

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Judiciary Committee

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BILL: CS/SB 1592

INTRODUCER: Judiciary Committee and Senator Bennett

SUBJECT: Administrative Procedures/Unadopted Rules

DATE: April 19, 2007

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	Favorable
2.	Daniell	Maclure	JU	Fav/CS
3.			TA	
4.				
5.				
6.				

**I. Summary:**

This bill revises provisions in the Administrative Procedure Act, codified in ch. 120, F.S., relating to unadopted agency rules. The bill creates incentives for agencies to adopt rules and for affected persons to challenge unadopted rules by:

- Creating requirements for agency adoption of policy statements as rules;
- Bolstering the ability of the Joint Administrative Procedures Committee to examine unadopted agency rules; and
- Modifying provisions relating to the award of costs and fees in rule challenges.

This bill amends the following sections of the Florida Statutes: 120.52, 120.54, 120.545, 120.56, 120.57, 120.595, and 120.55.

**II. Present Situation:**

**Overview of the Administrative Procedure Act (APA), Ch. 120, F.S.**

Because administrative agencies have been granted extensive investigative, rulemaking, and adjudicating powers, statutes such as the Florida Administrative Procedure Act (APA) have been adopted to provide parties in administrative proceedings with procedural protection and due process.<sup>1</sup> The APA allows individuals who feel that their interests are being or will be affected

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<sup>1</sup> 2 FLA. JUR 2D *Administrative Law* s. 1 (2007).

by the preliminary decisions of agencies to challenge those decisions.<sup>2</sup> The central purpose of the APA is to provide the basic fairness that should surround all governmental activity, such as:

- The opportunity for adequate and full notice of agency activities;
- The right to present viewpoints and to challenge the views of others;
- The right to develop a record which is capable of court review;
- The right to locate precedent and have it applied; and
- The right to know the factual bases and policy reasons for agency action.<sup>3</sup>

The operative provisions of the APA concern only “agencies” as defined in the APA. The term “agency” is defined in s. 120.52(1), F.S., as each:

- State officer and state department, and each departmental unit described in s. 20.04, F.S.<sup>4</sup>
- Authority, including a regional water supply authority.
- Board and commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
- Regional planning agency.
- Multicounty special district with a majority of its governing board comprised of non-elected persons.
- Educational unit.
- Entity described in chs. 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation), F.S., and s. 186.504 (regional planning councils), F.S.
- Other units of government in the state, including counties and municipalities, to the extent they are expressly made subject to the act by general or special law or existing judicial decisions.

The definition also includes the Governor in the exercise of all executive powers other than those derived from the State Constitution.<sup>5</sup>

The Division of Administrative Hearings (DOAH), which consists of an independent group of administrative law judges (ALJs), conducts hearings under ch. 120, F.S., when certain agency decisions, e.g., rules and determinations of a party’s substantial interest, are challenged by substantially affected persons.<sup>6</sup> Proceedings by DOAH are conducted like nonjury trials and are governed by ch. 120, F.S.<sup>7</sup>

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<sup>2</sup> Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, 75 FLA. B.J. 14, 14 (2001); see also 2 FLA. JUR 2D *Administrative Law* s. 5 (2007).

<sup>3</sup> 2 FLA. JUR 2D *Administrative Law* s. 5 (2007) (quoting *Singer Island Civic Ass’n, Inc. v. State Dep’t of Environmental Regulation*, 636 So. 2d 723, 725 (Fla. 4th DCA 1994)).

<sup>4</sup> Section 20.04, F.S., sets the structure of the executive branch of state government.

<sup>5</sup> The definition of agency expressly excludes certain legal entities or organizations found in chs. 361 and 348, F.S., and ss. 339.175 and 163.01(7), F.S.

<sup>6</sup> Rigot, *supra* note 2, at 14.

<sup>7</sup> *Id.*

## The Joint Administrative Procedures Committee and Agency Rulemaking

The APA also provides for legislative oversight of rules. The Joint Administrative Procedures Committee (JAPC or the committee) is created in s. 11.60, F.S., as a legislative check on legislatively created authority as interpreted by executive agencies. The JAPC is a joint standing legislative committee composed of six members, three from the Senate and three from the House of Representatives.<sup>8</sup> The committee is assigned the duty of maintaining a continuous review of administrative rules and the statutory authority on which they are based.<sup>9</sup>

Pursuant to s. 120.52(15), F.S., a “rule” means “each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.” Florida law states that statutory language which grants general rulemaking authority must not be construed to go beyond the implementation or interpretation of any specified powers and duties conferred by the same statute.<sup>10</sup>

Prior to the adoption, amendment, or repeal of any rule, an agency must publish notice of the intended action in the *Florida Administrative Weekly* (FAW) at least 28 days prior to the intended action.<sup>11</sup> The notice shall provide:

- A short, plain explanation of the purpose and effect of the proposed action;
- The full text of the proposed rule or amendment and a summary thereof;
- A reference to the specific rulemaking authority pursuant to which the rule is adopted;
- A reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific;
- A summary of the agency’s statement of the estimated regulatory costs, if one is prepared;
- A statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs must do so in writing within 21 days after publication of the notice; and
- The procedure for requesting a public hearing on the proposed rule.

Section 120.54(3)(a)4., F.S., requires an agency to furnish the following documents to the JAPC at least 21 days prior to rule adoption:

- A copy of the proposed rule;
- A detailed written statement of the facts and circumstances justifying the proposed rule;
- A copy of any statement of estimated regulatory costs that has been prepared pursuant to s. 120.541, F.S.;

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<sup>8</sup> Section 11.60(1), F.S.

<sup>9</sup> Section 11.60(2)(a), F.S.

<sup>10</sup> Section 120.536(1), F.S.

<sup>11</sup> Section 120.54(3)(a)1. and 2., F.S.

- A statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and
- A copy of the notice of intent to adopt, amend, or repeal a rule, as required by s. 120.54(3)(a)1., F.S.

The JAPC will conduct a review of all proposed rules to determine whether:

- The rule is an invalid exercise of delegated legislative authority;
- The statutory authority for the rule has been repealed;
- The rule reiterates or paraphrases statutory material;
- The rule is in proper form;
- The notice given prior to adoption was sufficient to give adequate notice of the purpose and effect of the rule;
- The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements;
- The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements;
- The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule;
- The rule could be made less complex or more easily comprehensible to the general public;
- The rule does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objections;
- The rule will require additional appropriations; and
- If the rule is an emergency rule, there exists an emergency justifying the promulgation of such rule, the agency has exceeded the scope of its statutory authority, and the rule was promulgated in compliance with the requirements and limitations of s. 120.54(4), F.S.<sup>12</sup>

If JAPC objects to a rule, it must certify the objection to the agency within five days of the objection.<sup>13</sup> The committee also must notify the President of the Senate and the Speaker of the House of Representatives of any objection concurrent with certification to the agency.<sup>14</sup>

Upon receipt of the objection, an agency must:

- (a) Modify the proposed rule to meet JAPC's objection;
- (b) Withdraw the proposed rule; or
- (c) Refuse to modify or withdraw the proposed rule.<sup>15</sup>

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<sup>12</sup> Section 120.545(1), F.S.

<sup>13</sup> Section 120.545(2), F.S.

<sup>14</sup> *Id.*

<sup>15</sup> Section 120.545(3), F.S.

If the objection is to an existing rule, the agency must notify the committee that:

- (a) It has elected to amend the rule to meet the objection;
- (b) It has elected to repeal the rule; or
- (c) It refuses to amend or repeal the rule.<sup>16</sup>

Section 120.545(4), F.S., provides that if an agency elects to modify a proposed rule to meet the objection, after modification it must give notice in the first available issue of the FAW. If an agency elects to amend an existing rule to meet an objection, it must notify JAPC in writing and initiate the amendment procedure by giving notice in the next available issue of the FAW. The agency must complete the amendatory process to an existing rule under these circumstances within 90 days.<sup>17</sup>

If the agency refuses to modify, amend, withdraw, or repeal a rule to which JAPC has filed an objection, JAPC must file a detailed notice of its objection with the Department of State (department). The department must publish this notice in the FAW and in the *Florida Administrative Code* (FAC).<sup>18</sup>

The committee may not require the agency to meet its objection. JAPC, however, may seek an administrative or judicial determination that a rule to which it has filed an objection is an invalid exercise of delegated legislative authority.

### **JAPC Reports on Unadopted Rules**

Throughout the history of the Administrative Procedure Act (APA), the Legislature has consistently expressed its preference that agencies adopt their policies pursuant to the rulemaking procedures of ch. 120, F.S.<sup>19</sup> Important goals of the APA, to combat the perception of “phantom government,” were to provide public notice of agency policy, encourage public participation in the formulation of that policy, and ensure legislative oversight of delegated authority.<sup>20</sup>

The judicial response to the APA has been somewhat mixed, and the courts have tended to afford more discretion to agencies in whether or not to adopt policy statements as rules; courts have also narrowed and created exceptions to the definition of a rule.<sup>21</sup> Accordingly, the APA has been amended several times in an attempt to reassert the legislative intent that agencies must adopt their policies pursuant to ch. 120, F.S.

In February 2006, JAPC released a report on unadopted rules, which contained a background and history of unadopted rules, and provided recommendations and proposals for consideration. The report confirmed that the application of unadopted rules by agencies is a legitimate concern;

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<sup>16</sup> *Id.*

<sup>17</sup> Section 120.545(6), F.S.

<sup>18</sup> Section 120.545(9), F.S.

<sup>19</sup> Florida Legislature, Joint Administrative Procedures Committee, *Report on Unadopted Rules*, 1, February 2006 (hereinafter *Report*).

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 1.

however, the underlying cause of the problem and the appropriate means to address it were not readily clear.<sup>22</sup>

JAPC released a Supplement to the Report on Unadopted Rules in February 2007. Research done by JAPC identified at least 130 instances of agency policy statements that appeared to meet the definition of a rule but were not adopted pursuant to the requirements of ch. 120, F.S. The report mentioned the following concerns with the current law:

The current statute provides little incentive for agencies to adopt policy statements as rules until a rule challenge is filed, as there is no “penalty” for failing to adopt the rule earlier. The current statute also provides no incentive for an affected person to spend time and money challenging an unadopted rule, since the challenged policy can still be applied to the person if the agency subsequently initiates rulemaking. Similarly, attorney’s fees and costs are awarded to the petitioner only if a final order is issued, not if the agency initiates rulemaking.<sup>23</sup>

JAPC recommended that the Legislature amend the APA to address the use of unadopted rules by creating more incentives for agencies to adopt rules and incentives for affected persons to challenge unadopted rules.

### **Costs and Attorney’s Fees in Administrative Proceedings**

Section 120.595, F.S., provides for an award of costs and attorney’s fees in certain ch. 120, F.S., proceedings. Currently, an agency may avoid the imposition of attorney’s fees and costs simply by initiating the rulemaking process when a challenge is filed to an unadopted rule pursuant to s. 120.56(4), F.S. However, if the action proceeds, the Administrative Law Judge (ALJ) is required to award a prevailing petitioner reasonable costs and attorney’s fees, unless the agency demonstrates that the statement is required to meet a federal government program requirement or for the receipt of federal funds.

### **III. Effect of Proposed Changes:**

This bill revises provisions in the Administrative Procedure Act (APA), codified in ch. 120, F.S., relating to unadopted agency rules. The bill creates incentives for agencies to adopt rules and for affected persons to challenge unadopted rules by:

- Creating requirements for agency adoption of policy statements as rules;
- Bolstering the ability of the Joint Administrative Procedures Committee (JAPC) to examine unadopted agency rules; and
- Modifying provisions relating to the award of costs and attorney’s fees in rule challenges.

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<sup>22</sup> Florida Legislature, Joint Administrative Procedures Committee, *Supplement to Report on Unadopted Rules*, 1, February 2007 (hereinafter *Supplement to Report*).

<sup>23</sup> *Id.* at 4.

## Section 1. Short Title

### *Present Situation*

Chapter 120, F.S., is known and cited as the “Administrative Procedure Act.” The APA, created in 1974, was intended to combat the perception of “phantom government,” the idea that agency policies were neither widely known nor consistently applied.<sup>24</sup> However, some believe that the APA has not yet eliminated the notion of “phantom government.”<sup>25</sup>

### *Proposed Changes*

The bill provides that, upon enactment, this act may be cited as the “Open Government Act.” It is important to note that the bill is not renaming the APA.

## Section 2. Definitions

### *Present Situation*

The APA requires agencies to adopt as a rule, pursuant to s. 120.54(1)(a), F.S., any agency statement that meets the definition of a rule. Pursuant to s. 120.52(15), F.S., a “rule” means “each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.” The APA definition of a rule is a functional one, meaning that an agency statement is a rule depending upon how it *functions*. Accordingly, if a rule is not adopted, the statement does not cease to be a rule; it simply becomes an “unadopted rule” in violation of ch. 120, F.S., requirements.<sup>26</sup>

Courts and commentators have used the terms “unadopted rule,” “policy,” “nonrule policy,” “incipient policy,” and “incipient rulemaking” interchangeably, which may have contributed to the uncertainty over what agency policy must be promulgated through the rulemaking process.<sup>27</sup>

### *Proposed Changes*

This bill adds a definition for “unadopted rule” to s. 120.52, F.S., which provides definitions for terms used in the APA. “Unadopted rule” means “an agency statement that meets the definition of ‘rule’ but has not been adopted pursuant to the requirements of s. 120.54[, F.S.]”

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<sup>24</sup> *Report, supra* note 19, at 2.

<sup>25</sup> See Donna E. Blanton and Robert M. Rhodes, *Flexibility, Flexibility, Flexibility: The New Variance and Waiver Provision*, 71 FLA. B.J. 35 (March 1997).

<sup>26</sup> *Report, supra* note 19, at 8.

<sup>27</sup> *Id.*

### Section 3. Rulemaking

#### *Present Situation*

Under current law, an affected person is given the opportunity to present evidence and argument on all issues of consideration when a rule is to be adopted, amended, or repealed.<sup>28</sup> A public hearing on the rule must be held if requested by the affected person or at the discretion of the agency.<sup>29</sup>

Section 120.54(3)(e)2., F.S., provides that a rule may not be filed for adoption:

- Less than 28 days or more than 90 days after the notice required by paragraph (a);
- Until 21 days after the notice of change required by paragraph (d);
- Until 14 days after the final public hearing;
- Until 21 days after preparation of a statement of estimated regulatory costs required under s. 120.541, F.S.; or
- Until the administrative law judge has rendered a decision under s. 120.56(2), F.S.

The APA allows anyone who has a substantial interest in an agency rule or who is regulated by such agency to petition the agency to adopt, revise, or repeal a rule. The petition must designate the rule and the action being requested. Within 30 days of receiving the petition, the agency must take one of the following actions:

- Begin rulemaking on the issue;
- Otherwise comply with the requested action; or
- Deny the petition stating in writing its reasons for the denial.<sup>30</sup>

However, if the petition addresses an existing agency statement that has not yet been adopted as a rule, within 30 days the agency must either begin rulemaking or publish a notice in the *Florida Administrative Weekly* (FAW) that it will hold a public hearing on the petition within 30 days of publishing the notice.<sup>31</sup> The purpose of the public hearing is to receive public comments on the unadopted rule and to “consider whether the public interest is served adequately by the application of the rule on a case-by-case basis, as contrasted with its adoption by the rulemaking procedures or requirements [of the APA].”<sup>32</sup>

Within 30 days after the public hearing, the agency is required to either initiate rulemaking or publish a statement of its reasons for not doing so.<sup>33</sup>

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<sup>28</sup> Section 120.54(3)(c)1., F.S.

<sup>29</sup> *Id.*

<sup>30</sup> Section 120.54(7)(a), F.S.

<sup>31</sup> Section 120.54(7)(b), F.S.

<sup>32</sup> *Id.*

<sup>33</sup> Section 120.54(7)(c), F.S.

### *Proposed Changes*

This bill provides that if an agency head is a board or other collegial body, other than one comprised of the Governor and Cabinet, then the agency head may not delegate the responsibility to conduct public hearings pursuant to s. 120.54(3)(c)1., F.S., without the consent of the persons requesting the public hearing.

The bill also provides that if a statement of estimated regulatory costs is prepared pursuant to s. 120.541, F.S., then a rule may not be filed for adoption until the statement is provided to the public and all persons who submitted a lower cost regulatory alternative.

The bill also makes changes to paragraphs (7)(b) and (c) of s. 120.54, F.S, by eliminating the options that allow an agency to:

- Hold public hearings about the action requested in the petition; or
- Publish a statement in the FAW explaining why the agency will not begin rulemaking.

According to a JAPC representative, these options appeared to have never been utilized because the committee never received a filed statement as required under paragraph (7)(c).

### **Section 4. Committee review of agency rules**

#### *Present Situation*

The Joint Administrative Procedures Committee (JAPC or the committee) is statutorily authorized to review proposed agency rules to determine if the rule conforms to the requirements of ch. 120, F.S.<sup>34</sup> The APA authorizes JAPC to request any information from an agency that is reasonably necessary to help it determine if the rule being examined complies with the rule promulgation provisions of ch. 120, F.S.<sup>35</sup> If the committee objects to an agency rule or proposed rule, it must certify the objection to the agency and the agency has several alternatives, depending on the status of the rule.

If the committee objects to a proposed rule, the agency:

- Must modify the rule to address the committee's objection(s);
- Must withdraw the entire rule; or
- May refuse to modify or withdraw the rule.<sup>36</sup>

If the committee objects to an existing rule, the agency must notify the committee that it will:

- Amend the rule to meet the committee's objection(s) and begin amendatory procedures;

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<sup>34</sup> Section 120.545(1), F.S.

<sup>35</sup> Section 120.545(2), F.S.

<sup>36</sup> Section 120.545(3)(a), F.S.

- Repeal the rule and begin repeal procedures; or
- Not amend or repeal the rule.<sup>37</sup>

Section 120.545(4)-(6), F.S., provides instructions to the agency depending on which option listed above the agency takes.

Section 120.545(9), F.S., provides that if an agency refuses to modify, amend, withdraw, or repeal a rule to which the committee has objected, the committee must publish a notice of objection in the FAW. If the rule the committee objects to is published in the Florida Administrative Code (FAC), a reference to the committee's objection must be included in the rule's history note.

If an agency refuses to begin proceedings to modify, amend, withdraw, or repeal a rule, the committee may submit a recommendation to legislative leaders to modify or suspend adoption of a proposed rule or amend or repeal an existing rule.<sup>38</sup> If legislation is to be introduced, the agency must be notified so it can either temporarily suspend the rule or inform the committee in writing that it refuses to temporarily suspend the rule. The APA provides procedures the agency must follow depending on which action the agency takes upon being notified that legislation is to be introduced.<sup>39</sup>

Currently, the APA does not authorize JPAC to object to an agency's unadopted rule or an agency's statement of estimated regulatory costs. There are also no statutory options that apply if the rule is unadopted.

### *Proposed Changes*

This bill amends s. 120.545, F.S., by changing the duties of agencies and the JAPC with respect to rules and review of rules. The bill authorizes JAPC to examine whether a rule's statement of estimated regulatory costs complies with statutory requirements. Furthermore, JAPC is empowered to request from an agency any information necessary to examine an unadopted agency statement, and the bill provides specific measures that must be taken by an agency when JAPC objects to a rule, including an unadopted rule.<sup>40</sup> If the rule is unadopted, the agency must file notice of an intent to adopt the rule, file a notice in the FAW that the agency has abandoned its reliance on the statement as a basis for agency action, or notify JAPC that it refuses to adopt a rule or abandon reliance on the statement.

The bill provides that agency failure to respond to a JAPC objection to a statement of regulatory costs constitutes a refusal to prepare a corrected statement, and agency failure to respond to a committee objection to an unadopted rule constitutes a refusal to adopt a rule and a refusal to abandon reliance upon the statement as a basis for agency action.

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<sup>37</sup> Section 120.545(3)(b), F.S.

<sup>38</sup> Section 120.545(10)(a), F.S.

<sup>39</sup> Section 120.545(10)(b)3. and 4., F.S.

<sup>40</sup> The bill also deletes the terms "proposed rule" and "existing rule" and instead references a rule "not yet in effect" or "in effect."

If JAPC objects to a rule and an agency refuses to adopt or abandon it – in addition to a refusal to modify, amend, withdraw, or repeal such rule as described in current statute – JAPC must file an objection with the Department of State, and if the rule is published in the FAC, a reference to the objection must be published in the history note in the FAW.

The committee may also submit a recommendation to the Legislature that legislation be introduced to address any committee objection. If JAPC votes to recommend the introduction of legislation to address an objection, JAPC may request that the agency suspend reliance upon the statement as a basis for agency action. If JAPC prepares a bill to address its objection, it must comply with the rules of the Legislature. If such a bill fails to become law, temporary agency suspension must expire.

The bill provides that after JAPC certifies an objection to an unadopted rule by an agency, the agency must suspend reliance on the statement, or notify JAPC that it refuses to suspend reliance on the statement. If the agency suspends reliance on the statement, it must give notice of the suspension in the FAW. Failure of an agency to respond to the JAPC certification constitutes failure to suspend reliance on the statement.

## **Section 5. Challenges to rules**

### ***Present Situation***

Section 120.56(2), F.S., authorizes any person substantially affected by a proposed rule to seek an administrative determination of the invalidity of that proposed rule by filing a petition with the Division of Administrative Hearings (division):

- Within 21 days after the date of publication of the notice required by s. 120.54(3)(a), F.S.;
- Within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c), F.S.;
- Within 20 days after the preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, F.S.; or
- Within 20 days after the date of publication of the notice required by s. 120.54(3)(d), F.S.

Section 120.56(4), F.S., authorizes any person substantially affected by an agency statement to file a petition seeking a determination as to whether the statement should have been promulgated as a rule under s. 120.54(1), F.S. The APA provides procedures for considering such a petition.

### ***Proposed Changes***

This bill amends s. 120.56(2), F.S., by revising the third option listed in the “Present Situation” portion of this analysis, providing that any person substantially affected by a proposed rule may file a petition with the division for an administrative determination within 20 days after a statement of estimated regulatory costs has been provided to all persons who submitted a lower cost regulatory alternative and made available to the public.

This bill amends s. 120.56(4), F.S., by modifying those provisions relating to the ability of a person substantially affected by an agency statement to seek an administrative determination that the agency statement is a rule that has not been adopted by the rulemaking procedures. The bill provides that upon the filing of the petition for the administrative determination, the agency must discontinue reliance on the statement as a basis for agency action until:

- The proceeding is dismissed for any reason other than initiation of rulemaking under s. 120.54, F.S.;
- The statement is adopted and becomes effective as a rule;
- A final order is issued determining that the petitioner failed to prove the agency statement constitutes a rule; or
- A final order is issued determining that rulemaking is not feasible or practicable.

However, if the administrative law judge (ALJ) determines that the agency's inability to rely on the contested statement during the proceeding would constitute an immediate danger to the public health, safety, or welfare, the ALJ shall grant the agency's petition to use the statement until the end of the proceeding.

The bill provides that a proceeding to challenge an agency statement defined as a rule may be consolidated with a proceeding to challenge an existing rule.

The bill eliminates language relating to the process to determine whether an agency was acting in good faith to enter into rulemaking.

According to JAPC, under the bill an agency could no longer avoid an adverse ruling simply by initiating the rulemaking process.<sup>41</sup>

## **Section 6. Additional procedures for particular cases**

### ***Present Situation***

The recent report by JPAC noted that early case law granted agencies the option of engaging in "policy by adjudication" but described such a "prove up" option as an incentive to rulemaking. However, instead of requiring an agency to prove up the facts at issue in the course of adjudication as an alternative to adopting policy statements by rule, the statute permitted an agency to prove up the agency policy contained in an unadopted statement.<sup>42</sup>

Specifically, for hearings involving disputed issues of material fact, s. 120.57, F.S., provides that when an agency's action is based on an unadopted rule, such action is not presumed to be valid or invalid until the agency shows that the unadopted rule:

- Is within the powers, functions, and duties given to the agency by the Legislature or the state constitution;
- Does not enlarge, modify, or overcome any specific law that is being implemented;

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<sup>41</sup> *Supplement to Report, supra* note 22, at 4.

<sup>42</sup> *Id.* at 5.

- Is not vague;
- Does not give the agency unrestricted discretion;
- Sets adequate standards for agency decisions;
- Is not arbitrary or capricious;
- Is not applied to an affected party without due notice;
- Does not apply excessive regulatory costs on the affected party.

### ***Proposed Changes***

This bill amends s. 120.57(1)(e), F.S., to repeal existing “prove up” language by providing that agency action that determines the substantial interest of a party may not be based on an unadopted rule. Neither an agency nor an administrative law judge (ALJ) may enforce policy based on an unadopted rule when an agency fails to prove rulemaking is not feasible or practicable. An agency may still forego rulemaking as long as the agency proves up the facts or conduct at issue in each adjudicatory proceeding, rather than proving up the unadopted policy itself.<sup>43</sup>

The bill eliminates the current statutory language enumerated in the “Present Situation” section relating to the showing an agency has to make to establish that an action is valid.

### **Section 7. Attorney’s fees**

#### ***Present Situation***

Under current law, an agency may avoid the imposition of costs by initiating the rulemaking process when a challenge is filed to an unadopted rule.

Current law provides for an award of attorney’s fees to a party or agency depending upon who prevails. However, such judgments for attorney’s fees are capped at \$15,000.

#### ***Proposed Changes***

This bill amends s. 120.595, F.S., by increasing the cap on attorney’s fees that may be awarded against a party in a proceeding to \$50,000.

In a proceeding brought to challenge an agency statement defined as a rule, the administrative law judge (ALJ) must award reasonable costs and attorney’s fees to the petitioner upon entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), F.S., unless the agency demonstrates that the statement is required by the Federal Government.

Even if the agency initiates rulemaking during an unadopted rule challenge and the statement becomes a rule, the ALJ shall award costs and attorney’s fees accrued to the date the agency initiated rulemaking to the petitioner upon a finding that the agency knew or should have known that the statement was an unadopted rule. One factor the ALJ may consider in making this determination is whether or not the petitioner or other person had requested or formally

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<sup>43</sup> *Id.*

petitioned the agency to adopt the statement as a rule prior to the filing of the unadopted rule challenge.

### **Sections 8 and 9. Publication**

#### *Present Situation*

The Department of State is required to compile and continuously revise the FAC.

#### *Proposed Changes*

This bill amends s. 120.55(1)(a), F.S., to conform cross-references to a change that is proposed in section 4 of this bill. Section 8 amends the current statute up to December 31, 2007, and section 9 amends the statute that will be effective December 31, 2007, pursuant to section 4 of ch. 2006-82, L.O.F.

### **Section 10. Effective date**

Except as otherwise expressly provided in this act, this act shall take effect July 1, 2007.

## **IV. Constitutional Issues:**

### A. Municipality/County Mandates Restrictions:

None.

### B. Public Records/Open Meetings Issues:

None.

### C. Trust Funds Restrictions:

None.

## **V. Economic Impact and Fiscal Note:**

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

The bill appears to provide incentives for people to challenge unadopted rules by eliminating those provisions that currently allow an agency to initiate the rulemaking process and avoid any sanctions. Additionally, the bill provides for the award of costs and attorney's fees against the agency, unless the agency prevails.

**C. Government Sector Impact:**

Agencies that have not adopted as rules those agency statements that should be adopted pursuant to ch. 120, F.S., may incur administrative costs associated with the rulemaking process. Those costs are indeterminate, and should be minimal. Agencies that lose in a proceeding challenging an agency statement not adopted as a rule may be liable for costs and attorney's fees. Those costs can be avoided by complying with the new provisions concerning unadopted rules, and may be offset across all agencies by the effect of the provision deleting the cap on attorney's fees that can be awarded to an agency if an ALJ determines that a party participated for an improper purpose in a proceeding challenging a proposed agency rule, or an existing agency rule.

**VI. Technical Deficiencies:**

The bill provides that its provisions may be cited as the "Open Government Act"; however, the title of the bill makes no reference to the provision of a short title.

**VII. Related Issues:**

None.



## **VIII. Summary of Amendments:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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