forms and manuals incorporated by reference in the rules to the JAPC. JAPC will submit any comments on the proposed rule within 21 days of receipt.

7.2 The Administrative Law Section will address all comments and critiques received from the JAPC staff, and coordinate any required changes with the responsible office.

7.3 If it appears that the comments and critiques received from the JAPC cannot be resolved within the 90-day period established in **Section 120.54, F.S.**, the Office of the General Counsel will request the tolling of the rulemaking process under the provisions of **Section 120.54(3)(e)6., F.S.**

8. PUBLIC HEARING

8.1 Section 120.54, F.S., gives interested persons 21 days from the date of publication of the **Notice of Rulemaking** in the **F.A.R.** to request a public hearing on the proposed rule. The **Notice** published in the **F.A.R.** can provide the date, time, and place for the public hearing established by the Office of the General Counsel with concurrence of the responsible office or provide that a public hearing will be held if requested within 21 days of the publication.

8.2 As **Section 120.54, F.S.**, allows 21 days for affected parties to request a public hearing, the hearing date set forth in the **Notice of Rulemaking** should be approximately one month after the publication of the **Notice of Rulemaking**. The

office responsible for the rule is also responsible for coordinating the scheduling of the rule hearing with the Administrative Law Section.

8.3 If errors are discovered in the notice as published, or last minute changes are required after the notice is sent to the Department of State for publication, it may be necessary to publish a corrected **Notice of Rulemaking**. Publication of a corrected **Notice** will not extend the 90-day time limit and may require that the hearing be rescheduled.

8.4 If a hearing is held, the Office of the General Counsel will conduct the public hearing, but the liaison is responsible for the attendance of the appropriate Department personnel making a presentation or answering technical or procedural questions. This is a non-adversarial hearing. Questions and comments are made a part of the record, but no decisions are made at the time of the hearing.

8.5 When there has been substantial controversy regarding a proposed rule during a rule hearing, it is advisable to provide additional time (usually 14 days) to allow participants to submit additional written comments and proposals. If substantial changes later result, it may be appropriate to consider scheduling additional public hearings to discuss the final proposal. Public dialogue on controversial and complex rulemaking helps reduce conflict and improve the quality of the rulemaking product.

9. RULE CHALLENGES

9.1 A rule challenge is a formal challenge to a rule that is filed with the Division of Administrative Hearings. A rule challenge to a proposed rule can be filed at certain discrete times: 1) within 21 days of publication of the **Notice of Rulemaking**; 2) within 10 days after the final public hearing; 3) within 20 days after a **Notice of Change** is published; and 4) within 20 days after the preparation of a **SERC**. A rule challenge to an adopted or existing rule can be filed at any time.

9.2 If a timely challenge to a proposed rule is filed with the Division of Administrative Hearings, the Department may proceed with all other steps in the rulemaking process. The Department may not file a rule for adoption before the conclusion of the formal proceedings. The burden is on the Department to prove that its proposed rule is not an invalid exercise of delegated legislative authority as defined in **Section 120.52(8), F.S.** If all or part of a proposed rule is determined to be invalid by an Administrative Law Judge, the Department shall give notice of the decision in the first available issue of the **F.A.R.** The Department has the option to withdraw an entire rule if a portion has been ruled invalid.

9.3 When a challenge to an existing rule is filed, the rule remains in effect until the Administrative Law Judge enters a final order finding all or part of the rule to be invalid.

The burden is on the challenger to prove that the Department's existing rule is an invalid exercise of delegated legislative authority as defined in **Section 120.52(8), F.S.**

10. CHANGES TO PROPOSED RULES

10.1 Any changes to the proposed rule supported by the record of the public hearing, in response to written comments received before the hearing, or in response to comments from the JAPC review must be published in the **F.A.R.** The publication of notice of these substantive changes is handled by the Office of the General Counsel. A **Notice of Change** must be published at least 21 days prior to final filing of the rule for adoption. The Department must also provide a copy of the **Notice of Change** to any person who submitted a written request for a **Notice of Change** within 21 days after publication of the **Notice of Rulemaking**.

10.2 Except for published changes to the original **Notice of Rulemaking**, any substantive changes made to a rule after publication of the **Notice of Change** in the **F.A.R.** and prior to final rule adoption must be based upon specific comments presented at the public hearing, in response to written comments received before the public hearing, or as a result of review by the JAPC. Editorial changes (those which do not affect the content or meaning of the rules) need not be based on these criteria. All changes will be submitted to the JAPC at least seven days prior to filing for adoption of the rule, rule amendment, or rule repeal.

10.3 The seven-day advance notice is critical and must be considered. Because of the requirement to publish changes in the **F.A.R.** at least 21 days prior to actual filing for adoption, the 90-day limit for filing can be extended as a result of substantive changes (changes other than purely editorial corrections, such as correction of typographical errors or erroneous authoritative references).

11. RULE ADOPTION

11.1 The Department has a maximum of 90 days from the publication of a **Notice of Rulemaking** in the **F.A.R.** to file a proposed rule for adoption. If the Department fails to file a proposed rule for adoption during this time frame, the proposed rule cannot be filed for adoption and must be withdrawn. The 90-day period is extended in the following manner when the following events occur:

- (1) The deadline is extended by 21 days (to 111 days) when the small business ombudsman timely provides a written proposal for a lower cost regulatory alternative.
- (2) The deadline is extended by 21 days (to 111 days) when a substantially affected person timely submits a written proposal for a lower cost regulatory alternative.

- (3) The deadline is extended to 45 days after publication of a **Notice of Change** when the notice is published before the expiration of the deadline. (Because the notice must be published before the deadline elapses, the deadline will not be extended by a full 45 days.)
- (4) The deadline is extended to 45 days after the adjournment of a public hearing when the notice of that hearing is published before the expiration of the deadline. (Depending on the timing of the hearing itself, the deadline may be extended by more than 45 days.)
- (5) Items 12.1(3) and 12.1(4) can be combined to continually extend the deadline, provided that the notice of hearing or **Notice of Change** is published before the deadline expires.
- (6) When a timely rule challenge is filed, the 90-day period is suspended until a final order is issued by the Administrative Law Judge.
- (7) The Department can elect to suspend rulemaking in response to a potential objection received from the JAPC staff. The 90-day period is tolled until the Department notifies the JAPC of its intent to resume the rulemaking process.

11.2 Filing for Adoption: The Office of the General Counsel prepares the final version of the rules along with the required certifications for filing the rules with the Department of State, including certification of any related forms, procedures, or other documents which are incorporated by reference.

11.3 The Office of the General Counsel will request a final version of any incorporated forms or procedures from the Forms and Procedures Office and will review the specific incorporation by reference language and certification for incorporated documents with that office to ensure that the forms listed in the rule and in the certifications are the same forms actually filed with the Department of State, Bureau of Administrative Code.

11.4 The certification used for the filing of rules is specifically set out in **Chapter 1-1, F.A.C.**, and includes appropriate check blocks to show that all **Administrative Procedure Act** requirements have been fulfilled. The Administrative Law Section is responsible for all coordination with the JAPC staff, including obtaining the final approval certification from JAPC for the final filing.

11.5 The General Counsel will forward a recommendation for final action to the Secretary. The Secretary makes the final decision as to whether to adopt or withdraw a proposed rule and signs all related certifications before the proposed rules, rule amendments, or rule repeals are filed for adoption with the Department of State.

11.6 When the rule is filed with the Department of State for adoption, the Office of the General Counsel will provide the responsible office a stamped copy showing the official filing (date and time filed with the Department of State) and an indication of the projected effective date which is 20 days after filing with the Department of State, unless a later date was specifically indicated when the rule was proposed, or was reflected in a **Notice of Change**. For implementing new or amended procedures related to the rules, the Office of the General Counsel will inform the responsible office of the effective date of the rule. The Office of the General Counsel will update the final version of the rule chapter in the mainframe computer rules database and will provide the responsible office with updated pages from the **F.A.C.**, when published.

11.7 A rule becomes effective 20 days after the official filing, unless a later effective date is set out in the rule.

12. EMERGENCY RULES

12.1 Section 120.54(4), F.S., permits an agency to file an emergency rule, if the agency finds an immediate danger to the public health, safety, or welfare requires emergency action. An emergency rule is only effective for a period of 90 days from the date filed with the Department of State or a later proposed effective date specifically proposed in the notice of emergency rule. Since the emergency rule is only in effect for 90 days, it is essential that the permanent rulemaking process begins at the same time in order to avoid any gaps between the expiration date of the emergency rules and the effective date of the permanent rule adoption. An emergency rule will be extended beyond the 90 days only if there is a timely rule challenge filed in response to the corresponding proposed permanent rule or rule amendment. This provision allows for the application of the emergency rule pending the resolution of the challenge.

12.2 A proposed rule to be filed as an emergency rule must be approved by the Secretary, who certifies an immediate danger to the public health, safety, or welfare.

12.3 The Office of the General Counsel shall review the proposed emergency rule to ensure it is in proper format, shall assure the appropriate documentation is filed and published in order for the rule to take immediate effect, and shall assist the appropriate office in adopting the proposed permanent rule so there is no lapse in the continuous effect of the rule. Because of the 90-day limit, the permanent rule or rule amendment should be submitted for publication of notice at the same time the emergency rule is filed with the Department of State to reduce the possibility of the emergency rule expiring before the permanent rule or rule amendment becomes effective.

13. REQUIRED RULEMAKING FILES AND MONITORING RULES FOR UPDATES AND AMENDMENTS

13.1 The Office of the General Counsel will maintain a master file of all rules of the Department. Independent of the previously outlined review procedure, should the Office of the General Counsel determine a new rule, rule amendment, or rule repeal is necessary, the Office of the General Counsel shall communicate such need in writing to the appropriate office in the Central Office responsible for the policy or subject matter involved. Each office within the Central Office will monitor the rules it administers for necessary amendments. This monitoring includes updating rules to conform to revisions to all materials (forms, manuals, federal standards, other rules) incorporated by reference.

13.2 The responsible office must periodically (at least every two years) review the rules for which it has responsibility, or at the request of the Office of the General Counsel to determine if the rules are still needed, if amendments are necessary, or if it is correct as is and no amendments are required. The responsible office is encouraged to solicit comments from all Department offices (including district offices) that usually implement the rule to determine if there are any amendments that may improve the rule. This review must also include verification that all forms and other referenced documents still are current and useful.

14. INCORPORATION BY REFERENCE

14.1 When forms, manuals, or procedures are used only in conjunction with a rule, future amendments to these documents will not be finalized and distributed for use until incorporated by reference under a subsequent amendment to the rules. This requirement is based upon **Section 120.54(1)(i), F.S.** However, in cases where an interim change is needed because of unique circumstances, such as significant statutory changes, the Forms and Procedures Office may authorize interim release pending rule adoption upon approval of the Administrative Law Section.

15. TRAINING

None required.

16. FORMS

None required