



**RULEMAKING OVERSIGHT
&
REPEAL
SUBCOMMITTEE
MEETING**

**Thursday, January 24, 2013
10:00 a.m. – 11:00 a.m.**

306 House Office Building

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Rulemaking Oversight & Repeal Subcommittee

Start Date and Time: Thursday, January 24, 2013 10:00 am
End Date and Time: Thursday, January 24, 2013 11:00 am
Location: 306 HOB
Duration: 1.00 hrs

Brief introduction to the Administrative Procedure Act and agency rulemaking, by Subcommittee staff.

Introduction to the role of the Joint Administrative Procedures Committee, by Ken Plante, Coordinator of JAPC.

Presentation on regulatory reform initiatives, 2010 to present, by Patricia Nelson, Governor's Office of Fiscal Accountability and Regulatory Reform.

NOTICE FINALIZED on 01/17/2013 13:30 by Powell.Sonja



FLORIDA HOUSE OF REPRESENTATIVES
Rules & Calendar Committee
Rulemaking Oversight & Repeal Subcommittee

Will Weatherford
Speaker

John Tobia
Chair

AGENDA

Thursday, January 24, 2013

10:00 a.m. – 11:00 a.m.

Room 306

House Office Building

- **Opening Remarks by Chair Tobia**
- **Roll Call by Sonja Powell, CAA**
- **Announcements**
 - **All those wishing to address the committee please fill out and submit the provided Appearance Record.**
 - **Please make sure all electronic devices are turned off or are on silent mode.**
- **Brief introduction to the Administrative Procedure Act and agency rulemaking, by**

Eric Miller,
Subcommittee Staff Attorney

- **Introduction to the role of the Joint Administrative Procedures Committee, by**

Ken Plante,
Coordinator of JAPC

- **Presentation on regulatory reform initiatives, 2010 to present, by**

**Patricia Nelson,
Rules Ombudsman Deputy Director
Governor's Office of Fiscal Accountability and Regulatory Reform (OFARR)**

- **Closing Remarks**

- **Meeting Adjourned**

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ADMINISTRATIVE PROCEDURE ACT BRIEFING OUTLINE

[Overview of APA and administrative rulemaking]

[Some references to J.A.P.C. – role of JAPC will be presented by Ken Plante]

I. What is the Administrative Procedure Act (“APA”)

1. Ch. 120, F.S.
2. **Principle: The Legislature creates programs by substantive statute and directs how those programs are implemented and administered.**
3. The APA provides the uniform *procedures*¹ for agencies to administer substantive programs, including
 - Rulemaking: Adopting rules
 - Permitting and Licensing
 - Enforcement: Imposing a fine or other non-criminal sanction.
- E.g. Ch. 487, F.S., provides DACS with substantive authority to administer the Florida Pesticide Law, including licensing those who apply pesticides and sanctioning violations of the statute.
 - APA provides the *uniform procedure* DACS must follow when exercising its regulatory authority over the pesticide industry.
4. APA provides right to public notice and hearing before an agency takes final action, whether rulemaking, license or permit denial or enforcement.
5. Provides 3 methods under which agencies make binding legal interpretations:
 - **Final Order** – Written final decision by an agency resulting from an APA proceeding and which is not a rule.
 - Pertains only to specific parties named in the case.²
 - **Declaratory Statement** – official agency interpretation of a statute under its jurisdiction based on facts provided by petitioning party.³
 - **Agency rule** – applicable to public generally.⁴
6. Applies to executive agencies as broadly defined by statute⁵
 - Includes all executive branch agencies with statewide jurisdiction
 - Local entities or officers with jurisdiction in more than one county

¹ Section 120.515, F.S.

² Section 120.569(2), F.S.

³ Section 120.565, F.S.

⁴ Section 120.54, F.S.

⁵ Section 120.52(1), F.S.

- Educational units
- Local entities made subject to the APA by special law.⁶
- Excludes most municipalities.

II. Delegated Rulemaking

A. Delegated Authority

1. Often referred to as a “delegation of legislative power.”
2. Rulemaking is the action of an administrative agency to adopt a particular policy that implements or interprets a statute.
3. To adopt a rule the agency must have statutory **Authority & Direction**.
 - a. **Authority:** An express grant of authority to make rules to implement a specific law.⁷
 - Grants may be expressed as, “Rulemaking Authority”⁸ or language which expressly authorizes or requires the agency to "develop", "create", "promulgate" or "adopt" "rules"
 - The grant need not be detailed,⁹ but must clearly apply to the laws to be implemented.
 - b. **Direction:** “Specific Statute to be Implemented”
 - Substantive law an agency must implement.
 - Supplies express guidance for agency to execute the statute.
 - Must provide standards and guidelines for agency exercises of discretion¹⁰
 - Sufficiently specific to preclude the agency from exercising unbridled discretion to create policy or apply the law.¹¹
 - c. **May not create new law, contradict or expand a statute**

B. Rulemaking in practice

⁶ Section 120.52(1), F.S.

⁷ Section 120.52(8) & s. 120.536(1), F.S. *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

⁸ Section 120.52(17), F.S.

⁹ *Save the Manatee Club, Inc.*, supra at 599.

¹⁰ *Florida Dept. of State, etc. v. Martin*, 916 So. 2d 763, 769-770 (Fla. 2005), quoting with approval *Bush v. Schiavo*, 885 So.2d 321 (Fla.2004), cert. denied, 543 U.S. 1121, 125 S.Ct. 1086, 160 L.Ed.2d 1069 (2005).

¹¹ *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

1. Rulemaking is a primary tool agencies use to implement the duties assigned to them by law.
2. Rules have force of law – violations may be sanctioned under agency's substantive law authority.
3. **Rule:**
 - Agency statement of general applicability
 - Interprets, implements, or prescribes law or policy
 - Includes: agency procedure and practice requirements
 - Includes certain types of forms;¹²
 - May amend or repeal an existing rule
 - May set fees, fines or other penalties within ranges authorized by statute
4. **Rulemaking is the non-discretionary, exclusive means to exercise the delegated authority to adopt generally-binding policy.**
 - a. Agencies do not have discretion; must use statutory rulemaking process to establish all binding policies implementing statute.¹³
 - b. The APA definition of a rule encompasses every policy, procedure, or form adopted to implement or interpret a statute if such is applicable to the general public.¹⁴
 - c. No “Invalid exercise of delegated legislative authority:”¹⁵
 - Agency action which exceeds powers, functions, duties delegated by Legislature.
 - d. Rulemaking usually initiated by agency but any person regulated by an agency or substantially interested in a rule may petition for adoption, amendment, or repeal of a rule.¹⁶

5. Rule Adoption

- a. Basic Requirements¹⁷
 - Public notice
 - Opportunity for public comments and submissions
 - Opportunity for hearing on request
 - Right to challenge whether rule exceeds agency’s authority¹⁸

¹² Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

¹³ Section 120.54(1)(a), F.S.

¹⁴ Section 120.52(16), F.S.

¹⁵ Section 120.52(8), F.S.

¹⁶ Section 120.54(7)(a), F.S.

¹⁷ Section 120.54, F.S.

- Trial before Division of Administrative Hearings (DOAH)
- Judicial Review¹⁹

b. Procedure

- Publish Notice of Rule Development in FAR²⁰
 - R D Workshop
 - Negotiated Rulemaking
- Publish Notice of Proposed Rule²¹
 - Publication in the Florida Administrative Register (FAR)²²
 - Submit proposed rule for review by the Joint Administrative Procedures Committee of the Legislature (JAPC)²³
 - Opportunity for public comment
 - Rule Hearing
 - Agency must consider Fiscal/ECONOMIC Impact²⁴
 - If rule will adversely impact small business or increase regulatory costs above a certain amount²⁵ agency must prepare a formal Statement of Estimated Regulatory Costs (SERC).
 - May modify proposal by similar notification as Proposed Rule
- Final Adoption²⁶
 - Completion of all rulemaking requirements.
 - No pending actions or unanswered JAPC objections.
 - Final version filed with Dept. of State
- Effectiveness²⁷
 - Rules do not take effect automatically when adopted.
 - Default effective date: 20 days after filing
 - Some: different date specified by statute or later date stated in the rule notice.

¹⁸ Section 120.56, F.S.

¹⁹ Section 120.68, F.S.

²⁰ Section 120.54(2), F.S.

²¹ Section 120.54(3)(a), F.S.

²² Section 120.55(1)(b), F.S.

²³ Section 120.54(3)(a)4., F.S.

²⁴ Section 120.54(3)(b), F.S.

²⁵ \$200,000 aggregate within 1 year of rule going into effect. Section 120.541(1)(b), F.S.

²⁶ Section 120.54(3)

²⁷ Section 120.54(6)(e)6., F.S.

- Rules with significant economic impact do not take effect until ratified by Legislature.
- Rules challenged in DOAH prior to original effective date do not take effect until validated by DOAH.

6. **Ratification by the Legislature**²⁸

- Added as a rulemaking requirement in 2010.²⁹
- SERC shows rule projected to have certain impacts exceeding \$1 million in the 5 years after rule goes into effect.³⁰
- Agency submits adopted rule to Speaker & President at least 30 days prior to regular session (failing to make this deadline does not keep the Legislature from acting at any time)
- House Process
 - Speaker refers submitted rule to staff of this Subcommittee.
 - Staff logs request, reviews rule, SERC, and rulemaking status.
 - Staff consults with staff of committee/subcommittee with substantive jurisdiction over the program making the rule.
 - If substantive committee/subcommittee chooses to take jurisdiction over the question of ratification, subcommittee monitors.
 - If substantive committee does not wish to act on or object to ratification, Rulemaking Oversight & Repeal Subcommittee may proceed by PCB upon the initiative of the Chair and the approval of the Rules Chair and the Speaker.
 - On approval by Subcommittee, PCB is filed as a general bill, referred to other committees by Speaker.
 - Note: a member may file a ratification bill but should expect Speaker to consider references to both substantive subcommittee and this Subcommittee.
 - Ratification bills are intended to deal with no other subject and amendments to substantive law would most likely be non-germane.

²⁸ Section 120.541(3), F.S.

²⁹ Chapter 2010-279, LOF.

³⁰ Section 120.541(2)(a), F.S.

7. Challenges to Rules

- a. Test legal validity of proposed or existing rule.
 - Before adoption of proposed rule
 - After adoption
- b. Typical challenge:
 - Substantially affected person
 - Legal basis:
 - 1) Rule exceeds or is contrary to specific law being implemented, or
 - 2) Agency lacks authority to adopt the rule.
- c. Challenge may be brought in circuit court either as a declaratory action or as a legal defense to some judicial enforcement of the rule.
- d. APA: administrative challenge
 - More common; faster, less expensive
 - Direct petition filed in DOAH³¹
 - DOAH has final authority in direct challenges.³²
- e. Challenges to “unadopted rules”
 - Agency policy or statement that has the effect of a rule but was not adopted through statutory rulemaking.³³
 - Separate action³⁴ in DOAH or
 - Challenge to agency action which would affect the party’s substantial interests (license or permit denial, imposition of sanctions).³⁵
- f. All administrative challenges – subject to Appellate review.³⁶
8. Incorporating materials/forms by reference: agency must adopt rule incorporating material/form in order to compel use of material/form.³⁷ Purpose: make incorporated material readily available via the internet.
9. Separate statutory procedure for Waiver/Variance of rule in individual cases.³⁸

III. APA Exemptions: s. 120.80, 120.81

³¹ Section 120.56, F.S.

³² Section 120.56(1)(e), F.S.

³³ Section 120.52(20), F.S.

³⁴ Section 120.56(4), F.S.

³⁵ Section 120.57(1)(e), F.S.

³⁶ Section 120.68, F.S.

³⁷ Section 120.54(1)(i), F.S.

³⁸ Section 120.542, F.S.



JOINT ADMINISTRATIVE PROCEDURES COMMITTEE



JOINT ADMINISTRATIVE PROCEDURES COMMITTEE



Rep. Mike Fasano, Chair

Rep. Douglas Vaughn ‘Doug’ Broxson

Rep. Charles David ‘Dave’ Hood, Jr.

Rep. Dave Kerner

Rep. George R. Moraitis, Jr.

Rep. Hazelle P. ‘Hazel’ Rogers

Senator Rene Garcia, Vice Chair

Senator Dwight Bullard

Senator Nancy C. Detert

Senator Miguel Diaz de la Portilla

Senator Geraldine F. ‘Geri’ Thompson

ADMINISTRATIVE PROCEDURE ACT

- **INCREASED PUBLIC PARTICIPATION**
- **INDEPENDENT HEARING PROCESS**
- **JUDICIAL REVIEW**
- **LEGISLATIVE OVERSIGHT COMMITTEE**

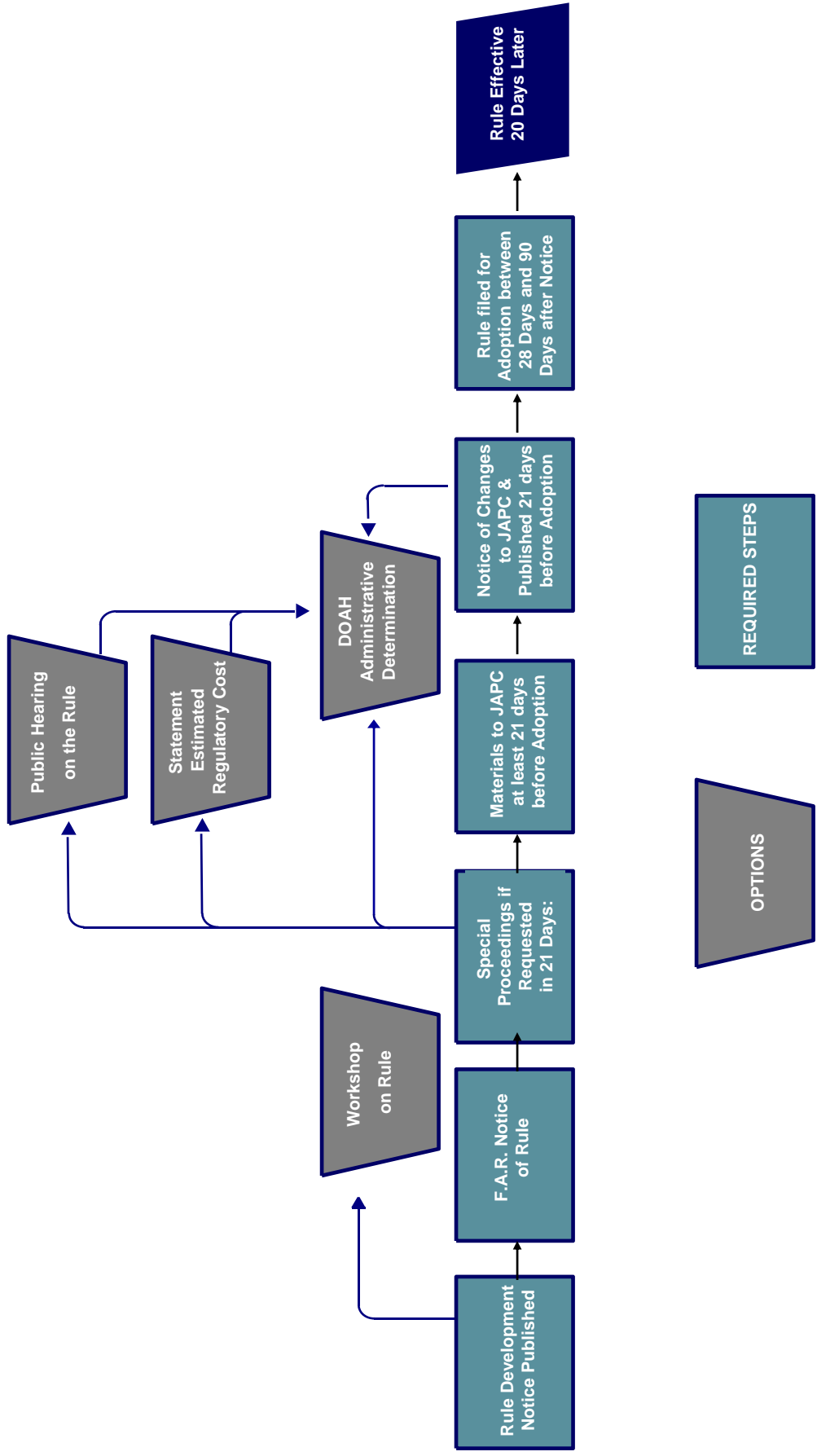
**JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE
(Rule 4.6, Joint Rules of the Florida Legislature)**

- **Maintain a continuous review of administrative rulemaking.**
- **Consult regularly with legislative standing committees regarding the legislative authority for proposed rules.**
- **Maintain a continuous review of statutes that authorize agencies to adopt rules.**

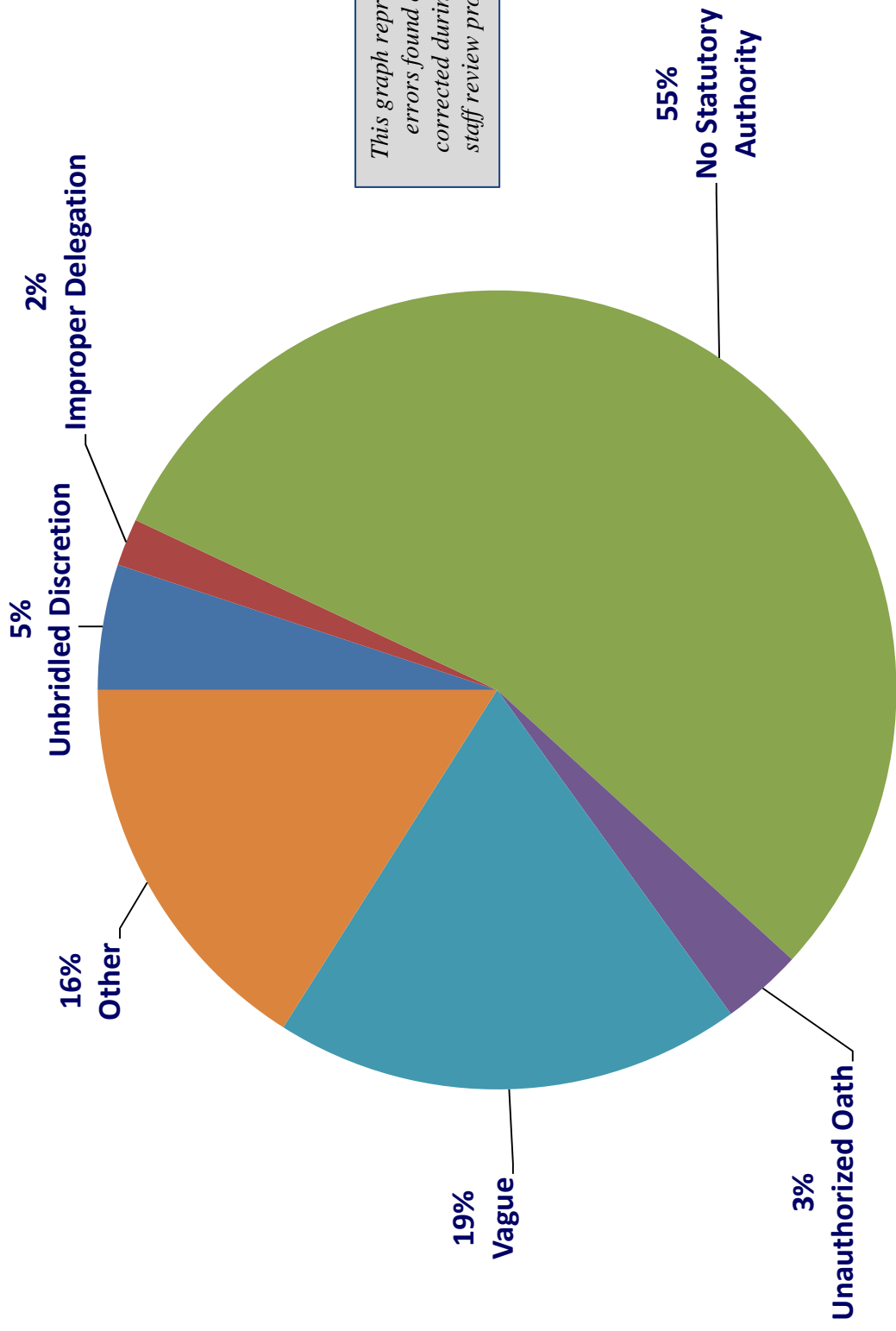
STAFF REVIEW OF PROPOSED RULES (Section 120.545, Florida Statutes)

- **Invalid exercise of delegated legislative authority**
- **Rule is consistent with expressed legislative intent**
- **The statement of estimated regulatory costs (SERC) complies with the requirements of sec. 120.541**
- **Adequate notice was given of the purpose and effect of the rule**
- **The rule is based on specific legislative authority**
- **The rule implements a specific statute**

THE RULE ADOPTION PROCESS

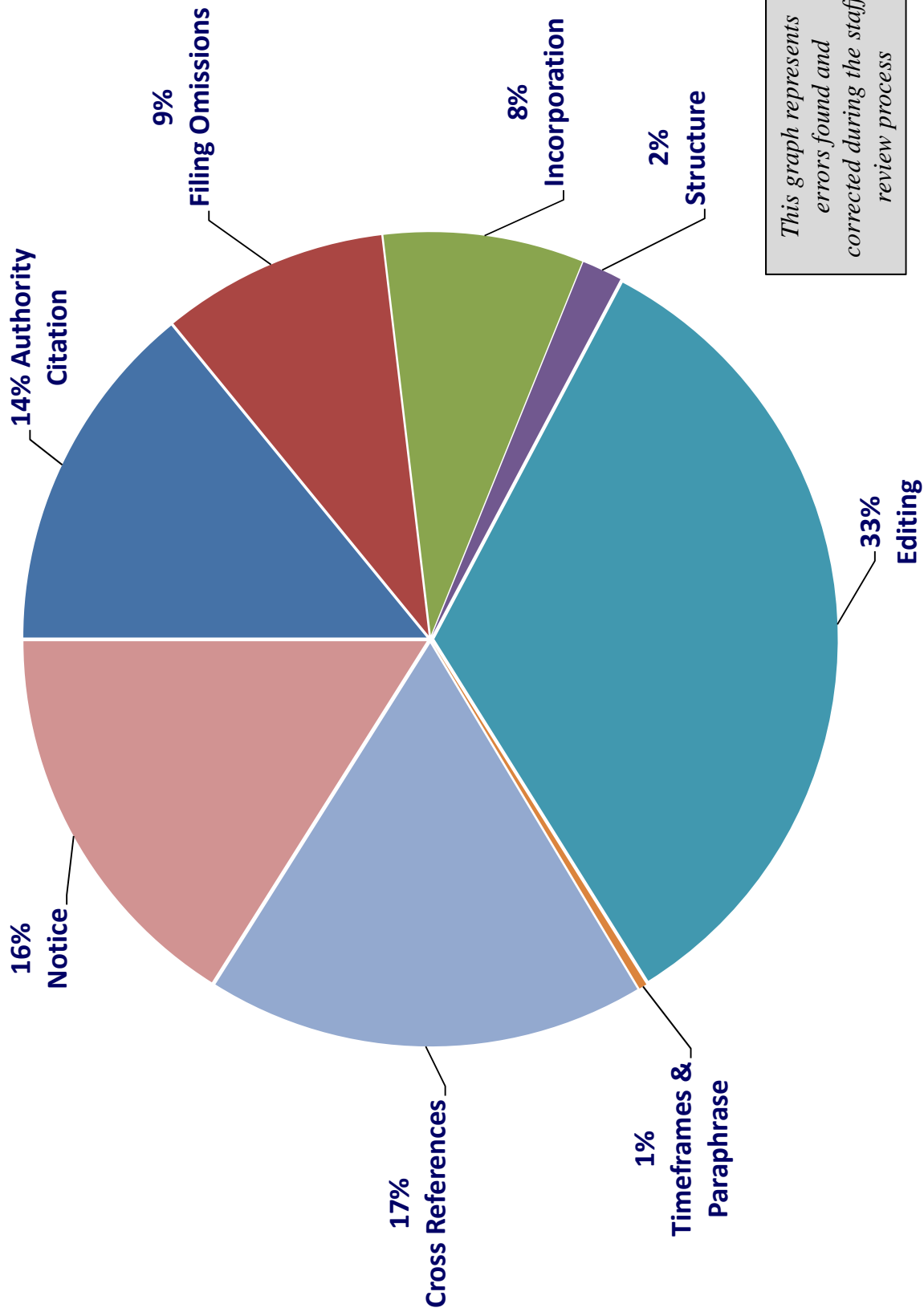


2012 SUBSTANTIVE ERRORS

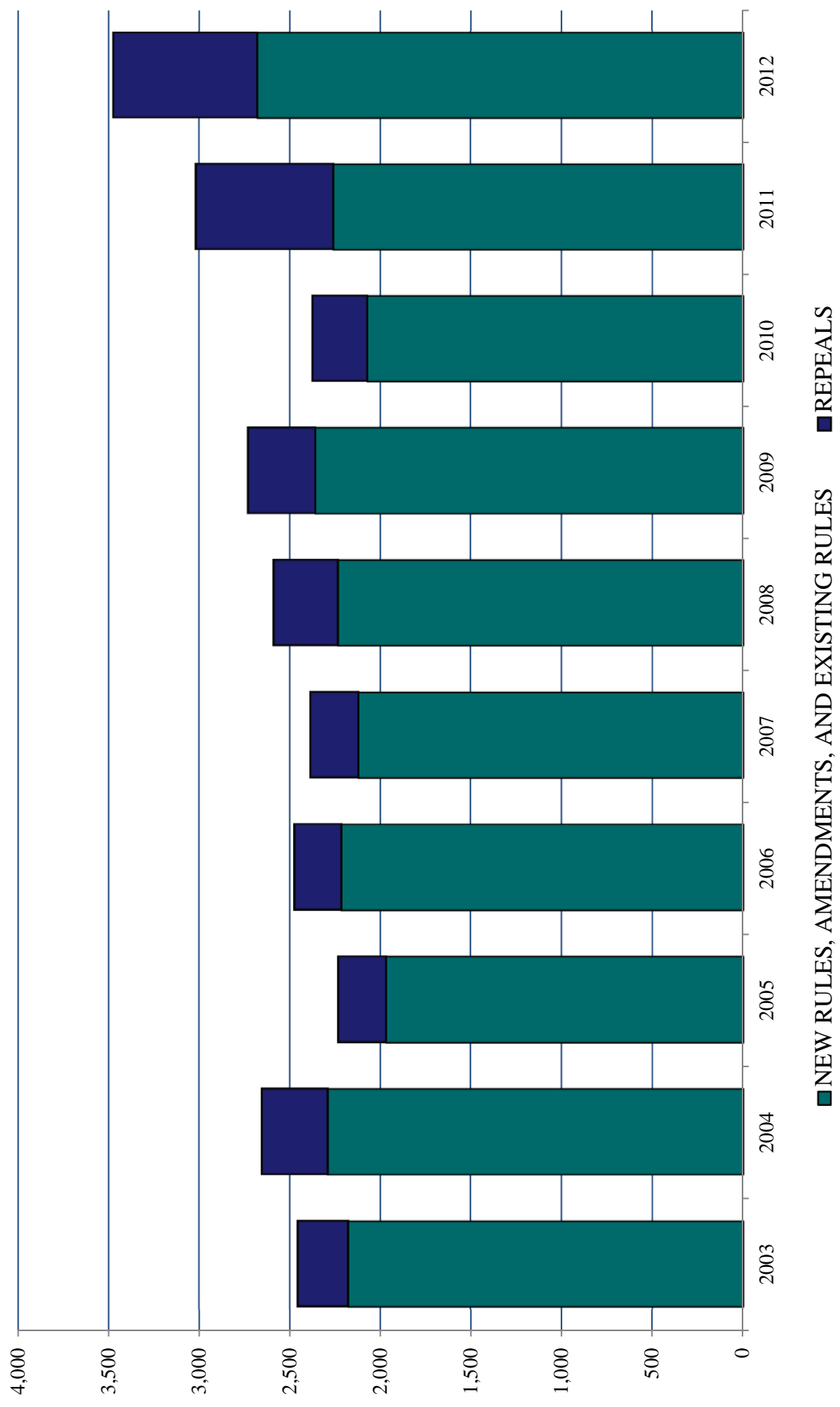


This graph represents errors found and corrected during the staff review process.

2012 TECHNICAL ERRORS



NUMBER OF RULES UNDER REVIEW 2003 - 2012



House Rulemaking Oversight and Repeal Subcommittee
January 24, 2012
Rulemaking Changes 2010 to Present

Presented By:
Patricia Nelson
Rules Ombudsman
Deputy Director
Office of Fiscal Accountability and Regulatory Reform
(OFARR)

I. Chapter 2010-279, Laws of Florida (2010 HB 1565)

- A. Economic Analysis
- B. Legislative Ratification

II. Chapter 2011-225, Laws of Florida (2011 SB 993)

- A. Legislative ratification
- B. Annual regulatory plans
- C. Legislative review of existing rules

III. Chapter 2012-27, Laws of Florida

- A. Small Business Regulatory Advisory Council
- B. Rules Ombudsman

IV. Chapter 2012-31, Laws of Florida

- A. Automatic repeal

V. Chapter 2012-63, Laws of Florida

- A. Rules Ombudsman
- B. Florida Administrative Register

VI. Chapter 2012-116, Laws of Florida

- A. Changes to Chapter 20, F.S.
- B. Changes to Chapter 120, F.S.