

November 2, 2004

Rulemaking Procedure for Board of Governors and State University Boards of Trustees

A. **Background:**

In November 2002, Florida voters passed an amendment to Article IX of the Florida Constitution establishing a system of governance for the state universities. Under the amendment, “a board of trustees shall administer each public university and a board of governors shall govern the state university system.” A component of such governance is Board of Governors and board of trustee rulemaking procedures that provide for appropriate input and are suitable for the state university setting.

Therefore, the Board of Governors has established this procedure for rulemaking by the Board of Governors and state university boards of trustees.

B. **When is rulemaking required?**

1. **Rules Defined.**

This procedure shall apply only to “rules,” which are defined as policy statements of general applicability adopted by the Board of Governors or a state university that implement its powers and duties. They do not apply to the following:

- Internal management memoranda, which are defined as statements that do not affect the private interests of any person and which have no application outside the state university system.
- Legal memoranda, opinions, and guidelines.

- Preparation of the state university system or a state university's budget.
- Negotiated contractual provisions, including those reached as a result of collective bargaining.
- Curriculum and other academic requirements.

2. **Invalid Exercise of Authority.**

Rules must be made pursuant to Article IX, Section 7, of the Florida Constitution and other applicable law. A proposed or existing rule is an invalid exercise of authority if any one of the following applies:

- The Board of Governors or state university has materially failed to follow the rulemaking procedures set forth in this procedure;
- The rule changes, modifies, or contravenes the Board of Governors' or state university board of trustees' authority;
- The rule is vague or vests unbridled discretion in the Board of Governors or state university; or
- The rule is arbitrary or capricious.

3. **Feasibility.**

Rules shall be adopted under the rulemaking procedures provided in this procedure as soon as feasible and practicable. Rulemaking shall be presumed feasible unless:

- The Board of Governors or state university has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;
- Related matters are not sufficiently resolved to enable the Board of Governors or state university to address a statement by rulemaking;
- or
- The Board of Governors or state university is currently using the rulemaking process.

C. General Principles:

This procedure is based on the following principles:

- The Board of Governors and state universities must be able to timely implement new rules and rule changes.
- Rule development should provide opportunity for appropriate input from the state university system community and the public.
- Proposed rules and rule changes as well as adopted rules should be easily accessible to the state university system community and the public.

D. Rulemaking Procedures.

1. Rule development.

Proposed rules, repeal of rules, and rule changes are developed by appropriate staff as designated by the chancellor of the state university system or president of the state university. In the case of state university

rules affecting the faculty, appropriate notice should be provided to the cognizant faculty committees or groups.

2. **Notice.**

Prior to the adoption, amendment, or repeal of any rule, except an emergency rule, the Board of Governors or state university shall give notice of this intended action. The notice shall include the following elements:

- Summary of the proposed rule or amendment;
- The full text of the proposed rule or amendment or instructions on where to view it;
- Reference to the authority for the rule;
- Name of the person or persons originating the rule, the name of the supervisor or person who approved the rule, and the date upon which the proposed rule was approved; and
- Procedure for requesting a public hearing on the proposed rule.

3. **Publication of notice.**

Notice of Board of Governors rulemaking shall be published on the Board of Governors' internet website not less than 30 days prior to the intended action and forwarded to the Office of General Counsel of each state university. Notice of state university rulemaking shall be published on the state university's internet website and forwarded to the Office of the Chancellor of the State University System not less than 30 days prior to the intended action. Notice shall also be made by mail to any person that has

made a request for notices of rulemaking at least 14 days prior to publication.

“Internet website” shall mean a website established and maintained by the Board of Governors and each state university that permits the public to:

- Search notices by type, publication date, or rule number;
- Search a permanent database that archives all notices published on the website; and
- Subscribe to an automated e-mail notification of selected notice types.

4. **Hearing.**

Upon the written request of any person affected by the proposed rule or amendment received within 14 days after the date of publication on the internet website of the intended rule action, the Board of Governors or state university, depending on whether it is a Board of Governors’ or state university rule, shall give the affected person an opportunity to present evidence and arguments on the rule under consideration. If requested by an affected person, the chancellor of the state university system or state university president or designee, depending on whether it is a Board of Governors’ or state university rule, shall schedule a public hearing on the rule. Written comments may also be submitted on or before the date of the public hearing (or deadline for requesting such hearing if no hearing has been requested).

5. **Adoption.**

After the final public hearing on the proposed rule or amendment, or if the rule or rule amendment has not been changed from the published rule or contains only technical changes (changes that do not affect the substance of a rule), the rule or rule amendment may be adopted. No rule or rule amendment may be adopted until 30 days after the notice required in paragraph D3, until 14 days after the notice required in paragraph D6, until 7 days after the public hearing described in paragraph D4, or until the chancellor or chancellor's designee has rendered a decision under paragraph D9, whichever applies. Upon adoption and filing under paragraph D7 of this procedure, the proposed rule or amendment shall become effective unless the effective date is otherwise stated in the rule or amendment.

Any Board of Governors rule, rule amendment, or repeal must be approved by the Board of Governors or designee. Any state university rule, rule amendment, or repeal of a rule must be approved by the Board of Governors or designee and state university board of trustees or designee. If the Board of Governors or designee does not respond within 30 days of the notice required in paragraph D3, the state university rule, rule amendment, or repeal of a rule shall be deemed approved by the Board of Governors or designee.

6. **Modification or withdrawal of proposed rules.**

Any change to a proposed rule or rule amendment, other than a technical change, must be supported by the record of public hearing(s) held on the rule, be in response to written material received on or before the date of the final public hearing (or deadline for requesting such hearing if no hearing has been requested), or be in response to comments made by the chancellor's office. The change must be published on the Board of Governor's or state university's internet website and forwarded to the Office of General Counsel of each state university or the Office of the Chancellor of the State University System, depending on whether it is a Board of Governors' or state university rule.

After notice and prior to the adoption of a rule or rule amendment, the Board of Governors or state university may withdraw the rule or amendment in whole or in part. Notice of such action shall be published on the Board of Governors' or state university's internet website and forwarded to the Office of General Counsel of each state university or the Office of the Chancellor of the State University System, depending on whether it is a Board of Governors' or state university rule.

7. Filing.

A copy of the rule or rule amendment shall be filed when adopted in the office of the chancellor or state university president or designee, depending on whether it is a Board of Governors' or state university rule. At the time

the rule or rule amendment is filed, the chancellor or state university president or designee, depending on whether it is a Board of Governors' or state university rule, shall certify that the requirements set forth in this procedure have been met. The rulemaking record will also be filed with the rule or rule amendment and shall include: all notices, written summaries of hearings, and written comments and responses submitted pursuant to this procedure. Upon filing, the rules or rule amendments shall be published on the Board of Governors' or state university's internet website, depending on whether it is a Board of Governors' or state university rule.

8. Emergency Rules.

An emergency rule may be adopted if there is an immediate danger to the public health, safety, or welfare under a procedure which is fair under the circumstances. The action taken must be only that necessary to protect the public interest in the emergency. At the time of, or prior to, the Board of Governors' or state university's action, it must publish on its internet website the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure is fair under the circumstances.

An emergency rule shall not be effective for a period longer than 90 days and shall not be renewable. However, the Board of Governors or state university may take identical action under the regular rulemaking procedures set forth in this procedure.

9. Rule challenges.

a. General

- (1) Any person who is substantially affected by a rule, proposed rule, or proposed rule amendment may seek an administrative determination of the invalidity of the rule or rule amendment on the ground that the rule or rule amendment is an invalid exercise of authority.

- (2) The petition seeking an administrative determination must state with particularity objections to a rule or the provisions alleged to be an invalid exercise of authority with sufficient explanation of the facts or grounds for the objection or alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it or that the person challenging a proposed rule would be substantially affected by it. If a proposed rule amendment is challenged, the person seeking the determination must show that he or she is substantially affected by the proposed rule amendment.
- (3) A petition challenging a Board of Governors' rule shall be filed with the chancellor of the state university system. A petition challenging a state university rule shall be filed with the state university. Within 10 days after receiving the petition, the chancellor, president of the state university or designee, depending on whether it is a Board of Governors' or state university rule, shall assign a hearing officer who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn or a continuance is granted by agreement of the parties or for good cause shown.
- (4) The failure of the Board of Governors or a state university to follow the rulemaking procedures set forth in this procedure shall be presumed to be material; however, the Board of

Governors or state university may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.

- (5) Within 30 days after the hearing, the hearing officer shall issue a recommended order directed to the chancellor of the state university system. The chancellor of the state university system or the chancellor's designee shall issue a final decision.
- (6) Rule challenge hearings shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. A Board of Governors rule challenge hearing shall be conducted, pursuant to procedures established by the Board of Governors, which shall be promulgated as rules. A state university rule challenge hearing shall be conducted pursuant to procedures established by the state university, which shall be promulgated as rules. The petitioner shall be adverse to the Board of Governors or state university in any rule challenge hearing. Other substantially affected persons may join the proceedings as interveners on appropriate terms which shall not unduly delay the proceedings.
- (7) Sections 9.a.(1) through 9.a.(6) apply to 9.b. through 9.e. except where expressly indicated.

b. Special provisions for challenging proposed rules or rule amendments.

- (1) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule or proposed rule amendment by filing a petition seeking such a determination within 14 days after the date of publication as described in paragraph D3 or paragraph D6 of this procedure. The petitioner has the burden of going forward. The Board of Governors or state university, depending on whether it is a Board of Governors' or state university rule, then has the burden to prove by a preponderance of the evidence that the proposed rule or rule amendment is not an invalid exercise of authority as to the objections raised. Any person who is substantially affected by a change in a proposed rule or rule amendment may seek a determination of the validity of such change. Any person not substantially affected by a rule or rule amendment as initially noticed, but who is substantially affected by the rule or rule amendment as a result of a change, may challenge any provision of the rule or rule amendment and is not limited to challenging the change to the proposed rule or rule amendment.
- (2) After receipt of any recommended order, the chancellor or chancellor's designee, may determine that the proposed rule or rule amendment is wholly or partly invalid. The proposed rule or rule amendment, or provision of a proposed rule or rule

amendment, declared invalid shall be withdrawn and shall not be adopted. Pending the decision, however, the Board of Governors or state university, depending on whether it is a Board of Governors' or state university rule, may proceed with the rulemaking process, including, *inter alia*, the holding of a fact-finding hearing; however, the rule may not be adopted or filed. In the event part of a proposed rule or rule amendment is declared invalid, the Board of Governors or adopting state university, depending on whether it is a Board of Governors' or state university rule, may, in its sole discretion, withdraw the proposed rule or rule amendment in its entirety. The Board of Governors or state university whose proposed rule or rule amendment has been declared invalid in whole or in part shall give notice of the decision on its internet website.

(3) When a substantially affected person seeks determination of the invalidity of a proposed rule or rule amendment, the proposed rule or rule amendment is not presumed to be valid or invalid.

c. Special provisions for challenging existing rules.

(1) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has the burden of proving by a preponderance of the evidence that the existing

rule is an invalid exercise of authority as to the objections raised.

(2) After receipt of any recommended order, the chancellor or chancellor's designee, may determine that all or part of a rule is invalid. The Board of Governors or state university whose rule is declared invalid in whole or in part shall give notice of the decision on its internet website.

d. Special provisions for challenging state university statements as unpromulgated rules.

(1) Any person substantially affected by a statement of the chancellor's office or state university may seek a determination that the statement is not in accord with section B of this procedure. The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule as defined in this procedure and that the Board of Governors or state university has not adopted the statement by these rulemaking procedures.

(2) If a hearing is held and the petition proves the allegations of the petition, the Board of Governors or state university, depending on whether it is a Board of Governors' or state university statement, shall have the burden of proving that

rulemaking is not feasible and practical under paragraph B3 of this procedure.

- (3) After receipt of any recommended order, the chancellor or chancellor's designee may determine that all or part of a statement should have been promulgated as a rule under this procedure. The decision shall be published on the Board of Governors' or state university's internet website, depending on whether it is a Board of Governors' or state university statement, and all reliance on the statement or any substantially similar statement as a basis for action shall be discontinued.
- (4) If, prior to the decision of the chancellor or chancellor's designee, following final hearing to determine whether all or part of a state university statement should have been promulgated as a rule, the Board of Governors or state university publishes proposed rule(s) that address the statement, a presumption is created that the Board of Governors or state university, depending on whether it is a Board of Governors' or state university rule, is acting expeditiously and in good faith to adopt rule(s) that address the statement, and reliance upon the statement or any substantially similar statement as a basis for action shall be permitted.

(5) If the Board of Governors or state university fails to adopt rule(s) that address the statement within 180 days after publishing proposed rule(s), for the purposes of the rule challenge proceeding, a presumption is created that the Board of Governors or state university, depending on whether it is a Board of Governors' or state university statement, is not acting expeditiously and in good faith to adopt rules. If the proposed rules are challenged as an invalid exercise of authority, the 180-day period for adoption of rules is tolled until a final decision is entered in that proceeding. Further, if the proposed rule(s) addressing the challenged statement are determined to be an invalid exercise of authority, the Board of Governors or state university, depending on whether it is a Board of Governors' or state university statement, must immediately discontinue reliance on the statement and any substantially similar statement.

(e) Special provisions for challenging emergency rules

Challenges to the validity of an emergency rule shall be subject to the following time schedule: Within 7 days after receiving the petition, if the petition complies with the requirements of subparagraph 9a(2) above, the chancellor of the state university system, president of the state university or designee shall assign a hearing officer. The hearing officer shall conduct a hearing within 14 days, unless the petition is

withdrawn. Within 10 days of the hearing, the hearing officer shall issue a recommended order directed to the chancellor or chancellor's designee who shall issue a final decision within 10 days of receipt of the recommended order.

(f) Court of law

Final decisions with respect to Board of Governors and state university rule challenges may be challenged in a court of law through an appropriate common law writ only after exhausting all available administrative remedies under this procedure.