

FLORIDA INSURANCE REPORT

Volume 9, Issue 1

Special Report on Rulemaking

January, 2011

RADEY | THOMAS | YON | CLARK

Attorneys & Counselors at Law



State Agency Rules Under Attack by Governor and Legislature

By Donna E. Blanton

Both newly elected Governor Rick Scott and the Florida Legislature are taking aim at state agency rules, arguing that executive branch agencies are bogging down business and hurting job growth as they fill in the details of legislative acts through formal rulemaking.

On January 4, the same day the Governor was sworn into office, he signed an executive order directing all state agencies reporting to the Governor to indefinitely suspend all rulemaking efforts. He asked agencies not solely under his control to voluntarily comply with the order. Scott also created an Office of Fiscal Accountability and Regulatory Reform to review the approximately 900 rules that have been proposed by state agencies but have not yet been

adopted.¹

Meanwhile, at its organizational session two months ago, the reconstituted Florida Legislature voted to override former Governor Charlie Crist's veto of House Bill 1565, which substantially revises agency rulemaking requirements and provides that the Legislature must ratify any proposed rule that is likely to directly or indirectly increase regulatory costs in excess of \$200,000 within one year after implementation of the rule. The override became effective immediately and froze virtually all pending executive branch rules until the 2011 legislative session.² According to the Legislature's Joint Administrative Procedures Committee, more than 700 proposed rules that were in the adoption pipeline are affected.

Continued on Top of Page 2



Administrative Rulemaking Affecting the Property & Casualty Insurance Industry

By: Travis Miller

Due to Florida's unique structure for insurance regulation, several elected officials or governing bodies are authorized to promulgate administrative rules that affect the insurance industry. The following agencies or organizations frequently pursue administrative rules of interest to insurers::

Office of Insurance Regulation - The Office of Insurance Regulation (OIR) is the primary regulatory body overseeing the insurance industry. The head of OIR for most purposes is the Insurance Commissioner, and the OIR typically has authority to take formal agency actions such as issuing orders. However, the head of the OIR for administrative rulemaking purposes is the Financial Services Commission (FSC). The FSC is a collegial body consisting of the

Cont. on Page 6



Inside this issue:

| | |
|--|---|
| Get to Know... | 4 |
| Spotlight on the Office of Insurance Regulation | 4 |
| Health Law and Insurance Corner | 5 |
| What is the Impact of This? Statement of Regulatory Costs (SERC) | 6 |
| Administrative Rules Regulating the Health Care Industry | 7 |

State Agency Rules - Cont. from Page 1

The combination of these actions has created confusion throughout state government. State agencies are statutorily required to act through formally adopted rules.³ In fact, acting through non-rule policy is forbidden by the Legislature.⁴ Many regulated interests look to agency rules for guidance about how to conduct their businesses and how to stay compliant with broad legislative directives. Rules provide predictability, and many heavily regulated interests are used to participating in the rulemaking process to help shape agency rules.

The Governor and the Legislature, however, have expressed concerns that rules have gotten out of control and are hurting businesses, particularly small businesses. In his Executive Order, Scott wrote that “[n]o profession or occupation should be regulated by the state in a manner that unnecessarily restricts entry into the practice of the profession or occupation, adversely affects the availability of the professional or occupational services to the public, or imposes burdensome costs on businesses.” Ten days later, he said in a radio address that “I signed an executive order to put the brakes on job-killing regulations.”⁵

In a memo to House members before last November’s organizational session, Speaker-designate Dean Cannon, R-Winter Park, said that failure to override Crist’s veto of the legislative ratification bill “will allow executive agencies to continue adopt-

ing administrative rules with significant negative economic impacts at a time when the state’s economy is struggling to recover from the most serious economic downturn.”

The way the Governor’s rules freeze and the Legislature’s rules ratification process will actually work, and how they will affect the day-to-day business of state agencies, is far from certain.

On January 12, legislators learned that the veto override will require legislators to annually ratify about 1,700 proposed agency rules during the 60-day legislative session.⁷ A headline writer for one online blog referred to the endeavor as “a monumental time-suck.”⁸ Rep. Chris Dorworth, R-Lake Mary, is the chair of the new House Rulemaking and Regulation Committee. He said on January 12 that confusion surrounds how the Legislature will ratify rules and how the new legislation will interact with the Governor’s executive order freezing all rulemaking.

“[W]e’re going to see some alignment of this with the executive branch. But there will be growing pains,” he said.⁹

Another legislator pointed out that legislative ratification will result in a long delay in implementing many agency rules. “Since we only meet for 60 days a year, we’ll have to wait until the following year” to ratify rules adopted the previous year, said Rep. Jim Waldman, D-Coconut Creek.¹⁰

These new processes concerning

rules will affect the deadlines for rule-making that are included within chapter 120, the Administrative Procedure Act. Section 120.54(3)(e), Florida Statutes, provides that once rules are formally proposed they must be adopted within 90 days, absent certain circumstances, such as additional public hearings, formal changes to the rules, or rule challenges. If the deadline is not met, the rules must be withdrawn. Section 120.54(1)(b) provides that whenever the Legislature directs an agency to adopt rules, the agency must formally propose them within 180 days. It is not clear how the ratification process or the Governor’s rules freeze will interact with these statutory deadlines.¹¹

The number of proposed rules that will actually make their way to the Legislature for ratification each year depends on how long Scott’s rules freeze remains in place and what his new Office of Fiscal Accountability and Regulatory Reform tells agencies to do with their proposed rules. At this point, the Governor’s Office is still sorting through just what needs to be reviewed. On January 6, the Governor’s General Counsel sent an email to all state agencies under the Governor’s control requesting a list of each agency’s proposed rules currently pending at any stage in the rulemaking process. The list was to include a brief description of the rule,

Continued at top of next page

State Agency Rules - Cont.

its stage in the process, and the next significant date when action was to occur.¹² Agencies were given less than 24 hours to comply.¹³

Within the first few days after Scott signed his executive order freezing rules, indications were that agencies not directly under the Governor's control would voluntarily comply with the order. The general counsel of the Public Service Commission, which is legally a legislative branch agency, was quoted as saying his agency would comply. The general counsel of the Florida Housing Finance Corporation, which is a public-private agency administratively housed within the Governor's Department of Community Affairs but run by a Board of Directors, also expressed intent to comply. But by the end of the Governor's second week in office, independent elected officials who oversee their own agencies were pushing back.

Spokespeople for Attorney General Pam Bondi, Agriculture Commissioner Adam Putnam, and Chief Financial Officer Jeff Atwater – all newly elected Republicans – were quoted in a January 13 *St. Petersburg Times* story as saying they would conduct their own rules review and not submit their rules to the Governor's Office.¹⁴ A spokeswoman for Atwater said his office will review its rules and regulations "following their own standards." Putnam's spokesman was more blunt: "We are not sending our rules to the governor's office. We are

looking at all of our rules internally to make sure they align with the direction the commissioner wants to go with the department." Bondi's office issued a similar statement.¹⁵ Atwater heads the Department of Financial Services. Bondi oversees the Department of Legal Affairs, and Putnam heads the Department of Agriculture.

1. *Not yet clear is whether agencies overseen collectively by the Governor and Cabinet will comply with Scott's executive order. The Financial Services Commission, which consists of the Governor and Cabinet, is responsible for rulemaking for the Office of Insurance Regulation. Other agencies overseen by the Governor and Cabinet include the Department of Revenue, the Department of Highway Safety and Motor Vehicles, and the Florida Department of Law Enforcement. Office of the Governor, Executive Order Number 11-01, January 4, 2011. This order also imposed a freeze on the execution of agency contracts over \$1 million by any agency overseen by the Governor.*
2. *Memorandum to Agency Heads and General Counsels from Scott Boyd, Executive Director & General Counsel, Joint Administrative Procedures Committee, CS/CS/HB 1565 (2010-279, L.O.F.) – Legislative Ratification of Rules, November 17, 2010. The consensus among legislative and agency staff is that almost all rules are likely to have a direct or indirect impact of at least \$200,000 a year on the entities that are regulated.*
3. *§ 120.54(1), Fla. Stat.*
4. *Id.* ("Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.")
5. *Tampabay.com, The Buzz, Here's what Rick Scott wants you to know, January 15, 2011.*
6. *Memorandum to Members of the Florida House of Representatives, from Dean*

Cannon, Speaker-Designate, Information on Special Session, p. 3, November 4, 2010.

7. *Aaron Deslatte, Scott's rules review creates uncertainty, Orlando Sentinel, January 13, 2010.*
8. *Central Florida Political Pulse, Legislative rule review would be monumental time-suck, January 12, 2011.*
9. *Deslatte, supra note 3.*
10. *Id.*
11. *One possibility is that agencies may act more through emergency rulemaking pursuant to section 120.54(4), Florida Statutes. Emergency rules, which require a showing of an immediate danger to the public health, safety, or welfare, are normally effective for only 90 days, but the Legislature in House Bill 1565 exempted emergency rules from the 90-day effective period limitation when an agency has initiated rulemaking to adopt rules addressing the subject of the emergency rules and the proposed rules are awaiting ratification by the Legislature. § 120.54(4)(c)2., Fla. Stat.*
12. *Email memo from Rick Figlio to various state agencies, Executive Order 11-01, Immediate Action Required, January 6, 2011.*
13. *Id.*
14. *Janet Zink, Cabinet to Rick Scott: No, you can't veto our regulations, St. Petersburg Times, January 13, 2011.*
15. *Id.*

Donna is board certified by The Florida Bar in State and Federal Government and Administrative Practice.



GET TO KNOW ...

By Karen Asher-Cohen

BOB PRENTISS Bob is a Senior Attorney at the Office of Insurance Regulation and for the past five years,

has been the Team Leader in charge of rulemaking at the OIR, supervising a team of five attorneys. Bob joined the (then) Florida Department of Insurance in 1993. He grew up in New York and received his undergraduate degree at the University of California - Berkeley, his J.D. at the University of San Francisco, and his Master's degree in Instructional Design at Florida State University.

Recently, I had the opportunity to talk with Bob and asked him the following questions.

How has regulation changed in your time here, if you think it has?

I hear complaints about “over regulation” as evidenced by the overturned veto of the changes to the APA, and Governor Scott putting rules in abeyance, and it makes me wonder if OIR is so different from other agencies, or is this just a backlash on government regulation in general. So many of our rules, it seems to me, are requested by the industry. “Tell us what you want us to do,” is how I interpret the input we receive. And if the industry has problems with something, they tell us, and if we can do it a different way, we do. Plus, there are all the rules that are from the NAIC, which most of the industry supports, since it means there is interstate regulatory consistency. So 95+ % of rulemaking here is pretty non-controversial. And it seems that that is the way it has been since I started doing rules, which was back in the days when Jack Herzog was still here.

What is the best part of your job?

The intellectual stimulation, especially as it relates to learning new things. At this point, new things mean the new federal law involving health care, the PPACA. I work closely with Deputy Commissioner Mary Beth Senkewicz on that.

What is the worst part of your job?

The worst part of my job is the part that I have the most difficulty with, dealing with numbers, because I'm a lawyer, not an actuary or a financial analyst. Luckily for me, we have actuaries and finance people who will take the time to gently bring the lawyers up to speed, as needed.

Do you enjoy the rulemaking part of your job? Is it different than other assignments?

I do enjoy it. The biggest impact is that I am working on rules from all the different products we regulate and all the different types of licensees. The result is, since doing rules, I have been involved in a wider variety of regulation and I have become a lot more well-rounded.

How do you get away from it all?

Photography is my main hobby, but I am also finishing up a book that teaches people how to motivate themselves, and am building a professional speaking career.

Spotlight on the Office of Insurance Regulation

By Karen Asher-Cohen



Recently, I spoke to Monte Stevens, the Director of Government Affairs for the Office of Insurance Regulation, about the status of rulemaking at OIR, given the Governor's Executive Order and recent legislation. Monte provided the following update: there are no rules pending right now. The OIR is in the process of reviewing any rules that need to be brought before the Cabinet, in the manner outlined by the Governor's Office. Once that process is complete, the OIR will consult with the Cabinet Officers of the four Cabinet agencies - the Governor's Office, Department of Financial Services, the Attorney General's Office, and Agriculture - to determine the best course of action going forward.



Health Law and Insurance Corner

By: Tom Crabb

Most Florida Health Insurance Rate Increases Top 10% Making Them Subject To Greater Scrutiny Under ACA Rule Effective July 1

According to a media release from the advocacy group Florida Community Health Action Information Network (“Florida CHAIN”), of 28 health insurance rate increases approved by the Florida Office of Insurance Regulation in 2010 and reviewed by Florida CHAIN, only 3 were for less than 10%. Effective July 1, rate increases over 10% will be subject to a greater level of public awareness and scrutiny. A newly proposed federal rule implementing the federal Affordable Care Act requires insurers seeking rate increases greater than 10% to post notice of the increases on both the insurer’s website and healthcare.gov. Under this new rule, increases over 10% must be reviewed as a potentially unreasonable rate hike. According to the review by Florida CHAIN, the average rate increase among the approved filings was 12.8%. According to its media release, “The rule does not require States to reject proposed rate increases, but will ensure States shine a much brighter light on future increases.”

Florida Senate Moves Forward On Constitutional Amendment Limiting Effect Of ACA In Florida

On January 11, 2011, the Florida Senate Judiciary Committee voted 5 to 1 to approve a resolution by Senate President Mike Haridopolos to put a constitutional amendment to Florida voters limiting the effect of the federal Affordable Care Act. The proposed amendment prohibits “laws or rules from compelling any person, employer, or health care provider to participate in any health care system” and “permits a person or an employer to purchase lawful health care services directly from a health care provider” and makes other similar changes. If approved, the resolution (SJR2) would go to Florida voters in 2012.

Proposed Legislation Consolidates Health-Related State Agencies

At least two bills have already been filed to consolidate the Florida agencies related to health care. Representative Janet Adkins (R-Fernandina Beach) filed a bill that would consolidate the Department of Children and Families, Department of Health, Agency for Health Care Administration, and Agency for Persons With Disabilities into a “Department of Health and Human Services.” Governor Rick Scott has proposed similar consolidating legislation. A bill filed by Senator Ellyn Bogdanoff (R-Fort Lauderdale) would create the Health and Human Services Contract Resource Center, which would consolidate contract management among the health-related departments.

Rule Workshop on Accident and Health Premium Data Collection Cancelled; April 1 Filing Will Use 2009 Templates

The Office of Insurance Regulation cancelled a rule development workshop scheduled for January 18 on Accident and Health Gross Annual Premium (“GAP”) data collection. According to an OIR release, the GAP filing period will resume soon using the same instructions and template that were used for the 2009 calendar year data collection. That filing deadline remains April 1. The OIR apologized for the delay to those who have “advocated for changes and improvement to the GAP data and the data collection process.” Proposed changes already submitted will be considered once the rulemaking process restarts. All administrative rulemaking by the OIR has been temporarily halted at the direction of Governor Rick Scott. The agency head of the Office of Insurance Regulation is the Governor and Cabinet sitting as the Financial Services Commission and the Commission therefore controls OIR rulemaking. According to the OIR, additional filing instructions will be distributed to required filers once the OIR’s electronic portal has been opened to accept GAP filings.



What is the Impact of This? Statement of Regulatory Costs

By: David Yon

Be careful what you ask for...The Florida Legislature enacted HB 1565 during last year's session to give it more direct supervisions of agency rulemaking. The end result is it may have to review as many as 1700 rules. The bill provided for legislative review of administrative rules which are likely to directly or indirectly increase the "regulatory costs" in excess of \$200,000 in the state within the first year after adoption. Donna Blanton provides a great overview of the bill on

page 1. This article focuses on the trigger for that review, the *Statement of Regulatory Costs* (SERC).

Chapter 2010-279 became law after the legislature, in a special session, overrode former Governor Charlie Crist's veto. Existing law mandates that a SERC be prepared by the agency any time a substantially affected person submits a less expensive, good faith written alternative to the proposed rule. The agency must then accept this alternative or explain why it doesn't work. In addition, the new law requires it to determine whether the rule is likely to directly or indirectly increase regulatory costs (not defined) by more than \$200,000 in the aggregate within 1 year after

Continued on Page 8

Administrative Rulemaking - Continued from Page 3

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

When the OIR identifies a need for administrative rulemaking, an OIR representative seeks the FSC's permission to initiate rulemaking. This occurs at meetings of Florida's Cabinet (which consists of all members of the FSC). After the FSC authorizes rulemaking, the OIR conducts the required rule development workshops and public hearings. Subject to any changes made during the rulemaking process, the OIR staff then returns to the FSC to request its final authorization to file the rules for adoption.

As a member of the FSC, the Governor's views of administrative rulemaking will influence the willingness and ability of the OIR to pursue administrative rules, as seen in Karen Asher-Cohen's article on Page 4. However, the FSC consists of two other elected officials who might have different views of the rulemaking process as outlined in Donna Blanton's article in this edition of the *Florida Insurance Report*.

Florida Hurricane Catastrophe Fund - The Florida Hurricane Catastrophe Fund (FHCF) adopts its reimbursement contract and premium formula each year through administrative rules. In addition, the FHCF adopts other requirements such as its exposure data call and loss reporting instructions by rule. The FHCF currently is engaged in rulemaking that would update these requirements, with a rule hearing scheduled for January 25. The FHCF is housed

within Florida's State Board of Administration (SBA). Broadly speaking, the SBA manages state retirement funds and other investment pools. Although the SBA has an executive director, its affairs ultimately are overseen by three trustees--the Governor, the Chief Financial Officer, and the Attorney General. In this regard, the ultimate rulemaking authority for the FHCF rests with the three of the four principals who oversee OIR rulemaking.

Department of Financial Services - The Department of Financial Services (DFS) does not directly regulate insurers but it contains several divisions conducting regulatory functions that relate to the insurance industry. DFS regulates insurance agents, managing general agencies, adjusters and similar licensees. In addition, DFS contains the Division of Rehabilitation and Liquidation for administering insolvencies. DFS also includes the Division of Workers' Compensation.

The state's Chief Financial Officer, Jeff Atwater, is the head of the Department of Financial Services. With a separately elected official, DFS is not subject to the Executive Order released by Governor Scott. However, as noted in Donna Blanton's separate article, CFO Atwater is interested in conducting his own review of agency rulemaking.

Travis Miller is a shareholder with Radey Thomas Yon & Clark. He is board certified by The Florida Bar in State and Federal Government and Administrative Practice.

Administrative Rules Regulating the Health Care Industry

By: Tom Crabb

While the news has recently focused on the federal regulation of health care, health care providers are of course primarily regulated by the State of Florida. Administrative rulemaking relevant to the Florida health care industry is done primarily by the Department of Health and Agency for Health Care Administration.

Department of Health - The Department of Health promotes and protects the health of all Florida residents and visitors through organized state and community efforts. Its mission is succinctly to "promote, protect and improve the health of all people in Florida." Beyond its community health mission, the Department regulates health care professionals through its Division of Medical Quality Assurance. Doctors, nurses, pharmacists, dentists, massage therapists, and opticians are only a few of the professions regulated by the Department.

The agency head of the Department of Health is the State Surgeon General and State Health Officer, who is appointed by the Governor, confirmed by the Senate, and serves at the pleasure of the Governor. As an executive branch agency under the ultimate direction of the Governor, the Department of Health has immediately suspended all rulemaking in the wake of Governor Scott's Executive Order 11-01, affecting dozens of administrative rules which were in various stages of development. Those currently pending rules are on topics including infection

control, eligibility and admission of new licensees, license and other fees, licensure examinations, and the issuance of temporary licenses. As with virtually all other state agencies, much of the day to day work of the Department of Health and the licensees it oversees is directed by administrative rules.

Agency for Health Care Administration - A single sentence on the website of the Agency for Health Care Administration describes just how significant this agency is to the State of Florida as it is the "chief health policy and planning entity for the state . . . primarily responsible for the state's \$18 billion Medicaid program that serves over 2.7 million Floridians, the licensure of the state's 41,000 health care facilities and the sharing of health care data through the Florida Center for Health Information and Policy Analysis."

The head of AHCA is the Secretary of Health Care Administration, who is appointed by the Governor, confirmed by the Senate, and who shall "serve at the pleasure of and report to the Governor." § 20.42, F.S. AHCA rules cover everything from Certificate of Need procedures for hospitals and other facilities to the regulation of nursing homes, surgery centers, and many others.

As an executive branch agency under the direction of the Governor, AHCA too has suspended all rulemaking in compliance with Executive Order 11-01. Pending rules subject to the Order include those relating to standards for care facilities and home health agencies, Medicaid reimbursement, and many others.



Have You Checked Out the Insurance Portal?

Radey Thomas Yon & Clark has an insurance

portal on our website devoted to the latest Florida insurance information. On the portal page you can find:

- the daily news from Florida papers;
- the latest resource documents from the various regulatory agencies we cover;

- the most recent edition of the Florida Insurance Report;
- blogs that cover insurance and political issues; and
- podcasts on current insurance issues

And of course people in your organization can sign up for our Florida Insurance Report. Check out the portal at <http://www.radeylaw.com/insurance/insurance-portal/>

301 South Bronough Street
Suite 200
Tallahassee, FL 32301
850-425-6654 - Phone
850-425-6694 - Fax

Editors &
Contributors

Kendria Ellis*
kellis@radeylaw.com
850-425-6686

Travis Miller
tmiller@radeylaw.com
850-425-6654

David Yon
david@radeylaw.com
850-425-6671

Karen Asher-Cohen
karen@radeylaw.com
850-425-6654

Donna Blanton
dblanton@radeylaw.com
850-425-6654

Tom Crabb
tcraab@radeylaw.com
850-425-6654

* not an attorney

**Would you like an
electronic version of
this publication?**

**Sign up at the
subscription area of our
new website or
e-mail Kendria Ellis at:
kellis@radeylaw.com**

SERC - Continued from Page 6

implementation of the rule. If the rule is likely to exceed this amount, it cannot go into effect until the legislature approves it. Failure to prepare the SERC is a ground to find the rule invalid. A SERC must contain the following about a rule:

An economic analysis showing whether the rule directly or indirectly:

- Is likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of \$1 million in the aggregate within 5 years after the implementation of the rule;
- Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate within 5 years after the implementation of the rule; or
- Is likely to increase regulatory costs, including any transactional costs, in excess of \$1 million in the aggregate within 5 years after the implementation of the rule.

In making this evaluation the SERC must also contain:

- A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule.
- A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the pro-

posed rule, and any anticipated effect on state or local revenues.

- A good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule. As used in this section, "transactional costs" are direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, the cost of monitoring and reporting, and any other costs necessary to comply with the rule.
- An analysis of the impact on small businesses, counties and cities as defined Florida law.
- A description of any regulatory alternatives submitted during the proceedings and either a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule.

If the regulatory costs of complying with the rule exceed the thresholds in paragraph (2)(a), then the rule must be submitted to the President of the Senate and Speaker of the House and may not take effect until it is ratified by the Legislature. The goal of the new SERC requirements are to simplify and reduce the regulatory process. Whether this results in more efficient government remains to be seen.