



THE FLORIDA LEGISLATURE



# JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

**2018 Annual Report**

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BILL GALVANO  
President



Representative Erin Grall, Chair  
Senator Linda Stewart, Vice Chair  
Senator Janet Cruz  
Senator Ed Hooper  
Senator Keith Perry  
Senator Tom A. Wright  
Representative Vance Arthur Aloupis, Jr.  
Representative James "J.W." Grant  
Representative Brett Thomas Hage  
Representative Cindy Polo  
Representative Holly Raschein  
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JOSE R. OLIVA  
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THE FLORIDA LEGISLATURE  
**JOINT ADMINISTRATIVE  
PROCEDURES COMMITTEE**

March 8, 2019

Honorable Bill Galvano  
President, Florida Senate  
The Capitol, Room 409  
Tallahassee, Florida 32399-1100

Honorable Jose R. Oliva  
Speaker, House of Representatives  
The Capitol, Room 420  
Tallahassee, Florida 32399-1300

Mr. President and Mr. Speaker:

Pursuant to Rule 4.6(6) of the Joint Rules of the Florida Legislature, we are pleased to submit to the Legislature the Joint Administrative Procedures Committee annual report, covering January 1, 2018 through December 31, 2018.

Sincerely,

A handwritten signature in blue ink that reads "Erin Grall".

Erin Grall  
Representative, District 54  
Chair

A handwritten signature in blue ink that reads "Linda Stewart".

Linda Stewart  
Senator, District 13  
Vice-Chair

Enclosure

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# **JOINT ADMINISTRATIVE PROCEDURES COMMITTEE MEMBERS**



**Representative Erin Grall, Chair**  
**Representative Vance Arthur Aloupis, Jr.**  
**Representative James “J.W.” Grant**  
**Representative Brett Thomas Hage**  
**Representative Cindy Polo**  
**Representative Holly Raschein**  
**Representative Clovis Watson, Jr.**

**Senator Linda Stewart, Vice Chair**  
**Senator Janet Cruz**  
**Senator Ed Hooper**  
**Senator Keith Perry**  
**Senator Tom A. Wright**



## THE JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

The Joint Administrative Procedures Committee is a standing committee of the Legislature created by Joint Rule Four of the Florida Legislature.

***The committee is composed of twelve members, five from the Senate, appointed by the President of the Senate, and seven from the House of Representatives, appointed by the Speaker of the House.***

The Chair of the committee is designated by the President of the Senate in odd-numbered years and by the Speaker of the House in even-numbered years. The committee staff is headed by a Coordinator, and includes reviewing attorneys and administrative support staff.

The committee is required to report annually to the Legislature. This report is published at the start of the regular session and covers the preceding calendar year. It contains statistical information regarding rulemaking in the various state agencies as well as summaries of all objections voted by the committee during the preceding year.

The committee maintains a continuous review of the statutory authority upon which each administrative rule is based and notifies the agency if its authority is eliminated or significantly changed by repeal, amendment, or decision of a court of last resort. Following each session of the Legislature, the committee reviews each law signed by the Governor or allowed to become law without his

signature and determines whether the law will have a probable effect on an agency's rules. If so, the affected agency is notified.

If the reviewing attorneys have concerns that a proposed or existing rule may not be authorized or exceeds the delegated rulemaking authority, the agency is contacted. Often, the agency agrees that there is no authority for the rule and withdraws or amends the rule to meet the staff concerns. If there is disagreement about whether or not there is authority for the rule, the rule is scheduled for consideration by the full committee. The agency may appear before the committee

and present argument and evidence in support of its rule. If, after hearing the agency's argument, the committee does not find statutory authority for the rule, an objection is voted and the agency has a period defined by statute in which to respond. If the agency refuses to modify or withdraw a rule to which

the committee has objected, public notice of the objection is given and a notation accompanies the rule when it is published in the Florida Administrative Code.

In the event that an agency fails to initiate administrative action to meet an objection voted by the committee, the committee is authorized to submit to the President of the Senate and Speaker of the House a recommendation that legislation be introduced to modify or suspend the adoption of a proposed rule, or amend or repeal an existing rule. If the



committee votes to recommend the introduction of legislation, the committee is required to notify the agency of its action, and may request that the agency temporarily suspend the rule or suspend the adoption of a proposed rule, pending consideration of proposed legislation during the next regular session of the Legislature. The agency must respond to the committee within a specified time either by temporarily suspending the rule or suspending the adoption of a proposed rule, or by notifying the committee that it refuses to suspend the rule or rule adoption. The committee is required to prepare bills to modify or suspend the adoption of a proposed rule, or to amend or repeal an existing rule, in accordance with rules of the Senate and the House of Representatives for introduction in the next regular legislative session. The proposed bill is presented to the Senate President and House Speaker along with the committee recommendation.

***The committee constantly monitors judicial decisions in administrative law and advises the agency when either its statutory rulemaking authority or its rules are affected by these decisions.***

The committee has a duty to recommend needed changes in the Administrative Procedure Act (APA) to the Legislature. These recommendations may be based upon its review of judicial decisions as well as its daily interaction with executive agencies and with citizens as they participate in the administrative procedures of the state. In the 2018 legislative session, the committee made no recommendations relating to Chapter

120, F.S., and there were no revisions to the APA.

Joint Rule 4.6 directs the committee to undertake and maintain a systematic and continuous review of the Florida Statutes that authorize agencies to adopt rules, and to make recommendations to the appropriate standing committees of the Senate and the House of Representatives as to the advisability of considering changes to the delegated legislative authority to adopt rules in specific circumstances. The committee made no recommendations relating to rulemaking authority in 2018.

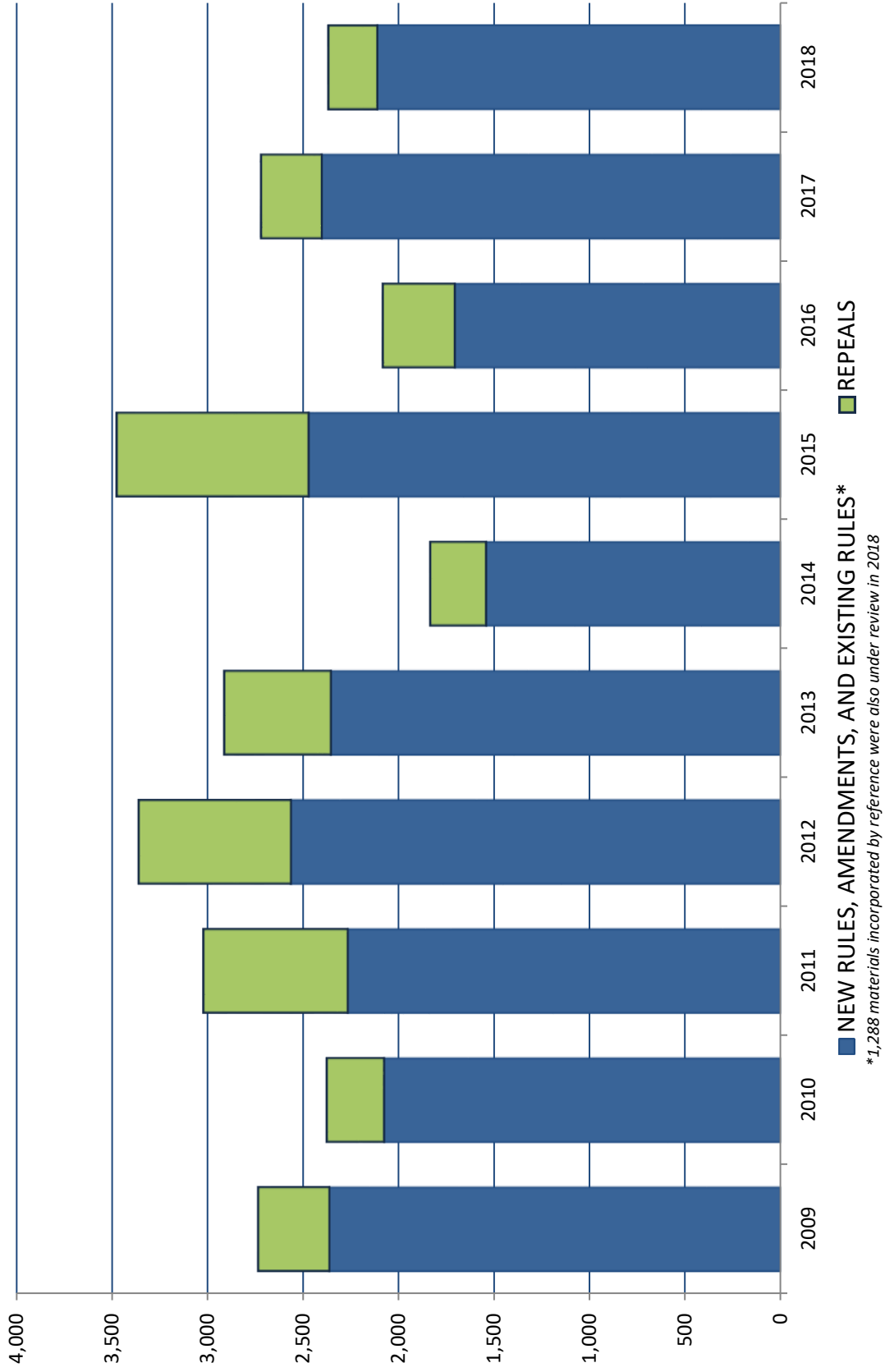
The committee has long had standing to seek judicial review of the validity of any rule to which it has objected and which has not been modified or repealed to meet the objection. To date, the committee has never found it necessary to exercise this power. Before judicial review, the committee must first notify the head of the agency involved and the Governor and provide an opportunity for consultation with the committee. If the issue cannot be resolved in this manner, the committee may bring an action in the appropriate court asking that the rule be declared invalid.

***Thus, the committee performs services for the Legislature, the administrative agencies of the state and the people whom they regulate.***



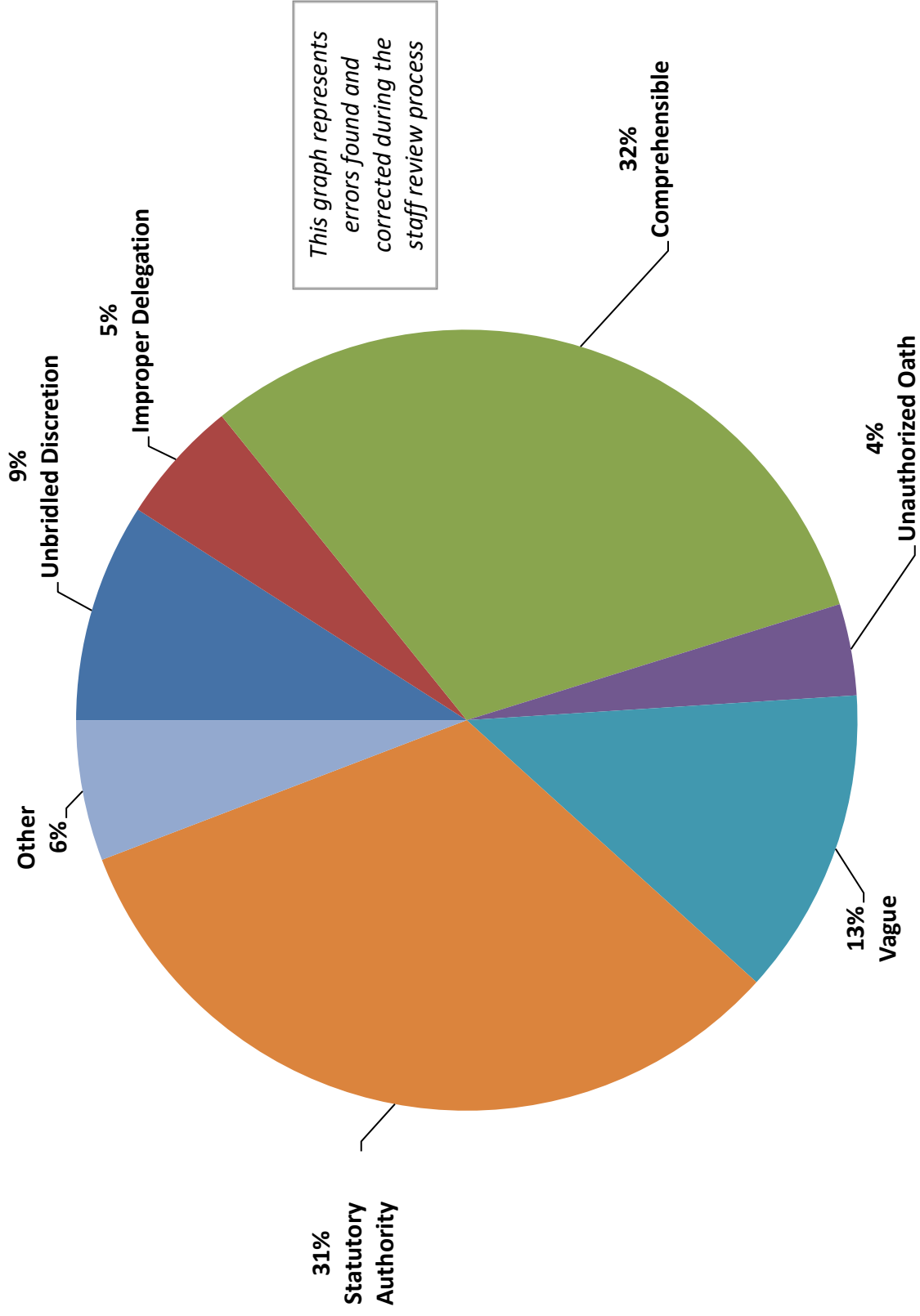
# **Statistical Information on Committee Review of Rules**

# NUMBER OF RULES UNDER REVIEW 2009 - 2018

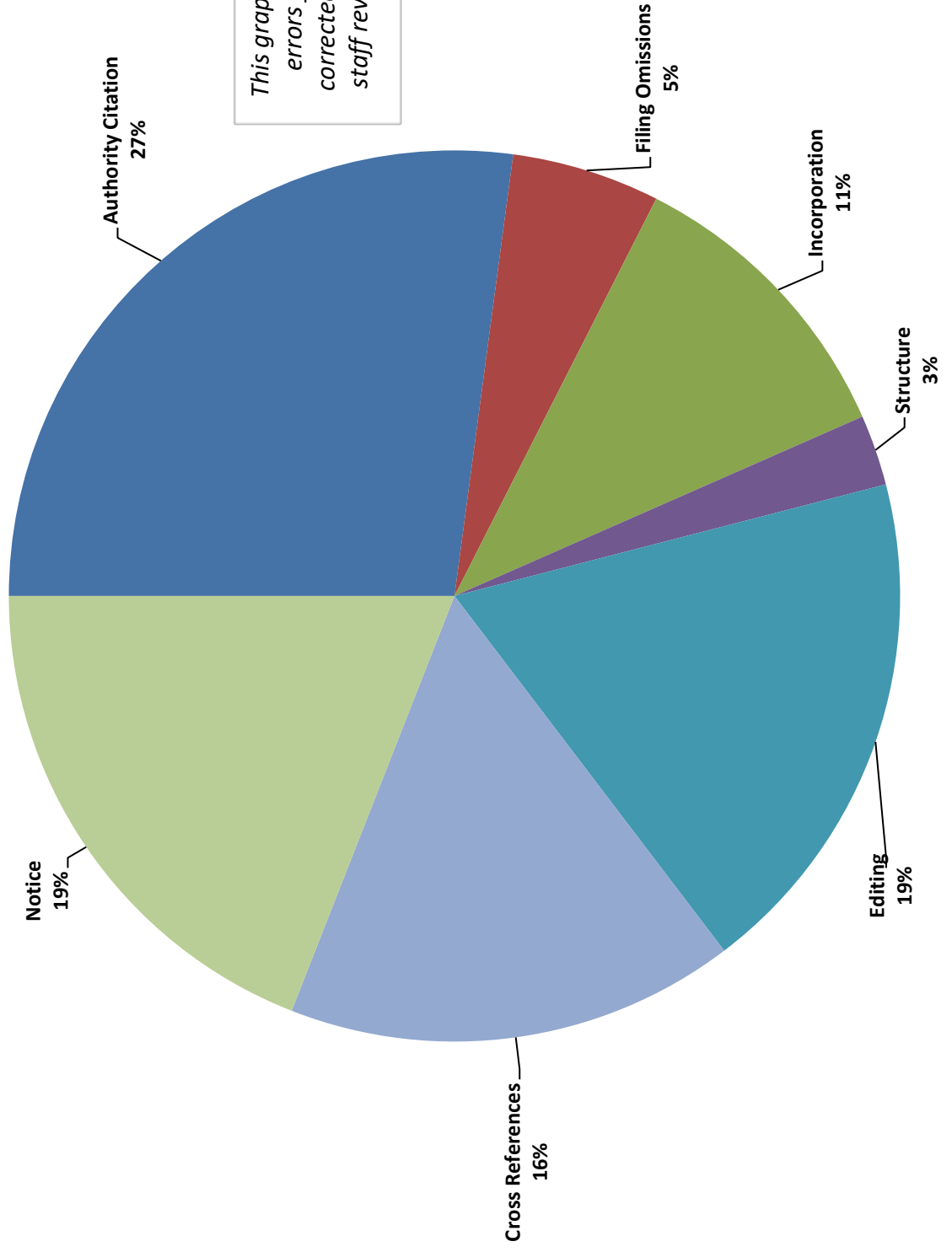




# TYPES OF SUBSTANTIVE ERRORS - 2018



# TYPES OF TECHNICAL ERRORS - 2018





# Proposed Rules (2009 - 2018)

# PROPOSED RULES 2009 THROUGH 2018

CHPT #	AGENCY	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	TOTAL
01	State	36	17	14	18	25	14	52	18	12	11	217
02	Legal Affairs	4	18	5	4	15	12	34	9	17	8	126
05	Agriculture and Consumer Services	69	101	49	46	99	147	54	92	167	108	932
06	Education	144	72	78	117	84	107	109	130	105	90	1036
09	Community Affairs*	58	34	88	0	0	0	0	0	0	0	180
11	Law Enforcement	33	27	0	87	0	30	35	35	34	29	310
12	Revenue	136	59	69	50	160	29	129	29	67	52	780
14	Transportation	78	95	10	20	27	14	64	18	18	40	384
15	Highway Safety and Motor Vehicles	43	68	2	137	2	24	2	2	26	0	306
16	Natural Resources*	0	0	9	0	0	0	0	0	0	0	9
18	Board of Trustees of the Internal Improvement Trust Fund	22	8	8	3	4	0	10	2	0	20	77
19	State Board of Administration	35	42	29	52	47	51	28	39	18	13	354
20	Citrus	1	11	35	54	4	9	37	4	25	78	258
23	Florida Parole Commission	29	0	0	25	14	6	2	0	20	2	98
25	Public Service Commission	43	5	67	67	14	19	25	13	9	11	273
27	Executive Office of the Governor	8	24	10	0	14	0	1	0	0	1	58
28	Administration Commission	0	7	0	46	52	0	17	0	0	0	122

# PROPOSED RULES 2009 THROUGH 2018

CHPT #	AGENCY	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	TOTAL
29	Regional Planning Councils	0	0	2	8	5	0	0	0	0	3	18
32	Florida State Fair Authority	6	0	0	0	0	0	0	0	0	0	6
33	Corrections	40	85	42	79	55	44	9	21	26	19	420
34	Commission on Ethics	1	12	13	10	34	21	48	10	6	4	159
35	Metropolitan Planning Organizations	0	0	0	0	0	9	0	0	0	0	9
40	Water Management Districts	161	110	89	136	493	109	211	72	32	66	1479
41	Commission for the Transportation Disadvantaged	3	0	0	5	1	0	2	0	1	3	15
42	Florida Land and Water Adjudicatory Commission	12	3	10	3	7	0	4	2	2	11	54
49	Regional Utility Authorities	0	9	1	0	0	17	0	0	0	0	27
53	Lottery	1	0	2	66	3	0	65	1	1	0	139
54	Interlocal Agencies	0	1	0	0	0	0	0	0	0	0	1
55	Veterans' Affairs	3	3	0	0	0	3	36	10	4	0	59
57	Space Florida	3	0	0	0	0	0	0	0	0	0	3
58	Elder Affairs	34	15	17	26	26	0	20	14	3	13	168
59	Agency for Health Care Administration	164	83	19	108	73	108	76	126	73	100	930
60	Management Services	39	114	97	88	42	42	125	68	134	18	767
61	Business and Professional Regulation	275	160	135	322	247	114	270	175	182	119	1999

# PROPOSED RULES 2009 THROUGH 2018

CHPT #	AGENCY	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	TOTAL
62	Environmental Protection	194	91	359	144	307	129	175	159	38	124	1720
63	Juvenile Justice	26	157	7	1	131	4	57	4	16	15	418
64	Health	515	310	185	275	289	254	510	399	226	284	3247
65	Children and Families	81	86	12	78	86	63	259	90	115	101	971
66	Navigation Districts	6	20	6	3	10	4	4	0	0	0	53
67	Florida Housing Finance Corporation	68	1	42	9	79	69	1	61	71	64	465
68	Florida Fish and Wildlife Conservation Commission	58	113	70	81	238	62	80	88	58	96	944
69	Financial Services	161	200	97	185	83	222	260	144	192	150	1694
70	Department of Military Affairs	2	0	0	0	0	0	0	0	0	0	2
71	Agency for Enterprise Information Technology*	1	23	0	0	0	0	0	33	0	0	57
72	Board of Governors	0	0	1	0	0	0	1	1	0	0	3
73	Department of Economic Opportunity	0	0	0	29	25	35	24	38	59	32	242
74	Agency for State Technology	0	0	0	0	0	0	15	11	3	6	35
		<b>2593</b>	<b>2184</b>	<b>1679</b>	<b>2382</b>	<b>2795</b>	<b>1771</b>	<b>2851</b>	<b>1918</b>	<b>1760</b>	<b>1691</b>	<b>21,624</b>

\*Repealed



# Emergency Rules (2009 - 2018)

# EMERGENCY RULES 2009 THROUGH 2018

CHPT #	AGENCY	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	TOTAL
01	State	0	3	2	1	0	0	0	0	0	0	6
02	Legal Affairs	1	1	1	1	1	0	0	1	0	1	7
05	Agriculture and Consumer Services	1	2	2	0	0	0	0	2	5	0	12
06	Education	0	0	0	1	1	0	0	0	0	0	2
11	Law Enforcement	0	0	0	0	0	0	0	0	0	0	0
12	Revenue	16	7	18	8	7	7	3	2	4	8	80
14	Transportation	0	0	0	0	0	0	0	0	0	0	0
15	Highway Safety and Motor Vehicles	0	0	0	0	0	0	0	0	0	0	0
18	Board of Trustees of the Internal Improvement Trust Fund	0	0	0	0	0	0	0	0	0	0	0
19	State Board of Administration	1	5	2	1	0	0	0	0	0	0	9
20	Citrus	1	0	2	1	1	0	3	2	5	1	16
23	Florida Parole Commission	0	0	0	0	0	0	0	0	0	0	0
25	Public Service Commission	0	0	0	0	0	0	0	0	0	0	0
27	Executive Office of the Governor	3	7	0	0	0	0	0	0	0	0	10
28	Administration Commission	0	0	0	0	0	0	0	0	0	0	0
29	Regional Planning Councils	0	0	0	0	0	0	0	0	0	0	0



# EMERGENCY RULES 2009 THROUGH 2018

CHPT #	AGENCY	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	TOTAL
31	Loxahatchee River Environmental Control District	0	0	0	0	0	0	0	0	0	0	0
32	Florida State Fair Authority	0	0	0	0	0	0	0	0	0	0	0
33	Corrections	0	0	0	0	0	0	0	0	0	0	0
34	Commission on Ethics	0	0	0	0	0	0	0	0	0	0	0
40	Water Management Districts	0	1	0	0	0	0	0	0	5	0	6
41	Commission for the Transportation Disadvantaged	0	0	0	0	0	0	0	0	0	0	0
42	Florida Land and Water Adjudicatory Commission	0	0	0	0	0	0	0	0	0	0	0
49	Regional Utility Authorities	0	0	0	0	0	0	0	0	0	0	0
53	Lottery	74	65	66	81	82	69	70	67	79	69	722
54	Interlocal Agencies	0	0	0	0	0	0	0	0	0	0	0
55	Veterans' Affairs	0	0	0	0	0	0	0	0	0	0	0
57	Space Florida	0	0	0	0	0	0	0	0	0	0	0
58	Elder Affairs	0	2	0	0	0	0	0	0	2	0	4
59	Agency for Health Care Administration	0	0	10	0	0	0	0	0	2	0	12
60	Management Services	7	7	0	0	0	0	0	1	2	2	19
61	Business and Professional Regulation	0	0	0	0	0	0	1	1	2	1	5
62	Environmental Protection	0	0	0	0	0	0	0	1	0	0	1

# EMERGENCY RULES 2009 THROUGH 2018

CHPT #	AGENCY	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	TOTAL
63	Juvenile Justice	0	0	0	0	0	0	0	0	0	0	0
64	Health	1	0	0	1	0	2	0	2	14	1	21
65	Children and Families	10	14	3	0	0	6	0	0	2	0	35
66	Navigation Districts	0	0	0	0	0	0	0	0	0	0	0
67	Florida Housing Finance Corporation	10	0	0	0	0	0	0	0	0	0	10
68	Florida Fish and Wildlife Conservation Commission	0	0	0	0	0	0	0	0	0	0	0
69	Financial Services	1	0	0	1	0	0	0	0	0	0	2
70	Department of Military Affairs	0	0	0	0	0	0	0	0	0	0	0
72	Board of Governors	0	0	0	0	0	0	0	0	0	0	0
73	Department of Economic Opportunity	0	0	0	0	0	1	2	0	0	0	3
74	Agency for State Technology	0	0	0	0	0	0	0	0	0	0	0
		<b>127</b>	<b>115</b>	<b>106</b>	<b>96</b>	<b>92</b>	<b>85</b>	<b>79</b>	<b>79</b>	<b>122</b>	<b>83</b>	<b>984</b>



# 2018 Rule Objections

**JOINT ADMINISTRATIVE PROCEDURES COMMITTEE**  
**OBJECTION REPORT**

**AGENCY:** DEPARTMENT OF HEALTH

**RULE NUMBER:** RULE 64-4.011

**TITLE:** **COMPASSIONATE USE REGISTRY IDENTIFICATION CARDS**

**OBJECTIONABLE PROVISIONS:**

**64-4.011**

(1) All patients and **legal representatives** are required to have a valid **Compassionate Use Registry** identification card to obtain low-THC cannabis, medical cannabis, or a cannabis delivery device.

(2) To apply for a patient **Compassionate Use Registry** identification card, a person must:

(a) Be a Florida resident, as evidenced by a copy of a valid Florida driver's license or identification card; a utility bill in the person's name including a Florida address; or a Florida voter registration card. The name and address on the document provided for proof of residency must match the name and address provided in the application. To establish Florida residency for minor patients, proof of residency of the parent or designated **legal representative** must be provided;

\* \* \*

(3) To apply for a **legal representative Compassionate Use Registry** identification card, a person must submit DH8010-OCU-10/2016, "**Compassionate Use Registry** Identification Card Legal Representative Application," which is incorporated by reference and available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-07856>.

(4) In order for a minor patient to receive a patient **Compassionate Use Registry** identification card, the minor patient must reside in Florida and have a **legal representative** designated in his or her application and in the online **Compassionate Use Registry**.

\* \* \*

(7) If there is no initial order by the patient's authorized physician at the time of the approval of the patient or **legal representative's Compassionate Use Registry** identification card, the Department will provide a temporary verification email which may be printed and used, with a photo ID, to obtain low-THC cannabis, medical cannabis, or a cannabis delivery device until the patient or **legal representative** receives the **Compassionate Use Registry** identification card.

(8) To maintain an active **Compassionate Use Registry** identification card, a patient and/or **legal representative** must annually submit DH8009-OCU-10/2016 and/or DH8010-OCU-10/2016, along with the application fee and any required accompanying documents to the department forty-five (45) days prior to the card expiration date.

(9) When there has been a change in the patient's name, address, or designated **legal representative**, that patient must notify the department within ten (10) days by submitting a completed Change, Replacement or Surrender Request, DH8012-OCU-10/2016, which is incorporated by reference and available at <http://www.flrules.org/Gateway/reference.asp?No= Ref-07858>, along with a \$15 replacement fee in the form of a check or money order payable to the Department of Health. A patient who has not designated a legal representative at the time of application to the department may do so in writing at any time during the effective period of the patient's registry identification card.

\* \* \*

(12) The department may revoke a **Compassionate Use Registry** identification card for any of the following:

- (a) The patient or **legal representative** makes material misrepresentations in his or her application;
- (b) The patient uses his or her card to obtain cannabis for another individual;
- (c) The **legal representative** uses his or her card to obtain cannabis for an individual who has not designated them as their **legal representative** or who is not a qualified patient;
- (d) The patient or **legal representative** purchases, obtains, possesses, or uses cannabis not sold by an approved dispensing organization, or
- (e) The patient is no longer a qualified patient.

#### **CITED AGENCY AUTHORITY:**

Rulemaking Authority: 381.986(7)(f), 381.986(7)(j), F.S.  
(Note: These statutes no longer exist.)

Law Implemented: 381.986, 499.0295, F.S.

#### **SPECIFIC OBJECTION:**

##### ***The rule enlarges, modifies, or contravenes the law implemented***

The rule provides that, "To establish Florida residency for minor patients, proof of residency of the parent or designated legal representative must be provided; . . . ." Section 381.986, Florida Statutes, as amended by section 3, chapter 2017-232, Laws of Florida, no longer refers to "legal representative." Identification cards are authorized under section 381.986(7)(a), Florida Statutes, "for qualified patients and caregivers who are residents of this state . . . ." The term "caregiver" is defined in section 381.986(1)(a), Florida Statutes, as "a resident of this state who has agreed to assist with a qualified patient's medical use of marijuana, has a caregiver identification card, and meets the requirements of subsection (6)." Section 381.986(6), Florida Statutes, sets forth specific criteria regarding who may qualify as a caregiver, and requires all caregivers to have a caregiver identification card, "if an individual designated by a qualified patient meets all of the requirements of [subsection (6)] and department rule." While the rule addresses the requirement for "legal representatives," pursuant to section 381.986, Florida Statutes (2016), the definition, qualifications, and duties of a "legal representative" pursuant to the

former statute differ from those of a “caregiver” in the current statute. See § 381.986(1)(d), Fla. Stat. (2016) (“‘Legal representative’ means the qualified patient’s parent, legal guardian acting pursuant to a court’s authorization as required under s. 744.3215(4), health care surrogate acting pursuant to the qualified patient’s written consent or a court’s authorization as required under s. 765.113, or an individual who is authorized under a power of attorney to make health care decisions on behalf of the qualified patient.”). The rule has not been amended to address the new category of “caregiver,” and instead continues to refer to “legal representative,” a term no longer included in the statute, throughout the rule. Thus, this rule is an invalid exercise of delegated legislative authority pursuant to section 120.52(8)(c), Florida Statutes, because it impermissibly enlarges, modifies, or contravenes section 381.986, Florida Statutes.

***The rule enlarges, modifies, or contravenes the law implemented***

The term “compassionate use registry” is used throughout the rule, notwithstanding the fact that the term was replaced by “medical marijuana use registry” by section 3, chapter 2017-232, Laws of Florida. The terminology used in rule 64-4.011 (as well as that used in rule 64-4.009) needs to be amended to conform to the language used in section 381.986, Florida Statutes. As written, this rule is an invalid exercise of delegated legislative authority pursuant to section 120.52(8)(c), Florida Statutes, because it impermissibly enlarges, modifies, or contravenes section 381.986, Florida Statutes.

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**64-4.011(2)(a)**

(2) To apply for a patient Compassionate Use Registry identification card, a person must:

(a) **Be a Florida resident, as evidenced by a copy of a valid Florida driver’s license or identification card; a utility bill in the person’s name including a Florida address; or a Florida voter registration card.** The name and address on the document provided for proof of residency must match the name and address provided in the application. **To establish Florida residency for minor patients, proof of residency of the parent or designated legal representative must be provided; . . . .**

**CITED AGENCY AUTHORITY:**

Rulemaking Authority: 381.986(7)(f), 381.986(7)(j), F.S.  
(Note: These statutes no longer exist.)

Law Implemented: 381.986, 499.0295, F.S.

**SPECIFIC OBJECTION:**

***The rule enlarges, modifies, or contravenes the law implemented***

Rule 64-4.011(2)(a) is objectionable as an invalid exercise of delegated legislative authority pursuant to sections 120.545(1)(a) and 120.52(8)(c), Florida Statutes, because it impermissibly enlarges, modifies, or contravenes the provisions of section

381.986(5)(b), Florida Statutes, regarding the documentation required to determine residency of individuals seeking registration in the medical marijuana use registry.

The rule states that a patient must present as evidence of residency: a copy of a valid Florida Driver's license or identification card; a utility bill in the person's name including a Florida address; or a voter registration card. The rule requires that a minor establish residency by proving residency of the parent or designated legal representative.

Section 381.986(5)(b), Florida Statutes, as amended in section 3, chapter 2017-232, Laws of Florida, changed the documentation required to determine residency. Specifically, section 381.986(5)(b), Florida Statutes, requires:

(5) MEDICAL MARIJUANA USE REGISTRY.—

\* \* \*

(b) The department shall determine whether an individual is a resident of this state for the purpose of registration of qualified patients and caregivers in the medical marijuana use registry. To prove residency:

1. An adult resident must provide the department with a copy of his or her valid Florida driver license issued under s. 322.18 or a copy of a valid Florida identification card issued under s. 322.051.
2. An adult seasonal resident who cannot meet the requirements of subparagraph 1. may provide the department with a copy of two of the following that show proof of residential address:
  - a. A deed, mortgage, monthly mortgage statement, mortgage payment booklet or residential rental or lease agreement.
  - b. One proof of residential address from the seasonal resident's parent, step-parent, legal guardian or other person with whom the seasonal resident resides and a statement from the person with whom the seasonal resident resides stating that the seasonal resident does reside with him or her.
  - c. A utility hookup or work order dated within 60 days before registration in the medical use registry.
  - d. A utility bill, not more than 2 months old.
  - e. Mail from a financial institution, including checking, savings, or investment account statements, not more than 2 months old.
  - f. Mail from a federal, state, county, or municipal government agency, not more than 2 months old.
  - g. Any other documentation that provides proof of residential address as determined by department rule.

3. A minor must provide the department with a certified copy of a birth certificate or a current record of registration from a Florida K-12 school and must have a parent or legal guardian who meets the requirements of subparagraph 1.

For the purposes of this paragraph, the term “seasonal resident” means any person who temporarily resides in this state for a period of at least 31 consecutive days in each calendar year, maintains a temporary residence in this state, returns to the state or jurisdiction of his or her residence at least one time during each calendar year, and is registered to vote or pays income tax in another state or jurisdiction.

As section 381.986, Florida Statutes, was amended in 2017 to change the documentation required of persons seeking registration in the medical marijuana use registry, the Department’s rule is an invalid exercise of delegated legislative authority pursuant to sections 120.545(1)(a) and 120.52(8)(c), Florida Statutes, because the rule’s requirements impermissibly enlarge, modify, or contravene section 381.986, Florida Statutes, as that statute was amended by the Legislature in 2017.

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**CHRONOLOGY:**

By letter dated October 30, 2017, the Department was apprised of all of the concerns identified in the objection report. As of the date of this report, no response had been received from the Department. By letter dated January 9, 2018, the Department was notified that Committee staff would be recommending an objection to Rule 64-4.011, F.A.C.

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Date prepared: January 29, 2018



**JOINT ADMINISTRATIVE PROCEDURES COMMITTEE**  
**OBJECTION REPORT**

**AGENCY:** DEPARTMENT OF HEALTH

**RULE NUMBER:** EMERGENCY RULE 64ER17-1

**TITLE:** DEFINITIONS

**OBJECTIONABLE PROVISIONS:**

**64ER17-1(4) Contingent licensee**

**(4) Contingent licensee – An applicant that has been granted approval contingent upon the initial registration of 100,000 active patients in the Medical Marijuana Use Registry in accordance with section 381.986(8)(a)4., F.S.**

**CITED AGENCY AUTHORITY:**

Rulemaking Authority: 381.986(8)(b), F.S.

Law Implemented: 381.986, F.S.

**SPECIFIC OBJECTION:**

***The emergency rule enlarges, modifies, or contravenes the law implemented***

Emergency Rule 64ER17-1(4) is objectionable as an invalid exercise of delegated legislative authority under sections 120.545(1)(a) and 120.52(8)(c), Florida Statutes, in that it impermissibly enlarges, modifies, or contravenes the provisions of section 381.986(8)(a)4., Florida Statutes, relating to the award of medical marijuana treatment center licenses.

Section 381.986(8)(a)4., Florida Statutes, states:

Within 6 months after the registration of 100,000 active qualified patients in the medical marijuana use registry, the department shall license four additional medical marijuana treatment centers that meet the requirements of this section. Thereafter, the department shall license four medical marijuana treatment centers within 6 months after the registration of each additional 100,000 active qualified patients in the medical marijuana use registry that meet the requirements of this section.

The emergency rule defines a “contingent licensee” as, “[a]n applicant that has been granted approval contingent upon the initial registration of 100,000 active patients in the

Medical Marijuana Use Registry in accordance with section 381.986(8)(a)4., F.S.” There is no provision under section 381.986(8)(a)4., Florida Statutes, for the awarding of contingent licenses. The award of licenses on a contingency basis forecloses the application by individuals/entities that may not meet the requirements of section 386.986(8)(b), Florida Statutes, at the time the contingent licenses are awarded, but could meet the requirements when the 100,000 patient threshold is met. The plain language of section 381.986(8)(a)4., Florida Statutes, envisions a series of applications being accepted and processed and four licenses being awarded within six months of the registration of each additional 100,000 active patients. Although it may increase efficiency to process the additional applications along with the 10 applications provided for under section 381.986(8)(a)2.c., Florida Statutes, the desire for greater efficiency does not justify the issuance of contingent licenses when such licenses are not authorized by statute. *See 4245 Corp. v. Div. of Beverage*, 371 So. 2d 1032, 1033 (Fla. 1<sup>st</sup> DCA 1978) (“The necessity for, or the desirability of, an administrative rule does not, of itself, bring into existence authority to promulgate such rule.”).

The emergency rule is an invalid exercise of delegated legislative authority and an objectionable violation of sections 120.545(1)(a) and 120.52(8)(c), Florida Statutes, in that it impermissibly enlarges, modifies, or contravenes the specific provisions of section 381.986(8)(a)4., Florida Statutes. *See DeMario v. Franklin Mortg. & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4<sup>th</sup> DCA 1994) (“An administrative agency may not enlarge, modify, or contravene the provisions of a statute.”); *Dep’t of Bus. Regulation, Div. of Alcoholic Beverage & Tobacco v. Salvation Ltd., Inc.*, 452 So. 2d 65, 66 (Fla. 1<sup>st</sup> DCA 1984) (“It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute.”).

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#### **64ER17-1(16)(d) Owner**

(16) Owner – Any person who, directly or indirectly, owns (actually or beneficially) or controls, a 5% or greater share of interests of the applicant or a medical marijuana treatment center. In the event that one person owns a beneficial right to interests and another person holds the voting rights with respect to such interests, then in such case, both shall be considered the owner of such interests. In determining the owners of the applicant or a medical marijuana treatment center, the attribution of ownership rules set forth in the Treasury Regulations cited as 26 CFR 1.414(c)-4 (b) and (c) (4-1-17 edition), as incorporated by reference, shall apply, but with the following exceptions and additions:

\* \* \*

**(d) In the event that a person under the age of 18 owns or is deemed an owner of an interest, such person must be disclosed to the department. Persons under the age of 18 shall only be required to submit to a background screening in the event that the interest or ownership was not imputed to another family member or guardian as outlined in paragraph (c) above.**

**CITED AGENCY AUTHORITY:**

Rulemaking Authority: 381.986(8)(b), F.S.  
Law Implemented: 381.986, F.S.

**SPECIFIC OBJECTION:**

***The emergency rule enlarges, modifies, or contravenes the law implemented***

Emergency Rule 64ER17-1(16)(d) is objectionable as an invalid exercise of delegated legislative authority pursuant to sections 120.545(1)(a) and 120.52(8)(c), Florida Statutes, in that it enlarges, modifies, or contravenes the specific provisions of section 381.986(8)(b)8., Florida Statutes, relating to the requirement for the background screening of all owners.

Section 381.986(8)(b)8., Florida Statutes, states, in pertinent part:

(8)(b) An applicant for licensure as a medical marijuana treatment center shall apply to the department on a form prescribed by the department and adopted in rule. \* \* \* An applicant for licensure as a medical marijuana treatment center must demonstrate:

\* \* \*

8. That all owners, officers, board members, and managers have passed a background screening pursuant to subsection (9).

Section 381.986(8)(b)8., Florida Statutes, provides no exception for owners under 18 years of age. Furthermore, Emergency Rule 64ER17-2(1)(c) states, "To be eligible for registration, all of the applicant's owners, officers, board members, and managers must have successfully passed a Level-2 background screening." Emergency Rule 64ER17-2(1)(c) provides no exception for owners under 18 years of age under any circumstances.

By waiving the background screening requirements of section 381.986(8)(b)8., Florida Statutes, for certain owners under 18 years of age, this emergency rule is not only inconsistent with the requirements of Emergency Rule 64ER17-2, Application for Registration of Medical Marijuana Treatment Centers, but is also an invalid exercise of delegated legislative authority under sections 120.545(1)(a) and 120.54(8)(c), Florida Statutes, in that it provides an unauthorized exemption to section 381.986, Florida Statutes. The rule, therefore, enlarges, modifies, or contravenes the specific provisions of section 381.986(8)(b)8., Florida Statutes. See *DeMario v. Franklin Mortg. & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4<sup>th</sup> DCA 1994) ("An administrative agency may not enlarge, modify, or contravene the provisions of a statute."); *Booker Creek Pres., Inc. v. Sw. Fla. Water Mgmt. Dist.*, 534 So.2d 419, 423 (Fla. 5<sup>th</sup> DCA 1988) ("[An agency cannot]. . . , without sufficient statutory criteria expressed in the statute, vary the impact of a statute by restricting or limiting its operation, through creating waivers or exemptions."); *Dep't of Bus. Regulation, Div. of Alcoholic Beverage & Tobacco v. Salvation Ltd., Inc.*, 452 So. 2d

65, 66 (Fla. 1<sup>st</sup> DCA 1984) (“It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute.”).

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**CHRONOLOGY:**

Emergency Rule 64ER17-1 was published in the Florida Administrative Register on September 21, 2017, and became effective on September 19, 2017, when it was filed with the Department of State. By letter dated October 9, 2017, the Department was apprised of all of the concerns identified in the objection report. As of the date that this report was prepared, Committee staff has not received a response from the Department. By letter dated January 8, 2018, the Department was notified that Committee staff was considering recommending an objection to Emergency Rule 64ER17-1.

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Date prepared: January 29, 2018.

**JOINT ADMINISTRATIVE PROCEDURES COMMITTEE  
OBJECTION REPORT**

**AGENCY:** DEPARTMENT OF HEALTH  
**RULE NUMBER:** EMERGENCY RULE 64ER17-2  
**TITLE:** APPLICATION FOR REGISTRATION OF MEDICAL MARIJUANA TREATMENT CENTERS

**OBJECTIONABLE PROVISIONS:**

**64ER17-2(1) and (3)**

(1) Each individual or entity that meets the requirements of section 381.986(8)(b), F.S., desiring to be registered as a medical marijuana treatment center pursuant to section 381.986, F.S., shall submit an application to the department using **Form DH8013-OMMU-08/2017, “Application for Medical Marijuana Treatment Center Registration”** herein incorporated by reference. The application must comply with the page limits, blind grading, format, and organization instructions detailed in the application. **The application, once submitted to the department, shall be considered final. The department will not accept any amendments or supplements to the initial application.** The applicant must include with the application at the time of submission, the following:

(a) A **non-refundable application fee** of \$60,830.00.

\* \* \*

(d) **For applicants seeking registration pursuant to section 381.986(8)(a)2.b., F.S., the applicant must provide evidence that it is majority-owned by (an) African-American farmer(s) who: . . . .**

1. Is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (*Pigford*) or *In re Black Farmers Discrimination Litigation*, 856 F. Supp. 2d 1 (D.D.C. 2011) (*BFDL*). Examples of acceptable evidence include:

a. Documentation from Poorman-Douglass Corporation (now Epiq Systems Inc.) that the applicant received a consent decree case number in *Pigford*;

b. Documentation that the applicant was granted class status by the *Pigford* adjudicator;

c. Court documents or United States Department of Agriculture (USDA) documents showing that the applicant received judgment discharging debt, providing a cash payment, or providing injunctive relief in *Pigford*;

d. Documentation that the applicant was determined to be a class member by Epiq Systems Inc. in *BFDL*;

e. Documentation that the applicant received a settlement award in *BFDL*; or

f. Other court documents or USDA documents demonstrating that the applicant was granted class member status in either *Pigford* or *BFDL*.

2. Is currently a member of the Black Farmers and Agriculturists Association – Florida Chapter.

OBJECTION REPORT  
EMERGENCY RULE 64ER17-2

3. A letter from the Black Farmers and Agriculturists Association – Florida Chapter certifying that the applicant meets subparagraph 1. and 2. will be accepted as sufficient evidence that the applicant qualifies for registration pursuant to section 381.986(8)(a)2.b., F.S.

\* \* \*

(3) Failure to provide the following at the time of submission of the application shall result in the application being denied prior to any scoring as contemplated in subsection (5) of this regulation:

- (a) The \$60,830.00 application fee;
- (b) Documentation required under paragraph (1)(b); or
- (c) The list of owners, officers, board members, and managers required under paragraph (1)(c).

**Incorporated Material:**

**Form DH8013-OMMU-08/2017, Application for Medical Marijuana Treatment Center Registration (the “Application”)**

On page 3

“THE APPLICATION, ONCE SUBMITTED TO THE DEPARTMENT SHALL BE CONSIDERED FINAL. THE DEPARTMENT WILL NOT ACCEPT ANY AMENDMENTS OR SUPPLEMENTS TO THE INITIAL APPLICATION.”

On page 14

The application MUST include:

1. A non-refundable \$60,830.00 application fee in the form of a money order or cashier's check made payable to the Florida Department of Health;

**CITED AGENCY AUTHORITY:**

Rulemaking Authority: 381.986(8)(b), F.S.

Law Implemented: 381.986, F.S.

**SPECIFIC OBJECTIONS:**

***The rule exceeds the agency’s grant of rulemaking authority and enlarges, modifies or contravenes the law implemented***

Emergency Rule 64ER17-2(1), (3), and the Application are objectionable as an invalid exercise of delegated legislative authority under sections 120.545(1)(a) and 120.52(8)(b) and (c), Florida Statutes. The rule provides an unauthorized exemption to section 120.60(1), Florida Statutes, which governs the procedures for agency review of applications to become licensed as medical marijuana treatment center, and creates an unauthorized nonrefundable application fee.

OBJECTION REPORT  
EMERGENCY RULE 64ER17-2

***Unauthorized exemption to section 120.60(1), Florida Statutes***

Emergency Rule 64ER17-2(1), (3), and the Application state that an “application, once submitted to the department, shall be considered final. The department will not accept any amendments or supplements to the initial application.” Similarly, Emergency Rule 64ER17-2(3) provides that the failure to provide certain information at the time the application is submitted will result in the application being denied prior to being scored. The finality of the application upon submission is contrary to the provisions of section 120.60(1), Florida Statutes, which provides:

Upon receipt of a license application, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. The agency may establish by rule the time period for submitting any additional information requested by the agency. For good cause shown, the agency shall grant a request for an extension of time for submitting the additional information. If the applicant believes the agency’s request for additional information is not authorized by law or rule, the agency, at the applicant’s request, shall proceed to process the application. An application is complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified.

Pursuant to section 120.60(1), Florida Statutes, the Department is required to provide an applicant the opportunity to correct an error or omission or supply additional information as requested by the Department. The rule and Application fail to provide such an opportunity, and section 381.986, Florida Statutes, does not provide an exemption to section 120.60(1), Florida Statutes. As a matter of law, if a rule and statute conflict, the statute controls. See *One Beacon, Inc. v. Agency for Health Care Admin.*, 958 So. 2d 1127, 1129 (Fla. 1<sup>st</sup> DCA 2007) (“In cases of conflict, a statute takes precedence over an administrative rule.”). See also *DeMario v. Franklin Mortg. & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4<sup>th</sup> DCA 1994) (“An administrative agency may not enlarge, modify, or contravene the provisions of a statute.”); *Booker Creek Pres., Inc. v. Sw. Fla. Water Mgmt. Dist.*, 534 So. 2d 419, 423 (Fla. 5<sup>th</sup> DCA 1988) (“[An agency cannot]. . ., without sufficient statutory criteria expressed in the statute, vary the impact of a statute by restricting or limiting its operation, through creating waivers or exemptions.”); *Dep’t of Bus. Regulation, Div. of Alcoholic Beverage & Tobacco v. Salvation Ltd., Inc.*, 452 So. 2d 65, 66 (Fla. 1<sup>st</sup> DCA 1984) (“It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute.”). Subsections (1) and (3) of Emergency Rule 64ER17-2 and the Application impermissibly enlarge, modify, or contravene section 381.986, Florida Statutes and are an invalid exercise of delegated legislative authority pursuant to section 120.52(8)(c), Florida Statutes.

OBJECTION REPORT  
EMERGENCY RULE 64ER17-2

***Unauthorized nonrefundable application fee***

Section 381.986(8)(b), Florida Statutes, provides that, “The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 establishing a procedure for the issuance and biennial renewal of licenses, including initial application and biennial renewal fees sufficient to cover the costs of implementing and administering this section. . . .” Emergency Rule 64ER17-2(1)(a) and the Application establish an application fee as mandated by section 381.986(8)(b), Florida Statutes, and require the fee to be submitted as part of the license application which, upon submission “shall be considered final.” The rule text and the Application also state that the \$60,830.00 fee is nonrefundable. The nonrefundable nature of the fee is inconsistent with the guidelines for refunding fees set forth by the Attorney General in Op. Att’y Gen. Fla. 75-293 (1975), which states:

If any action has been taken, the fee has been earned or is considered *due* and may not be refunded. However, if the board has not taken action upon the application, either in whole or in part, the application may be withdrawn and the fee refunded under s. 215.26, F. S., since the fee is not *due* until some action has been taken. Attorney General Opinions 056-219 and 058-334. [Emphasis in original.]

Furthermore, sections 120.52(8) and 120.536(1), Florida Statutes, provide in part that, “[a]n agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute.” Therefore, absent specific statutory authority to the contrary, if an individual requests a refund of the fee prior to any action being taken on the application, the application fee should be refundable. *Cf.* §§ 381.0075(6)(a), Fla. Stat. (stating specifically that fees assessed by the Department of Health to regulate body-piercing salons “are nonrefundable”); 382.0255(3), Fla. Stat. (stating specifically that the Department of Health shall establish fees for vital records by rule and that, “[a]ll fees shall be paid by the person requesting the record, are due and payable at the time services are requested, and are nonrefundable, except that, when a search is conducted and no vital record is found, any fees paid for additional certified copies shall be refunded.”). Section 381.986(8)(b), Florida Statutes, does not specifically state that the initial application fee shall be nonrefundable, and accordingly the Department lacks statutory authority to withhold a refund of the application fee upon request prior to taking action on the application. *See State v. Boddin*, 877 So. 2d 680, 685 (Fla. 2004) (stating that the Legislature is presumed to know the meaning of words and the rules of grammar).

Emergency Rule 64ER17-2(1)(a) and the Application are an invalid exercise of delegated legislative authority pursuant to sections 120.545(1)(a) and 120.52(8)(b) and (c), Florida Statutes, because they enlarge, modify, or contravene the provisions of section 381.986, Florida Statutes, and exceed the rulemaking authority granted to the Department in section 381.986, Florida Statutes.



OBJECTION REPORT  
EMERGENCY RULE 64ER17-2

***The rule enlarges, modifies, or contravenes the law implemented***

Emergency Rule 64ER17-2(1)(d) is objectionable as an invalid exercise of delegated legislative authority under sections 120.545(1)(a) and 120.52(8)(b) and (c), Florida Statutes, in that it exceeds the Department's rulemaking authority and impermissibly enlarges, modifies, or contravenes the provisions of section 381.986(8)(a)2.b., Florida Statutes.

Section 381.986(8)(a)2.b., Florida Statutes, provides, in pertinent part, "As soon as practicable, but no later than October 3, 2017, the department shall license one applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011). . . ." The rule imposes the requirement that an applicant for a license under section 381.986(8)(a)2.b., Florida Statutes, be "majority-owned by (an) African-American farmer(s). . . ." Section 381.986(8)(a)2.b., Florida Statutes, requires that the actual "applicant" be a class member of *Pigford* or *In Re Black Farmers Litig.* The requirement that a recognized class member be "majority-owned by (an) African-American farmer(s)" places an additional requirement not included in statute on an applicant and is meaningless if the applicant is an individual.

The rule, therefore, is an invalid exercise of delegated legislative authority under sections 120.545(1)(a) and 120.52(8)(b) and (c), Florida Statutes, in that it exceeds the Department's grant of rulemaking authority and enlarges, modifies, or contravenes the specific provisions of section 381.986(8)(a)2.b., Florida Statutes, by imposing an additional requirement on applicants who are recognized class members of *Pigford* or *In Re Black Farmers Litig.* See *DeMario v. Franklin Mortg. & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4<sup>th</sup> DCA 1994) ("An administrative agency may not enlarge, modify, or contravene the provisions of a statute."); *Booker Creek Pres., Inc. v. Sw. Fla. Water Mgmt. Dist.*, 534 So. 2d 419, 423 (Fla. 5<sup>th</sup> DCA 1988) ("[An agency cannot]. . . , without sufficient statutory criteria expressed in the statute, vary the impact of a statute by restricting or limiting its operation, through creating waivers or exemptions."); *Dep't of Bus. Regulation, Div. of Alcoholic Beverage & Tobacco v. Salvation Ltd., Inc.*, 452 So. 2d 65, 66 (Fla. 1<sup>st</sup> DCA 1984) ("It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute.").

***The rule enlarges, modifies, or contravenes the law implemented***

Emergency Rule 64ER17-2(1)(d)3. is objectionable as an invalid exercise of delegated legislative authority under sections 120.545(1)(a) and 120.52(8)(c), Florida Statutes, in that it impermissibly enlarges, modifies, or contravenes section 381.986, Florida Statutes, by imposing a requirement not included in the statute.

Section 381.986(8)(a)2.b., Florida Statutes, provides, in pertinent part: "As soon as practicable, but no later than October 3, 2017, the department shall license one applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011). . . ." Responsibility for completing the license application and providing documentation that the applicant is, in fact, a recognized class member of *Pigford* or *In Re Black Farmers Litig.* lies with the applicant. Rule 64ER17-2(1)(d)1. sets out the acceptable documentation required to

OBJECTION REPORT  
EMERGENCY RULE 64ER17-2

establish class membership. The acceptance of a “letter from the Black Farmers and Agriculturists Association – Florida Chapter certifying that the applicant meets subparagraph 1” in lieu of the specified documentation effectively elevates a letter from a non-governmental third party not directly associated with either the applicant or the *Pigford* or *In Re Black Farmers Litig.* litigation to have the same status as court documents. There is no legal basis for this substitution.

The emergency rule is, therefore, an invalid exercise of delegated legislative authority pursuant to sections 120.545(1)(a) and 120.52(8)(c), Florida Statutes, in that it impermissibly enlarges, modifies, or contravenes the specific provisions of section 381.986(8)(a)2.b., Florida Statutes. See *DeMario v. Franklin Mortg. & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4<sup>th</sup> DCA 1994) (“An administrative agency may not enlarge, modify, or contravene the provisions of a statute.”); *Dep’t of Bus. Regulation, Div. of Alcoholic Beverage & Tobacco v. Salvation Ltd., Inc.*, 452 So. 2d 65, 66 (Fla. 1<sup>st</sup> DCA 1984) (“It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute.”).

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**64ER17-2(6)(c)**

(6) Licenses will be awarded, subject to availability, as set forth in s. 381.986(8)(a)2., F.S., based on the highest total score in the following manner:

\* \* \*

(c) **The next four highest scoring applicants**, after removing any preference points for citrus applicants provided under paragraph (5)(c) above, **will receive notification of approval as contingent licensees. The contingent license will not become active until such time as the department provides notification of the registration of 100,000 active patients in the Medical Marijuana Use Registry.** The department will provide notification to the contingent licensee of the activation of its license within 30 days of the registration of the first 100,000 active patients.

**CITED AGENCY AUTHORITY:**

Rulemaking Authority: 381.986(8)(b), F.S.  
Law Implemented: 381.986, F.S.

**SPECIFIC OBJECTION:**

***The rule enlarges, modifies, or contravenes the law implemented***

Emergency Rule 64ER17-2(6)(c) is objectionable as an invalid exercise of delegated legislative authority under sections 120.545(1)(c) and 120.52(8)(c), Florida Statutes, because it enlarges, modifies, or contravenes the provisions of section 381.986(8)(a)4., Florida Statutes, relating to the award of additional medical marijuana treatment center licenses.

OBJECTION REPORT  
EMERGENCY RULE 64ER17-2

Section 381.986(8)(a)4., Florida Statutes, states:

Within 6 months after the registration of 100,000 active qualified patients in the medical marijuana use registry, the department shall license four additional medical marijuana treatment centers that meet the requirements of this section. Thereafter, the department shall license four medical marijuana treatment centers within 6 months after the registration of each additional 100,000 active qualified patients in the medical marijuana use registry that meet the requirements of this section.

The emergency rule awards four “contingent licenses,” with the activation of the license contingent upon the initial registration of 100,000 active patients. There is no provision under section 381.986(8)(a)4., Florida Statutes, for the awarding of contingent licenses. The award of licenses on a contingency basis forecloses the application by individuals/entities that may not meet the requirements of section 386.986(8)(b), Florida Statutes, at the time the contingent licenses are awarded, but could meet the requirements when the 100,000 patient threshold is met. The plain language of section 381.986(8)(a)4., Florida Statutes, envisions a series of applications being accepted and four licenses awarded within six months of the registration of each additional 100,000 active patients. Although it may increase efficiency to process the additional applications along with the 10 applications provided for under section 381.986(8)(a)2.c., Florida Statutes, the desire for greater efficiency does not justify the issuance of contingent licenses when such licenses are not authorized by statute. *See 4245 Corp. v. Div. of Beverage*, 371 So. 2d 1032, 1033 (Fla. 1<sup>st</sup> DCA 1978) (“The necessity for, or the desirability of, an administrative rule does not, of itself, bring into existence authority to promulgate such rule.”).

The rule is an objectionable violation of sections 120.545(1)(a) and 120.52(8)(c), Florida Statutes, because it enlarges, modifies, or contravenes the specific provisions of section 381.986(8)(a)4., Florida Statutes. *See DeMario v. Franklin Mortg. & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4<sup>th</sup> DCA 1994) (“An administrative agency may not enlarge, modify, or contravene the provisions of a statute.”); *Dep’t of Bus. Regulation, Div. of Alcoholic Beverage & Tobacco v. Salvation Ltd., Inc.*, 452 So. 2d 65, 66 (Fla. 1<sup>st</sup> DCA 1984) (“It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute.”).

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**CHRONOLOGY:**

Emergency Rule 64ER17-2 was published in the Florida Administrative Register on September 21, 2017, and became effective on September 19, 2017, when it was filed with the Department of State. By letter dated October 9, 2017, the Department was apprised of all of the concerns identified in the objection report. As of the date that this report was prepared, Committee staff has not received a response from the Department.

OBJECTION REPORT  
EMERGENCY RULE 64ER17-2

By letter dated January 8, 2018, the Department was notified that Committee staff was considering recommending an objection to Emergency Rule 64ER17-2.

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Date prepared: January 29, 2018.

**JOINT ADMINISTRATIVE PROCEDURES COMMITTEE**  
**OBJECTION REPORT**

**AGENCY:** DEPARTMENT OF HEALTH

**RULE NUMBER:** EMERGENCY RULE 64ER17-6

**TITLE:** DISCIPLINARY GUIDELINES AND FINES

**OBJECTIONABLE PROVISIONS:**

**64ER17-6(1)(b) - Improper Dispensation and Misuse of the Medical Marijuana Use Registry (MMUR):** subparagraphs 1., 2., 3., 4., 5., 6., 7., 8., 9., 10., 11., 12., 13.

**64ER17-6(1)(c) - MMTC Operational Violations:** subparagraphs 2., 3., 4., 5., 6., 7., 8., 9., 10., 11., 12., 13., 14., 15., 16., 17., 18., 19., 20., 21., 22., 23., 24., 25., 26., 27., 28., 29., 30., 31., 32., 33., 34., 35., 36., 37., 38., 39., 40., 41., 42., 43., 44., 45., 46.

(1) The penalties listed for the following violations of section 381.986, Florida Statutes, or department rule, shall be used as guidelines in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this rule. Penalties are applicable per instance of each violation and every day that a violation occurs shall be considered a separate violation.

\* \* \*

(b) Improper Dispensations and Misuse of the Medical Marijuana Use Registry (MMUR).

1. Dispensation by a MMTC of more than a 70-day supply of low-THC cannabis or medical cannabis to a patient or caregiver. **First violation, from a letter of warning to a \$500 fine; second violation, \$500 fine; subsequent violation, from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

2. Failure of a MMTC to enter an employee name or unique employee identifier into the MMUR for each dispensation of low-THC cannabis, medical cannabis, or cannabis delivery device. **First violation, from a letter of warning to a \$500 fine; second violation, \$500 fine; subsequent violation, from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

3. Failure of a MMTC to verify in the MMUR, prior to dispensing to the patient or their caregiver, that a physician has entered a valid order for low-THC cannabis, medical cannabis, or a cannabis delivery device for that patient. **First violation, from a letter of warning to a \$500 fine; second violation, \$500 fine; subsequent violation, from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

4. Failure of a MMTC to verify in the MMUR, prior to dispensing to the patient or their caregiver, that: (1) the patient has an active registration in the MMUR, (2) the patient or the patient's caregiver holds a valid and active identification card, and (3) that there is a sufficient number of milligrams of recommended product remaining to fill an order. Failure

to verify any of these three requirements constitutes a violation. First violation, from a **letter of warning** to a \$500 fine; second violation, \$500 fine; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

5. Failure of a MMTTC to record in the MMUR the: (1) date, (2) time, (3) quantity of medical marijuana dispensed, (4) form of medical marijuana dispensed, (5) type of marijuana delivery device dispensed if applicable, and (6) the name and MMUR identification number of the patient or caregiver for each dispensation. Failure to record any of these six requirements constitutes a violation. First violation, from a **letter of warning to a \$500 fine**; second violation, \$500 fine; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

6. Dispensation of low-THC cannabis, medical cannabis, or cannabis delivery device by a MMTTC to a qualified patient who is younger than 18 years of age. First violation, \$500 fine; subsequent violation, **from a \$500 fine to a \$500 fine and suspension or revocation.**

7. Dispensation or selling of any other type of cannabis, alcohol, or illicit drug-related product, including pipes, bongs, or wrapping papers, other than a marijuana delivery device required for the medical use of marijuana as specified in a physician certification, by an MMTTC at a dispensing facility. First violation, \$500 fine; subsequent violation, **from a \$500 fine to a \$500 fine and suspension or revocation.**

8. Dispensation of low-THC cannabis, medical cannabis, or a cannabis delivery device from the premises of a MMTTC between the hours of 9 p.m. and 7 a.m. First violation, \$500 fine; subsequent violation, **from a \$500 fine to a \$500 fine and suspension or revocation.**

9. Creates a patient or caregiver in the MMUR using misleading, incorrect, false, or fraudulent information. Any qualified ordering physician who violates this subparagraph is subject to a 180-day suspension from access to the MMUR. **This penalty does not prohibit any further appropriate action by the department or respective board against the qualified ordering physician.**

10. Creates a duplicate patient or caregiver in the MMUR. Any qualified ordering physician who violates this subparagraph is subject to a 180-day suspension from access to the MMUR. **This penalty does not prohibit any further appropriate action by the department or respective board against the qualified ordering physician.**

11. Failure to update the MMUR within 7 days after any change(s) is made to the original physician certification to reflect such change(s). Any qualified ordering physician who violates this subparagraph is subject to a 180-day suspension from access to the MMUR. **This penalty does not prohibit any further appropriate action by the department or respective board against the qualified ordering physician.**

12. Improper disclosure of personal information of a qualified patient or caregiver. Personal information includes the patient and caregiver names, birth dates, telephone numbers, addresses, electronic mail addresses, social security numbers and biometric identifiers. Violations of this subparagraph by an MMTTC or **an approved law enforcement MMUR user**, first violation, from a **letter of warning** to a \$500 fine; second violation, \$500 fine and a 180-day suspension from access to the MMUR; **subsequent violation, from a \$1,000 fine to a \$1,000 fine and suspension or revocation of access to the MMUR.** Any physician who violates this subparagraph is subject to a 180-day

suspension from access to the MMUR and **this penalty does not prohibit any further appropriate action by the department or respective board against the physician.**

13. Misuse of or improper access to the MMUR. Misuse or improper access includes:

a. Failure of a MMTTC or other approved user to establish or enforce policies and procedures restricting access to the MMUR only to those individuals authorized by section 381.986, Florida Statutes, and whose access has been approved by the department;

b. Failure of a MMTTC or other approved user to establish or enforce policies and procedures preventing personnel from sharing login and password information or accessing the MMUR on another individual's account; and

c. Use of data from the MMUR for cold-calling or otherwise soliciting patients or caregivers.

Violations of this subparagraph by an MMTTC or an **approved law enforcement MMUR user**, first violation, from a **letter of warning** to a \$500 fine; second violation, \$500 fine and a 180-day suspension from access to the MMUR; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation of access to the MMUR**. Any physician who violates this subparagraph is subject to a 180-day suspension from access to the MMUR and **this penalty does not prohibit any further appropriate action by the department or respective board against the physician.**

(c) MMTTC operational violations.

1. Failure of a MMTTC to maintain qualifications for approval. Suspension or revocation of MMTTC license.

2. Endangering the health, safety, or security of a qualified patient by a MMTTC. First violation, a **letter of warning** and a fine up to \$500; second violation, \$1,000 fine; subsequent violation, **\$1,000 fine to a \$1,000 fine and suspension or revocation.**

3. Employment of an owner, officer, board member, manager, or employee by a MMTTC who has been rendered ineligible under section 381.986(9), Florida Statutes, or who has been convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the business of a medical marijuana treatment center. First violation, **a \$250 to \$500 fine and license suspension.** Subsequent violation, **from a \$1,000 fine and license suspension to a \$5,000 fine and license revocation.**

4. Employment of an owner, officer, board member, manager, or employee by a MMTTC whose license or the authority to engage in any regulated profession, occupation, or business that is related to the business practices of a medical marijuana treatment center has been suspended, revoked, or otherwise acted against by the licensing authority of any jurisdiction, including its agencies or subdivisions, for a violation that would constitute a violation under Florida law. First violation, **a \$250 fine to \$500 fine and license suspension;** subsequent violation, **from a \$1,000 fine and license suspension to a \$5,000 fine and license revocation.** If the license or authority to engage in a regulated profession, occupation, or business has been reinstated or otherwise cleared of disciplinary obligations, the department will consider such reinstatement as a mitigating factor.

5. Making or filing a report or record that the MMTTC knows to be false. First violation, **from a letter of warning** to a \$500 fine; second violation, \$1,000 fine; subsequent violations, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

6. Willfully failing to maintain a record required by section 381.986, Florida Statutes, or department rule. First violation, **letter of warning** and a fine up to \$500; second violation, \$1,000 fine; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

7. Willfully impeding or obstructing an employee or agent of the department in furtherance of his or her official duties. First violation, **letter of warning** to a \$500 fine; subsequent violation, **from a \$1,000 to \$5,000 fine up to a \$1,000 to \$5,000 fine and suspension or revocation.**

8. Engaging in fraud or deceit, negligence, incompetence, or misconduct in the business practices of a MMTC. First violation, **letter of warning** and a fine up to \$500; second violation, \$1,000 fine; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

9. Making misleading, deceptive, or fraudulent representations in or related to the business practices of a MMTC. First violation, from a **letter of warning** to a \$500 fine; second violation, \$1,000 fine; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

10. Making misleading, deceptive, or fraudulent representations in its advertising. Advertising means the act of providing consideration for the publication, dissemination, solicitation, or circulation of visual, oral, or written communication, to induce directly or indirectly any person to patronize a particular MMTC, or to purchase particular medical marijuana or a medical marijuana-infused product. Advertising includes marketing, but does not include packaging or labeling. Advertising proposes a commercial transaction or otherwise constitutes commercial speech. First violation, from a **letter of warning** to a \$500 fine; second violation, \$1,000 fine; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

11. Violating a lawful order of the department or an agency of the state, or failure to comply with a lawfully issued subpoena of the department or an agency of the state. First violation, from a **letter of warning** to a \$500 fine; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

12. Employment of a qualified physician by a MMTC or independent testing laboratory. First violation, from a **letter of warning** to a \$500 fine; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

13. Use of a pesticide, fungicide, or herbicide other than those permitted for use by department rule. The presence of an unapproved pesticide, fungicide, or herbicide in the proximity of a MMTC facility or a failed test for an unapproved pesticide, fungicide, or herbicide constitute the use of an unapproved pesticide, fungicide, or herbicide. In addition to the mitigating or aggravating factors listed in subsection (2) below, the following factors will be considered:

- a. The toxicity of the unapproved pesticide, fungicide, or herbicide;
- b. The number of plants exposed; and
- c. The number of individuals exposed.

For the first violation, **from a \$1,000 to \$5,000 fine up to a \$1,000 to \$5,000 fine and license suspension**; subsequent violations, **from a \$1,000 to \$10,000 fine up to a \$1,000 to \$10,000 fine and license suspension or revocation.**



14. The wholesale of low-THC cannabis, medical cannabis, low-THC cannabis products, or medical cannabis products to any entity other than a licensed MMTC. The sale of each plant or cannabis product constitutes a separate violation. **From a \$1,000 to \$10,000 fine up to a \$1,000 to \$10,000 fine and suspension or revocation.**

15. Operating a cultivation, processing, or dispensing facility without prior authorization from the department. First violation, a **letter of warning** and fine up to \$500; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

16. Operating a number of dispensing facilities that exceed the provision of section 381.986(8)(a)5., Florida Statutes. First violation, a **letter of warning** and fine up to \$500; subsequent violation, **from a \$1,000 fine to a \$1,000 fine and suspension or revocation.**

17. Failure to notify the department of a sale of a dispensing facility slot within 3 days of sale. First violation, a **letter of warning** and fine up to \$500; subsequent violation, **\$1,000 fine to a \$1,000 fine and suspension or revocation.**

18. Failure to possess a valid certification of registration issued by the Department of Agriculture and Consumer Services pursuant to section 581.131, Florida Statutes, unless the licensee was licensed under the provisions of section 381.986(8)(a)2.b., Florida Statutes. First violation, a **letter of warning** and fine up to \$500; subsequent violation, **\$1,000 fine to a \$1,000 fine and suspension or revocation.**

19. Failure to employ a medical director to supervise the activities of the MMTC. Any violation, **\$1,000 fine to a \$1,000 fine and suspension or revocation.**

20. The wholesale purchase of marijuana or low-THC cannabis from, or a distribution of marijuana or low-THC cannabis to, another MMTC, without the MMTC seeking to make a wholesale purchase of marijuana submitting proof of harvest failure to and approval from the department. Harvest failure means a catastrophic loss of growing plants that presents a substantial risk of severe impact of a MMTC's ability to supply patients with low-THC or medical cannabis products. Any violation, **a \$1,000 to \$10,000 fine up to a \$1,000 to \$10,000 fine and suspension or revocation.**

21. Contracting for services related to the operations of a MMTC in violation of section 381.986(8)(e), Florida Statutes. Any violation, **\$1,000 to \$10,000 fine up to a \$1,000 to \$10,000 fine and suspension or revocation.**

22. Failure to notify the department in writing at least 60 days prior to the anticipated date of a change in ownership of a MMTC. Any violation, **\$1,000 to \$10,000 fine up to a \$1,000 to \$10,000 fine and suspension or revocation.**

23. Executing a change in ownership of a MMTC without prior department approval. Any violation, **from a \$1,000 to \$5,000 fine up to a \$1,000 to \$5,000 fine and suspension or revocation.**

24. Failure to execute a recall as required by the department. Any violation, **a \$1,000 to \$5,000 fine up to a \$1,000 to \$5,000 fine and suspension or revocation.**

25. Operating a MMTC dispensing facility within 500 feet of the real property that comprises a public or private elementary, middle, or secondary school, unless the county or municipality approves the location through a formal proceeding. Any violation, **from a \$1,000 fine up to a \$1,000 fine and suspension or revocation.**

26. Growing low-THC cannabis or medical marijuana in an environment other than an enclosed structure. Any violation, **\$500 fine per plant to \$500 fine per plant and suspension or revocation.**

27. Growing low-THC cannabis or medical marijuana in the same enclosed structure as other plants. Any violation, **a \$500 fine per plant to a \$500 fine per plant and suspension or revocation.**

28. Failure to inspect seeds and growing plants for plant pests that endanger or threaten the horticultural and agricultural interests of the state, or failure to notify the Department of Agriculture and Consumer Services within 10 calendar days after a determination that a plant is infested or infected by such plant pest, and implement and maintain phytosanitary policies and procedures. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

29. Failure to perform fumigation or treatment of plants, or remove and destroy infested or infected plants, in accordance with Chapter 581, Florida Statutes, and any rules adopted thereunder. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

30. Processing of low-THC cannabis, medical cannabis, low-THC cannabis products, or medical cannabis products in an environment other than an enclosed structure. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

31. Processing of low-THC cannabis or medical cannabis in the same enclosed structure as other plants or products. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

32. Failure to package low-THC cannabis products or medical cannabis products in compliance with the United States Poison Prevention Packaging Act of 1970, 15 U.S.C. ss. 1471 et seq. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

33. Failure to label low-THC cannabis products or medical cannabis products in compliance with section 381.986(8)(e)10.f., Florida Statutes. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

34. Failure to reserve two processed samples from each batch and retain such samples for at least 9 months in compliance with Section 381.986(8)(e)10.d., Florida Statutes. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

35. Failure to maintain a security system or video surveillance system in compliance with section 381.986(8)(f), Florida Statutes. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

36. Failure to ensure at least two MMTC employees, or two employees of a security agency with whom the MMTC contracts, are on site at cultivation, processing, and storage facilities at all times. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

37. Failure to establish or enforce policies and procedures which require each employee to wear a photo identification badge at all times while on the premises. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

38. Failure to establish or enforce policies and procedures which require each visitor to wear a visitor's pass at all times while on the premises. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

39. Failure to establish or enforce policies and procedures which require an alcohol and drug-free workplace. Any violation, **a \$1,000 to \$10,000 fine to a \$1,000 to \$10,000 fine and suspension or revocation.**

40. Failure to report to local law enforcement within 24 hours after the MMTC is notified or becomes aware of the theft, diversion, or loss of low-THC cannabis or medical cannabis. Any violation, **a \$1,000 to \$10,000 fine to a \$1,000 to \$10,000 fine and suspension or revocation.**

41. Failure to establish or enforce policies and procedures which require the safe transport of low-THC cannabis or medical marijuana to MMTC facilities, independent testing laboratories, or patients or caregivers in compliance with section 381.986(8)(g), Florida Statutes. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.** The minimum requirements for safe transport are:

a. Maintenance of a transportation manifest for each delivery, which must be retained for at least 1 year;

b. Ensuring that only vehicles in good working order are used to transport low-THC and medical cannabis;

c. Ensuring that low-THC cannabis and medical cannabis is locked in a separate compartment or container within the vehicle;

d. Ensuring that at least two persons are in a vehicle transporting low-THC cannabis or medical cannabis, and that at least one person remains in the vehicle while low-THC cannabis or medical cannabis is being delivered; and

e. Ensuring that all employees transporting or delivering low-THC cannabis or medical cannabis receive specific safety and security training.

42. Materially deviating from an application for licensure without prior approval from the department. Any violation, **a \$1,000 fine to \$10,000 fine up to a \$1,000 fine to \$10,000 fine and suspension or revocation.**

43. Failure to comply with a record inspection request from the department within 14 days. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

44. Failure to ensure that all employees are at least 21 years of age or older. Any violation, **a \$500 fine to a \$500 fine and suspension or revocation.**

45. Failure to ensure that all marijuana and marijuana products are secured in a secured, locked room or vault. Any violation, **a \$1,000 to \$10,000 fine up to a \$1,000 fine to \$10,000 fine and suspension or revocation.**

46. Displaying marijuana or marijuana products in a waiting room of a dispensing facility, or dispensing in a waiting room of a dispensing facility. Any violation, **\$500 fine to \$500 fine and suspension or revocation.**

#### **CITED AGENCY AUTHORITY:**

Rulemaking Authority: 381.986(10)(h), F.S.

Law Implemented: 381.986, F.S.

**SPECIFIC OBJECTIONS:**

Emergency Rule 64ER17-6(1)(b) and (c) are objectionable as an invalid exercise of delegated legislative authority pursuant to section 120.52(8), Florida Statutes, on several grounds: 1) the emergency rule impermissibly establishes a wide range of penalties without adequate standards for the imposition of the penalties, thereby vesting unbridled discretion in the Department in violation of section 120.52(8)(d), Florida Statutes; 2), the emergency rule is impermissibly vague, leaving the reader to guess at what penalty(ies) the Department may impose against physicians, and therefore vests unbridled discretion in the Department, in violation of section 120.52(8)(d), Florida Statutes; 3) the emergency rule creates a penalty, “letter of warning,” that exceeds the scope of penalties authorized under section 381.986(10), Florida Statutes, in violation of section 120.52(8)(c), Florida Statutes; and 4) the emergency rule seeks to impose sanctions upon, or otherwise discipline, law enforcement personnel over which the Department has no disciplinary authority, in violation of section 120.52(8)(b), Florida Statutes.

***The emergency rule fails to establish adequate standards for agency decisions***

Emergency Rule 64ER17-6(1)(b)1., 2., 3., 4., 5., 6., 7., 8., 12., 13. and (1)(c)2., 3., 4., 5., 6., 7., 8., 9., 10., 11., 12., 13., 14., 15., 16., 17., 18., 19., 20., 21., 22., 23., 24., 25., 26., 27., 28., 29., 30., 31., 32., 33., 34., 35., 36., 37., 38., 39., 40., 41., 42., 43., 44., 45., and 46. authorize the imposition of penalties ranging, for example, “from a \$1,000 fine to a \$1,000 fine and suspension or revocation without providing any standards or guidelines for the imposition of the penalties, thereby failing to establish adequate standards for agency decisions and vesting unbridled discretion in the Department in violation of section 120.52(8)(d), Florida Statutes.

***The emergency rule is impermissibly vague***

Emergency Rule 64ER17-6(1)(b) 9., 10., 11., 12., and 13. state that, “this penalty does not prohibit any further appropriate action by the department . . . against the physician.” Without defining “appropriate action,” subparagraphs 9., 10., 11., 12., and 13. are impermissibly vague, leaving the reader to guess at what other penalty(ies) may be imposed, thereby vesting unbridled discretion in the Department in violation of section 120.52(8)(d), Florida Statutes.

***The emergency rule enlarges, modifies, or contravenes the law implemented***

Subparagraphs 1., 2., 3., 4., 5., 12., and 13. of Emergency Rule 64ER17-6(1)(b) and subparagraphs 2., 5., 6., 7., 8., 9., 10., 11., 12., 15., 16., 17., and 18. of Emergency Rule 64ER17-6(1)(c) authorize the Department to issue a “letter of warning” for certain violations. Section 381.986(10)(f) and (g), Florida Statutes, establishes the following penalties that may be imposed on a medical marijuana treatment center:

(10) MEDICAL MARIJUANA TREATMENT CENTER  
INSPECTIONS; ADMINISTRATIVE ACTIONS

\* \* \*

(f) The department may impose reasonable fines not to exceed \$10,000 on a medical marijuana treatment center for any of the following violations:

(g) The department may suspend, revoke, or refuse to renew a medical marijuana treatment center license if the medical marijuana treatment center commits any of the violations in paragraph (f).

Section 120.54(1)(e), Florida Statutes, states, “No agency has inherent rulemaking authority, nor has any agency authority to establish penalties for violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules.” See *also* Art. I, § 18, Fla. Const. (“No administrative agency, except the Department of Military Affairs in an appropriately convened court-martial action as provided by law, shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.”). A letter of warning is not one of the penalties specifically provided for in section 381.986(10), Florida Statutes, which authorizes the imposition of penalties on medical marijuana treatment centers. Emergency Rule 64ER17-6(1)(b) 1., 2., 3., 4., 5., 12., and 13. and Emergency Rule 64ER17-6(1)(c)2., 5., 6., 7., 8., 9., 10., 11., 12., 15., 16., 17., and 18., are therefore objectionable as an invalid exercise of delegated legislative authority under section 120.52(8)(c), Florida Statutes, because the rule enlarges, modifies, or contravenes the provisions of section 381.986(10), Florida Statutes.

***The emergency rule exceeds the grant of rulemaking authority***

Emergency Rule 64ER17-6(1)(b)12. and 13. impose penalties on law enforcement personnel. The Department does not have independent authority over the activities of law enforcement personnel nor is such authority granted to the Department under section 381.986(10), Florida Statutes. Section 381.986(10)(h), Florida Statutes, cited by the Department as rulemaking authority, authorizes the Department to adopt rules to implement section 381.986(10), Florida Statutes, governing inspections and administrative actions against medical marijuana treatment centers. Emergency Rule 64ER17-6(1)(b)12. and 13. are therefore objectionable as an invalid exercise of delegated legislative authority pursuant to section 120.52(8)(b), Florida Statutes, in that they exceed the Department’s grant of rulemaking authority.

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**64ER17-6(1)(d)**

(1) The penalties listed for the following violations of section 381.986, Florida Statutes, or department rule, shall be used as guidelines in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this rule. Penalties are applicable per instance of each violation and every day that a violation occurs shall be considered a separate violation.

\* \* \*

**(d) Violation of any other provision of section 381.986, Florida Statutes, or of department rule. The full range of penalties listed in this rule shall be considered for violations pursuant to this paragraph.**

**CITED AGENCY AUTHORITY FOR EMERGENCY RULE 64ER17-6:**

Rulemaking Authority: 381.986(10)(h), F.S.

Law Implemented: 381.986, F.S.

**SPECIFIC OBJECTION:**

***The emergency rule fails to establish adequate standards for agency decisions***

Emergency Rule 64ER17-6(1)(d) is an invalid exercise of delegated legislative authority under section 120.52(8)(d), Florida Statutes, in that it adopts the impermissibly wide range of penalties set forth in Emergency Rule 64ER17-6(1)(c) without adequate standards for the imposition of the penalties, as well as failing to identify which “department rules” are subject to unidentified penalties, thereby vesting unbridled discretion in the Department.

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**CHRONOLOGY:**

Emergency Rule 64ER17-6 was published in the Florida Administrative Register on October 25, 2017, and became effective on October 24, 2017, when it was filed with the Department of State. By letter dated November 28, 2017, the Department was apprised of all of the concerns identified in the objection report. As of the date that this report was prepared, Committee staff has not received a response from the Department. By letter dated January 8, 2018, the Department was notified that Committee staff was considering recommending an objection to Emergency Rule 64ER17-6.

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Date prepared: January 29, 2018.



# **Administrative Determinations and Petitions for Judicial Review**

## 2018 ADMINISTRATIVE DETERMINATIONS AND PETITIONS FOR JUDICIAL REVIEW FILED ON THE INVALIDITY OF PROPOSED AND EXISTING RULES\*

### **NUMBER OF CASES FILED AT DOAH IN 2018:**

	CLOSED CASES	ACTIVE CASES
<i>PROPOSED RULES</i>	8	8
<i>EXISTING RULES</i>	2	6

### **JUDICIAL REVIEW CASES:**

**CASE NUMBER:** 17-6578RP

**STYLE:** FLORIDA ASSOCIATION OF THE AMERICAN INSTITUTE OF ARCHITECTS, INC. vs. FLORIDA BUILDING COMMISSION

**RULE:** 61G20-2.002

**DOAH FINAL ORDER DATE:** 2/15/2018

**CASE SUMMARY:** Proposed rule amendments are valid as to objections raised, shown to implement specific powers and duties in the 2017 law that changed the Florida Building Code triennial update process.

**DCA CASE:** 1D18-1122 filed 3/16/2018; Per Curiam Affirmed 10/26/2018

**CASE NUMBER:** 17-2570RP

**STYLE:** PELICAN BAY FOUNDATION, INC. vs. FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

**RULE:** 68C-22.023

**DOAH FINAL ORDER DATE:** 1/10/2018

**CASE SUMMARY:** The rule challenge is dismissed because it does not state a cause of action as a rule challenge, there being no part of the proposed rule which Petitioner seeks to invalidate.

**DCA CASE:** 1D18-4760 filed 11/9/2018



**CASE NUMBER:** 18-2212RP

**STYLE:** FLORIDA SENIOR LIVING ASSOCIATION, INC. vs. DEPARTMENT OF ELDER AFFAIRS

**RULE:** 58A-5.024, 58A-5.031, 58A-5.0131, 58A-5.0181, 58A-5.0182, 58A-5.0185, 58A-5.019, 58A-5.0191

**DOAH FINAL ORDER DATE:** 8/30/2018

**CASE SUMMARY:** Parts of these rules, including Form 1823, are invalid exercises of delegated legislative authority.

**DCA CASE:** 1D18-4140 filed 9/28/2018

**CASE NUMBER:** 18-2228RP

**STYLE:** FLORIDA ASSISTED LIVING ASSOCIATION, INC. vs. DEPARTMENT OF ELDER AFFAIRS

**RULE:** 58A-5.024, 58A-5.031, 58A-5.0131, 58A-5.0181, 58A-5.0182, 58A-5.0185, 58A-5.019, 58A-5.0191

**DOAH FINAL ORDER DATE:** 8/30/2018

**CASE SUMMARY:** Parts of these rules, including Form 1823, are invalid exercises of delegated legislative authority.

**DCA CASE:** 1D18-4140 filed 9/28/2018

**CASE NUMBER:** 18-2838RP

**STYLE:** LOUIS DEL FAVERO ORCHIDS, INC. vs. FLORIDA DEPARTMENT OF HEALTH, OFFICE OF COMPASSIONATE USE

**RULE:** 64-4.002

**DOAH FINAL ORDER DATE:** 8/6/2018

**CASE SUMMARY:** Petitioner proved that the Proposed Rule is an invalid exercise of delegated legislative authority.

**DCA CASE:** 1D18-3761 filed 9/4/2018

**CASE NUMBER:** 17-5882RX

**STYLE:** THE FLORIDA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC. vs. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING

**RULE:** 61D-6.011

**DOAH PARTIAL FINAL ORDER DATE:** 3/13/2018

**CASE SUMMARY:** 61D-6.011 is an invalid exercise of delegated legislative authority. Case in abeyance.

**DCA CASE:** 1D18-1434 filed 4/5/2018

**CASE NUMBER:** 18-2340RX

**STYLE:** FLORIDA SENIOR LIVING ASSOCIATION, INC. vs. DEPARTMENT OF ELDER AFFAIRS

**RULE:** 58A-5.024, 58A-5.031, 58A-5.0131, 58A-5.0181, 58A-5.0182, 58A-5.0185, 58A-5.019, 58A-5.0191

**DOAH FINAL ORDER DATE:** 8/30/2018

**CASE SUMMARY:** Parts of these rules, including Form 1823, are invalid exercises of delegated legislative authority.

**DCA CASE:** 1D18-4140 filed 9/28/2018

**CASE NUMBER:** 18-4475RX

**STYLE:** GBR ENTERPRISES, INC. vs. DEPARTMENT OF REVENUE

**RULE:** 12A-1.044

**DOAH FINAL ORDER DATE:** 1/14/2019

**CASE SUMMARY:** DOR exceeded its grant of rulemaking authority as to existing rule and the rule enlarges, modifies, or contravenes law implemented.

**DCA CASE:** 1D19-0437 filed 2/4/2019

**CASE NUMBER:** 18-5116RX

**STYLE:** TARGET CORPORATION, TOPGOLF INTERNATIONAL, INC., AND WALMART INC. vs. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

**RULE:** 61A-3.055

**DOAH FINAL ORDER DATE:** 11/30/2018

**CASE SUMMARY:** Rule 61A-3.055 is invalid because it gives the agency unbridled discretion and is arbitrary and capricious. Rule was within the Agency's delegated authority.

**DCA CASE:** 1D18-5309 filed 12/28/2018

\*Note: As of February 18, 2019. Data obtained from the [Division of Administrative Hearings \(DOAH\)](#).



**Joint Rule Four  
of the  
Florida Legislature:  
  
Joint  
Committees**

**Joint Rule Four—Joint Committees****4.1—Standing Joint Committees**

(1) The following standing joint committees are established:

- (a) Administrative Procedures Committee.
- (b) Committee on Public Counsel Oversight.
- (c) Legislative Auditing Committee.

(2) No other joint committee shall exist except as agreed to by the presiding officers or by concurrent resolution approved by the Senate and the House of Representatives.

(3) Appointments to each standing joint committee shall be made or altered and vacancies shall be filled by the Senate and the House of Representatives in accordance with their respective rules. There shall be appointed to each standing joint committee no fewer than five and no more than seven members from each house.

(4)(a) The President of the Senate shall appoint a member of the Senate to serve as the chair, and the Speaker of the House of Representatives shall appoint a member of the House of Representatives to serve as the vice chair, for:

1. The Legislative Auditing Committee and the Committee on Public Counsel Oversight, for the period from the Organization Session until noon on August 1 of the calendar year following the general election.

2. The Administrative Procedures Committee for the period from noon on August 1 of the calendar year following the general election until the next general election.

(b) The Speaker of the House of Representatives shall appoint a member of the House of Representatives to serve as the chair, and the President of the Senate shall appoint a member of the Senate to serve as the vice chair, for:

1. The Legislative Auditing Committee and the Committee on Public Counsel Oversight, for the period from noon on August 1 of the calendar year following the general election until the next general election.

2. The Administrative Procedures Committee for the period from the Organization Session until noon on August 1 of the calendar year following the general election.

(c) A vacancy in an appointed chair or vice chair shall be filled in the same manner as the original appointment.

**4.2—Procedures in Joint Committees**

The following rules shall govern procedures in joint committees other than conference committees:

(1) A quorum for a joint committee shall be a majority of the appointees of each house. No business of any type may be conducted in the absence of a quorum.

(2)(a) Joint committees shall meet only within the dates, times, and locations authorized by both the President of the Senate and the Speaker of the House of Representatives.

(b) Joint committee meetings shall meet at the call of the chair. In the absence of the chair, the vice chair shall assume the duty to convene and preside over meetings and such other duties as provided by law or joint rule. During a meeting properly convened, the presiding chair may temporarily assign the duty to preside at that meeting to another joint committee member until the assignment is relinquished or revoked.

(c) Before any joint committee may hold a meeting, a notice of such meeting shall be provided to the Secretary of the Senate and the Clerk of the House of Representatives no later than 4:30 p.m. of the 7th day before the meeting. For purposes of effecting notice to members of the house to which the chair does not belong, notice to the Secretary of the Senate shall be deemed notice to members of the Senate and notice to the Clerk of the House shall be deemed notice to members of the House of Representatives. Noticed meetings may be canceled by the chair with the approval of at least one presiding officer.

(d) If a majority of its members from each house agree, a joint committee may continue a properly noticed meeting after the expiration of the time called for the meeting. However, a joint committee may not meet beyond the time authorized by the presiding officers without special leave granted by both presiding officers.

(3) The presiding officers shall interpret, apply, and enforce rules governing joint committees by agreement when the rule at issue is a joint rule. Unless otherwise determined or overruled by an agreement of the presiding officers, the chair shall determine all questions of order arising in joint committee meetings, but such determinations may be appealed to the committee during the meeting.

(4) Each question, including any appeal of a ruling of the chair, shall be decided by a majority vote of the members of the joint committee of each house present and voting.

#### **4.3—Powers of Joint Committees**

(1) A joint committee may exercise the subpoena powers vested by law in a standing committee of the Legislature. A subpoena issued under this rule must be approved and signed by the President of the Senate and the Speaker of the House of Representatives and attested by the Secretary of the Senate and the Clerk of the House.

(2) A joint committee may adopt rules of procedure that do not conflict with the Florida Constitution or any law or joint rule, subject to the joint approval of the President of the Senate and the Speaker of the House of Representatives.

(3) A joint committee may not create subcommittees or workgroups unless authorized by both presiding officers.

#### **4.4—Administration of Joint Committees**

(1) Within the monetary limitations of the approved operating budget, the expenses of the members and the salaries and expenses of the staff of each joint committee shall be governed by joint policies adopted under Joint Rule 3.2.

(2) Subject to joint policies adopted under Joint Rule 3.2, the presiding officers shall appoint and remove the staff director and, if needed, a general counsel and any other staff necessary to assist each joint committee. All joint committee staff shall serve at the pleasure of the presiding officers. Upon the initial adoption of these joint rules in a biennium, each joint committee staff director position shall be deemed vacant until an appointment is made.

\* \* \* \*

#### **4.6—Special Powers and Duties of the Administrative Procedures Committee**

The Administrative Procedures Committee shall:

(1) Maintain a continuous review of the statutory authority on which each administrative rule is based and, whenever such authority is eliminated or significantly changed by repeal, amendment, holding by a court of last resort, or other factor, advise the agency concerned of the fact.

(2) Maintain a continuous review of administrative rules and identify and request an agency to repeal any rule or any provision of any rule that reiterates or paraphrases any statute or for which the statutory authority has been repealed.

(3) Review administrative rules and advise the agencies concerned of its findings.

(4) Exercise the duties prescribed by chapter 120, Florida Statutes, concerning the adoption and promulgation of rules.

(5) Generally review agency action pursuant to the operation of chapter 120, Florida Statutes, the Administrative Procedure Act.

(6) Report to the President of the Senate and the Speaker of the House of Representatives at least annually, no later than the first week of the regular session, and recommend needed legislation or other

appropriate action. Such report shall include the number of objections voted by the committee, the number of suspensions recommended by the committee, the number of administrative determinations filed on the invalidity of a proposed or existing rule, the number of petitions for judicial review filed on the invalidity of a proposed or existing rule, and the outcomes of such actions. Such report shall also include any recommendations provided to the standing committees during the preceding year under subsection (11).

(7) Consult regularly with legislative standing committees that have jurisdiction over the subject areas addressed in agency proposed rules regarding legislative authority for the proposed rules and other matters relating to legislative authority for agency action.

(8) Subject to the approval of the President of the Senate and the Speaker of the House of Representatives, have standing to seek judicial review, on behalf of the Legislature or the citizens of this state, of the validity or invalidity of any administrative rule to which the committee has voted an objection and that has not been withdrawn, modified, repealed, or amended to meet the objection. Judicial review under this subsection may not be initiated until the Governor and the head of the agency making the rule to which the committee has objected have been notified of the committee's proposed action and have been given a reasonable opportunity, not to exceed 60 days, for consultation with the committee. The committee may expend public funds from its appropriation for the purpose of seeking judicial review.

(9) Maintain a continuous review of the administrative rulemaking process, including a review of agency procedure and of complaints based on such agency procedure.

(10) Establish measurement criteria to evaluate whether agencies are complying with the delegation of legislative authority in adopting and implementing rules.

(11) Maintain a continuous review of statutes that authorize agencies to adopt rules and shall make recommendations to the appropriate standing committees of the Senate and the House of Representatives as to the advisability of considering changes to the delegated legislative authority to adopt rules in specific circumstances.

\* \* \* \*

**Chapter 120,  
Florida Statutes:  
  
Administrative  
Procedure Act**

## CHAPTER 120

## ADMINISTRATIVE PROCEDURE ACT

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**120.50 Exception to application of chapter.—**

This chapter shall not apply to:

- (1) The Legislature.
- (2) The courts.

*History.*—s. 1, ch. 74-310; s. 3, ch. 77-468; s. 1, ch. 78-162.

**120.51 Short title.**—This chapter may be known and cited as the “Administrative Procedure Act.”

*History.*—s. 1, ch. 74-310.

**120.515 Declaration of policy.**—This chapter provides uniform procedures for the exercise of specified authority. This chapter does not limit or impinge upon the assignment of executive power under Article IV of the State Constitution or the legal authority of an appointing authority to direct and supervise those appointees serving at the pleasure of the appointing authority. For purposes of this chapter, adherence to the direction and supervision of an appointing authority does not constitute delegation or transfer of statutory authority assigned to the appointee.

*History.*—s. 7, ch. 2012-116.

**120.52 Definitions.**—As used in this act:

(1) “Agency” means the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution:

(a) The Governor; each state officer and state department, and each departmental unit described in s. 20.04; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multi-county special district, but only if a majority of its governing board is comprised of nonelected persons; educational units; and each entity described in chapters 163, 373, 380, and 582 and s. 186.504.

(b) Each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county.

(c) Each officer and governmental entity in the state having jurisdiction in one county or less than one county, to the extent they are expressly made subject to this chapter by general or special law or existing judicial decisions.

This definition does not include a municipality or legal entity created solely by a municipality; a legal entity or agency created in whole or in part pursuant to part II of chapter 361; a metropolitan planning organization created pursuant to s. 339.175; a separate legal or administrative entity created pursuant to s. 339.175 of which a metropolitan planning organization is a member; an expressway authority pursuant to chapter 348 or any transportation authority or commission under chapter 343 or chapter 349; or a legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.

(2) “Agency action” means the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order. The term also includes any denial of a request made under s. 120.54(7).

(3) “Agency head” means the person or collegial body in a department or other governmental unit statutorily responsible for final agency action. An agency head appointed by and serving at the pleasure of an appointing authority remains subject to the direction and supervision of the appointing authority,



but actions taken by the agency head as authorized by statute are official acts.

(4) "Committee" means the Administrative Procedures Committee.

(5) "Division" means the Division of Administrative Hearings. Any document filed with the division by a party represented by an attorney shall be filed by electronic means through the division's website. Any document filed with the division by a party not represented by an attorney shall, whenever possible, be filed by electronic means through the division's website.

(6) "Educational unit" means a local school district, a community college district, the Florida School for the Deaf and the Blind, or a state university when the university is acting pursuant to statutory authority derived from the Legislature.

(7) "Final order" means a written final decision which results from a proceeding under s. 120.56, s. 120.565, s. 120.569, s. 120.57, s. 120.573, or s. 120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. A final order includes all materials explicitly adopted in it. The clerk shall indicate the date of filing on the order.

(8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

(f) The rule imposes 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 objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory

provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

(9) "Law implemented" means the language of the enabling statute being carried out or interpreted by an agency through rulemaking.

(10) "License" means a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act.

(11) "Licensing" means the agency process respecting the issuance, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license or imposition of terms for the exercise of a license.

(12) "Official reporter" means the publication in which an agency publishes final orders, the index to final orders, and the list of final orders which are listed rather than published.

(13) "Party" means:

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

(d) Any county representative, agency, department, or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county, when the proceeding involves the substantial interests of a significant number of residents of the county and the board of county commissioners has, by resolution, authorized the representative, agency, department, or unit to represent the class of interested persons. The authorizing resolution shall apply to a specific proceeding and to appeals and ancillary proceedings thereto, and it shall not be required to state the names of the persons whose interests are to be represented.

The term "party" does not include a member government of a regional water supply authority or a governmental or quasi-judicial board or commission established by local ordinance or special or general law where the governing membership of such board or commission is shared with, in whole or in part, or appointed by a member government of a regional water supply authority in proceedings under s. 120.569, s. 120.57, or s. 120.68, to the extent that an interlocal agreement under ss. 163.01 and 373.713 exists in which the member government has agreed that its substantial interests are not affected by the proceedings or that it is to be bound

by alternative dispute resolution in lieu of participating in the proceedings. This exclusion applies only to those particular types of disputes or controversies, if any, identified in an interlocal agreement.

(14) "Person" means any person described in s. 1.01, any unit of government in or outside the state, and any agency described in subsection (1).

(15) "Recommended order" means the official recommendation of an administrative law judge assigned by the division or of any other duly authorized presiding officer, other than an agency head or member of an agency head, for the final disposition of a proceeding under ss. 120.569 and 120.57.

(16) "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 term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.
2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.
3. Contractual provisions reached as a result of collective bargaining.
4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

(17) "Rulemaking authority" means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term "rule."

(18) "Small city" means any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census.

(19) "Small county" means any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census.

(20) "Unadopted rule" means an agency statement that meets the definition of the term "rule," but that has not been adopted pursuant to the requirements of s. 120.54.

(21) "Variance" means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Any variance shall conform to the standards for variances outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

(22) "Waiver" means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Any waiver shall conform to the standards for waivers outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

**History.**—s. 1, ch. 74-310; s. 1, ch. 75-191; s. 1, ch. 76-131; s. 1, ch. 77-174; s. 12, ch. 77-290; s. 2, ch. 77-453; s. 1, ch. 78-28; s. 1, ch. 78-425; s. 1, ch. 79-20; s. 55, ch. 79-40; s. 1, ch. 79-299; s. 2, ch. 81-119; s. 1, ch. 81-180; s. 7, ch. 82-180; s. 1, ch. 83-78; s. 2, ch. 83-273; s. 10, ch. 84-170; s. 15, ch. 85-80; s. 1, ch. 85-168; s. 2, ch. 87-385; s. 1, ch. 88-367; s. 1, ch. 89-147; s. 1, ch. 91-46; s. 9, ch. 92-166; s. 50, ch. 92-279; s. 55, ch. 92-326; s. 3, ch. 96-159; s. 1, ch. 97-176; s. 2, ch. 97-286; s. 1, ch. 98-402; s. 64, ch. 99-245; s. 2, ch. 99-379; s. 895, ch. 2002-387; s. 1, ch. 2003-94; s. 138, ch. 2003-261; s. 7, ch. 2003-286; s. 3, ch. 2007-196; s. 13, ch. 2007-217; s. 2, ch. 2008-104; s. 1, ch. 2009-85; s. 1, ch. 2009-187; s. 10, ch. 2010-5; s. 2, ch. 2010-205; s. 7, ch. 2011-208; s. 8, ch. 2012-116; s. 14, ch. 2013-173.

### **120.525 Meetings, hearings, and workshops.—**

(1) Except in the case of emergency meetings, each agency shall give notice of public meetings, hearings, and workshops by publication in the Florida Administrative Register and on the agency's website not less than 7 days before the event. The notice shall include a statement of the general subject matter to be considered.

(2) An agenda shall be prepared by the agency in time to ensure that a copy of the agenda may be received at least 7 days before the event by any person in the state who requests a copy and who pays the reasonable cost of the copy. The agenda, along with any meeting materials available in electronic form excluding confidential and exempt information, shall be published on the agency's website. The agenda shall contain the items to be considered in order of presentation. After the agenda has been made available, a change shall be made only for good cause, as determined by the person designated to preside, and stated in the record. Notification of such change shall be at the earliest practicable time.

(3) If an agency finds that an immediate danger to the public health, safety, or welfare requires immediate action, the agency may hold an emergency public meeting and give notice of such meeting by any procedure that is fair under the circumstances and necessary to protect the public interest, if:

(a) The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

(b) The agency takes only that action necessary to protect the public interest under the emergency procedure.

(c) The agency publishes in writing at the time of, or prior to, its action 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 used is fair under the circumstances. The agency findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

**History.**—s. 4, ch. 96-159; s. 3, ch. 2009-187; s. 3, ch. 2013-14.

### **120.53 Maintenance of agency final orders.—**

(1) In addition to maintaining records contained in s. 119.021(3), each agency shall also electronically transmit a certified text-searchable copy of each agency final order listed in subsection (2) rendered on or after July 1, 2015, to a centralized electronic database of agency final orders maintained by the division. The database

must allow users to research and retrieve the full texts of agency final orders by:

(a) The name of the agency that issued the final order.

(b) The date the final order was issued.

(c) The type of final order.

(d) The subject of the final order.

(e) Terms contained in the text of the final order.

(2) The agency final orders that must be electronically transmitted to the centralized electronic database include:

(a) Each final order resulting from a proceeding under s. 120.57 or s. 120.573.

(b) Each final order rendered pursuant to s. 120.57(4) which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value.

(c) Each declaratory statement issued by an agency.

(d) Each final order resulting from a proceeding under s. 120.56 or s. 120.574.

(3) Each agency shall maintain a list of all final orders rendered pursuant to s. 120.57(4) that are not required to be electronically transmitted to the centralized electronic database because they do not contain statements of agency policy or statements of precedential value. The list must include the name of the parties to the proceeding and the number assigned to the final order.

(4) Each final order, whether rendered by the agency or the division, that must be electronically transmitted to the centralized electronic database or maintained on a list pursuant to subsection (3) must be electronically transmitted to the database or added to the list within 90 days after the final order is rendered. Each final order that must be electronically transmitted to the database or added to the list must have attached a copy of the complete text of any materials incorporated by reference; however, if the quantity of the materials incorporated makes attachment of the complete text of the materials impractical, the final order may contain a statement of the location of such materials and the manner in which the public may inspect or obtain copies of the materials incorporated by reference.

(5) Nothing in this section relieves an agency from its responsibility for maintaining a subject matter index of final orders rendered before July 1, 2015, and identifying the location of the subject matter index on the agency's website. In addition, an agency may electronically transmit to the centralized electronic database certified copies of all of the final orders that were rendered before July 1, 2015, which were required to be in the subject matter index. The centralized electronic database constitutes the official compilation of administrative final orders rendered on or after July 1, 2015, for each agency.

**History.**—s. 1, ch. 74-310; s. 2, ch. 75-191; s. 2, ch. 76-131; s. 2, ch. 79-299; s. 1, ch. 81-296; s. 2, ch. 81-309; s. 8, ch. 83-92; s. 34, ch. 83-217; s. 3, ch. 83-273; s. 1, ch. 84-203; s. 77, ch. 85-180; s. 2, ch. 87-100; s. 2, ch. 88-384; s. 44, ch. 90-136; s. 35, ch. 90-302; s. 2, ch. 91-30; s. 79, ch. 91-45; s. 1, ch. 91-191; s. 1, ch. 92-166; s. 143, ch. 92-279; s. 55, ch. 92-326; s. 757, ch. 95-147; s. 5, ch. 96-159; s. 2, ch. 96-423; s. 2, ch. 97-176; s. 3, ch. 2008-104; s. 2, ch. 2015-155.

### **120.533 Coordination of the transmittal, indexing, and listing of agency final orders by Department of State.**—The Department of State shall:

(1) Coordinate the transmittal, indexing, management, preservation, and availability of agency final orders that must be transmitted, indexed, or listed pursuant to s. 120.53.

(2) Provide guidelines for indexing agency final orders. More than one system for indexing may be approved by the Department of State, including systems or methods in use, or proposed for use, by an agency. More than one system may be approved for use by a single agency as best serves the needs of that agency and the public.

(3) Provide for storage and retrieval systems to be maintained by agencies pursuant to s. 120.53(5) for indexing, and making available agency final orders by subject matter. The Department of State may authorize more than one system, including systems in use by an agency. Storage and retrieval systems that may be used by an agency include, without limitation, a designated reporter or reporters, a microfilming system, an automated system, or any other system considered appropriate by the Department of State.

(4) Provide standards and guidelines for the certification and electronic transmittal of copies of agency final orders to the division, as required under s. 120.53, and, to protect the integrity and authenticity of information publicly accessible through the electronic database, coordinate and provide standards and guidelines to ensure the security of copies of agency final orders transmitted and maintained in the electronic database by the division under s. 120.53(1).

(5) For each agency, determine which final orders must be indexed or transmitted.

(6) Require each agency to report to the department concerning which types or categories of agency orders establish precedent for each agency.

(7) Adopt rules as necessary to administer its responsibilities under this section, which shall be binding on all agencies including the division acting in the capacity of official compiler of administrative final orders under s. 120.53, notwithstanding s. 120.65. The Department of State may provide for an alternative official compiler to manage and operate the division's database and related services if the Administration Commission determines that the performance of the division as official compiler is unsatisfactory.

**History.**—s. 9, ch. 91-30; s. 1, ch. 91-191; s. 7, ch. 96-159; s. 3, ch. 2015-155.

### **120.536 Rulemaking authority; repeal; challenge.**—

(1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general

legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

(2) Unless otherwise expressly provided by law:

(a) The repeal of one or more provisions of law implemented by a rule that on its face implements only the provision or provisions repealed and no other provision of law nullifies the rule. Whenever notice of the nullification of a rule under this subsection is received from the committee or otherwise, the Department of State shall remove the rule from the Florida Administrative Code as of the effective date of the law effecting the nullification and update the historical notes for the code to show the rule repealed by operation of law.

(b) The repeal of one or more provisions of law implemented by a rule that on its face implements the provision or provisions repealed and one or more other provisions of law nullifies the rule or applicable portion of the rule to the extent that it implements the repealed law. The agency having authority to repeal or amend the rule shall, within 180 days after the effective date of the repealing law, publish a notice of rule development identifying all portions of rules affected by the repealing law, and if no notice is timely published the operation of each rule implementing a repealed provision of law shall be suspended until such notice is published.

(c) The repeal of one or more provisions of law that, other than as provided in paragraph (a) or paragraph (b), causes a rule or portion of a rule to be of uncertain enforceability requires the Department of State to treat the rule as provided by s. 120.555. A rule shall be considered to be of uncertain enforceability under this paragraph if the division notifies the Department of State that a rule or a portion of the rule has been invalidated in a division proceeding based upon a repeal of law, or the committee gives written notification to the Department of State and the agency having power to amend or repeal the rule that a law has been repealed creating doubt about whether the rule is still in full force and effect.

(3) The Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency shall initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

(4) Nothing in this section shall be construed to change the legal status of a rule that has otherwise been judicially or administratively determined to be invalid.

**History.**—s. 9, ch. 96-159; s. 3, ch. 99-379; s. 15, ch. 2000-151; s. 15, ch. 2005-2; s. 4, ch. 2008-104; s. 1, ch. 2012-31.

#### **120.54 Rulemaking.—**

(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—

(a) 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.

1. Rulemaking shall be presumed feasible unless the agency proves that:

a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.

2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

(b) Whenever an act of the Legislature is enacted which requires implementation of the act by rules of an agency within the executive branch of state government, such rules shall be drafted and formally proposed as provided in this section within the times provided in s. 120.74(4) and (5).

(c) No statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules unless there is an express statutory provision prohibiting its application until the adoption of implementing rules.

(d) In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law, choose the alternative that 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 objectives.

(e) No agency has inherent rulemaking authority, nor has any agency authority to establish penalties for violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules.

(f) An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be effective until the statute upon which they are based is effective. An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute.

(g) Each rule adopted shall contain only one subject.

(h) In rulemaking proceedings, the agency may recognize any material which may be judicially noticed, and it may provide that materials so recognized be incorporated into the record of the proceeding. Before the record of any proceeding is completed, all parties shall be provided a list of these materials and given a

reasonable opportunity to examine them and offer written comments or written rebuttal.

(i)1. A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes.

2. An agency rule that incorporates by specific reference another rule of that agency automatically incorporates subsequent amendments to the referenced rule unless a contrary intent is clearly indicated in the referencing rule. A notice of amendments to a rule that has been incorporated by specific reference in other rules of that agency must explain the effect of those amendments on the referencing rules.

3. In rules adopted after December 31, 2010, material may not be incorporated by reference unless:

a. The material has been submitted in the prescribed electronic format to the Department of State and the full text of the material can be made available for free public access through an electronic hyperlink from the rule making the reference in the Florida Administrative Code; or

b. The agency has determined that posting the material on the Internet for purposes of public examination and inspection would constitute a violation of federal copyright law, in which case a statement to that effect, along with the address of locations at the Department of State and the agency at which the material is available for public inspection and examination, must be included in the notice required by subparagraph (3)(a)1.

4. A rule may not be amended by reference only. Amendments must set out the amended rule in full in the same manner as required by the State Constitution for laws.

5. Notwithstanding any contrary provision in this section, when an adopted rule of the Department of Environmental Protection or a water management district is incorporated by reference in the other agency's rule to implement a provision of part IV of chapter 373, subsequent amendments to the rule are not effective as to the incorporating rule unless the agency incorporating by reference notifies the committee and the Department of State of its intent to adopt the subsequent amendment, publishes notice of such intent in the Florida Administrative Register, and files with the Department of State a copy of the amended rule incorporated by reference. Changes in the rule incorporated by reference are effective as to the other agency 20 days after the date of the published notice and filing with the Department of State. The Department of State shall amend the history note of the incorporating rule to show the effective date of such change. Any substantially affected person may, within 14 days after the date of publication of the notice of intent in the Florida Administrative Register, file an objection to rulemaking with the agency. The objection shall specify the portions of the rule incorporated by reference to which the person objects and the reasons for the objection. The agency shall not have the authority under this subparagraph to adopt those portions of the rule specified in such objection. The agency shall

publish notice of the objection and of its action in response in the next available issue of the Florida Administrative Register.

6. The Department of State may adopt by rule requirements for incorporating materials pursuant to this paragraph.

(j) A rule published in the Florida Administrative Code must be indexed by the Department of State within 90 days after the rule is filed. The Department of State shall by rule establish procedures for indexing rules.

(k) An agency head may delegate the authority to initiate rule development under subsection (2); however, rulemaking responsibilities of an agency head under subparagraph (3)(a)1., subparagraph (3)(e)1., or subparagraph (3)(e)6. may not be delegated or transferred.

(2) RULE DEVELOPMENT; WORKSHOPS; NEGOTIATED RULEMAKING.—

(a) Except when the intended action is the repeal of a rule, agencies shall provide notice of the development of proposed rules by publication of a notice of rule development in the Florida Administrative Register before providing notice of a proposed rule as required by paragraph (3)(a). The notice of rule development shall indicate the subject area to be addressed by rule development, provide a short, plain explanation of the purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available.

(b) All rules should be drafted in readable language. The language is readable if:

1. It avoids the use of obscure words and unnecessarily long or complicated constructions; and

2. It avoids the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions.

(c) An agency may hold public workshops for purposes of rule development. An agency must hold public workshops, including workshops in various regions of the state or the agency's service area, for purposes of rule development if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary. The explanation is not final agency action subject to review pursuant to ss. 120.569 and 120.57. The failure to provide the explanation when required may be a material error in procedure pursuant to s. 120.56(1)(c). When a workshop or public hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the rule being developed. The workshop may be facilitated or mediated by a neutral third person, or the agency may employ other types of dispute resolution alternatives for the workshop that are appropriate for rule development. Notice of a rule development workshop shall be by publication in the Florida Administrative Register not less than 14 days prior to the date on which the workshop is scheduled to be held and shall indicate the subject area which will be addressed; the agency

contact person; and the place, date, and time of the workshop.

(d)1. An agency may use negotiated rulemaking in developing and adopting rules. The agency should consider the use of negotiated rulemaking when complex rules are being drafted or strong opposition to the rules is anticipated. The agency should consider, but is not limited to considering, whether a balanced committee of interested persons who will negotiate in good faith can be assembled, whether the agency is willing to support the work of the negotiating committee, and whether the agency can use the group consensus as the basis for its proposed rule. Negotiated rulemaking uses a committee of designated representatives to draft a mutually acceptable proposed rule.

2. An agency that chooses to use the negotiated rulemaking process described in this paragraph shall publish in the Florida Administrative Register a notice of negotiated rulemaking that includes a listing of the representative groups that will be invited to participate in the negotiated rulemaking process. Any person who believes that his or her interest is not adequately represented may apply to participate within 30 days after publication of the notice. All meetings of the negotiating committee shall be noticed and open to the public pursuant to the provisions of this chapter. The negotiating committee shall be chaired by a neutral facilitator or mediator.

3. The agency's decision to use negotiated rulemaking, its selection of the representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action. Nothing in this subparagraph is intended to affect the rights of an affected person to challenge a proposed rule developed under this paragraph in accordance with s. 120.56(2).

### (3) ADOPTION PROCEDURES.—

#### (a) Notices.—

1. Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth 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 grant of rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented or interpreted. The notice must include a summary of the agency's statement of the estimated regulatory costs, if one has been prepared, based on the factors set forth in s. 120.541(2); a statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by s. 120.541(1), must do so in writing within 21 days after publication of the notice; and a statement as to whether, based on the statement of the estimated regulatory costs or other information expressly relied upon and described by the agency if no statement of regulatory costs is required, the proposed rule is expected to require legislative ratification pursuant to s. 120.541(3). The notice must state the procedure for requesting a

public hearing on the proposed rule. Except when the intended action is the repeal of a rule, the notice must include a reference both to the date on which and to the place where the notice of rule development that is required by subsection (2) appeared.

2. The notice shall be published in the Florida Administrative Register not less than 28 days prior to the intended action. The proposed rule shall be available for inspection and copying by the public at the time of the publication of notice.

3. The notice shall be mailed to all persons named in the proposed rule and to all persons who, at least 14 days prior to such mailing, have made requests of the agency for advance notice of its proceedings. The agency shall also give such notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed.

4. The adopting agency shall file with the committee, at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a copy of any material incorporated by reference in the 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; a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and the notice required by subparagraph 1.

#### (b) *Special matters to be considered in rule adoption.*—

1. Statement of estimated regulatory costs.—Before the adoption, amendment, or repeal of any rule other than an emergency rule, an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541. However, an agency must prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541, if:

a. The proposed rule will have an adverse impact on small business; or

b. The proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in this state within 1 year after the implementation of the rule.

2. Small businesses, small counties, and small cities.—

a. Each agency, before the adoption, amendment, or repeal of a rule, shall consider the impact of the rule on small businesses as defined by s. 288.703 and the impact of the rule on small counties or small cities as defined by s. 120.52. Whenever practicable, an agency shall tier its rules to reduce disproportionate impacts on small businesses, small counties, or small cities to avoid regulating small businesses, small counties, or small cities that do not contribute significantly to the problem the rule is designed to address. An agency may define "small business" to include businesses employing more than 200 persons, may define "small county" to include those with populations of more than 75,000, and may define "small city" to include those with populations of more than 10,000, if it finds that such a definition is necessary to adapt a rule to the needs and problems of small businesses, small counties, or small cities. The

agency shall consider each of the following methods for reducing the impact of the proposed rule on small businesses, small counties, and small cities, or any combination of these entities:

(I) Establishing less stringent compliance or reporting requirements in the rule.

(II) Establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements.

(III) Consolidating or simplifying the rule's compliance or reporting requirements.

(IV) Establishing performance standards or best management practices to replace design or operational standards in the rule.

(V) Exempting small businesses, small counties, or small cities from any or all requirements of the rule.

b.(I) If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to the rules ombudsman in the Executive Office of the Governor at least 28 days before the intended action.

(II) Each agency shall adopt those regulatory alternatives offered by the rules ombudsman in the Executive Office of the Governor and provided to the agency no later than 21 days after the rules ombudsman's receipt of the written notice of the rule which it finds are feasible and consistent with the stated objectives of the proposed rule and which would reduce the impact on small businesses. When regulatory alternatives are offered by the rules ombudsman in the Executive Office of the Governor, the 90-day period for filing the rule in subparagraph (e)2. is extended for a period of 21 days.

(III) If an agency does not adopt all alternatives offered pursuant to this sub-subparagraph, it shall, before rule adoption or amendment and pursuant to subparagraph (d)1., file a detailed written statement with the committee explaining the reasons for failure to adopt such alternatives. Within 3 working days after the filing of such notice, the agency shall send a copy of such notice to the rules ombudsman in the Executive Office of the Governor.

(c) *Hearings.*—

1. If the intended action concerns any rule other than one relating exclusively to procedure or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice of intended agency action, give affected persons an opportunity to present evidence and argument on all issues under consideration. The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule. When a public hearing is held, the agency must ensure that staff are available to explain the agency's proposal and to respond to questions or comments regarding the rule. If the agency head is a board or other collegial body created under s. 20.165(4) or s. 20.43(3)(g), and one or more requested public hearings is scheduled, the board or other collegial body shall conduct at least one of the public hearings itself and may not delegate this responsibility without the consent of those persons requesting the public hearing. Any material pertinent to the issues under consideration

submitted to the agency within 21 days after the date of publication of the notice or submitted to the agency between the date of publication of the notice and the end of the final public hearing shall be considered by the agency and made a part of the record of the rulemaking proceeding.

2. Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely asserts that the person's substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking proceeding is not adequate to protect the person's interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of ss. 120.569 and 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

(d) *Modification or withdrawal of proposed rules.*—

1. After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, if the rule has not been changed from the rule as previously filed with the committee, or contains only technical changes, the adopting agency shall file a notice to that effect with the committee at least 7 days prior to filing the rule for adoption. Any change, other than a technical change that does not affect the substance of the rule, must be supported by the record of public hearings held on the rule, must be in response to written material submitted to the agency within 21 days after the date of publication of the notice of intended agency action or submitted to the agency between the date of publication of the notice and the end of the final public hearing, or must be in response to a proposed objection by the committee. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a copy of a notice of change by certified mail or actual delivery to any person who requests it in writing no later than 21 days after the notice required in paragraph (a). The agency shall file the notice of change with the committee, along with the reasons for the change, and provide the notice of change to persons requesting it, at least 21 days prior to filing the rule for adoption. The notice of change shall be published in the Florida Administrative Register at least 21 days prior to filing the rule for adoption. This subparagraph does not apply to emergency rules adopted pursuant to subsection (4).

2. After the notice required by paragraph (a) and prior to adoption, the agency may withdraw the rule in whole or in part.

3. After adoption and before the rule becomes effective, a rule may be modified or withdrawn only in the following circumstances:

a. When the committee objects to the rule;

b. When a final order, which is not subject to further appeal, is entered in a rule challenge brought pursuant to s. 120.56 after the date of adoption but before the rule becomes effective pursuant to subparagraph (e)6.;

c. If the rule requires ratification, when more than 90 days have passed since the rule was filed for

adoption without the Legislature ratifying the rule, in which case the rule may be withdrawn but may not be modified; or

d. When the committee notifies the agency that an objection to the rule is being considered, in which case the rule may be modified to extend the effective date by not more than 60 days.

4. The agency shall give notice of its decision to withdraw or modify a rule in the first available issue of the publication in which the original notice of rulemaking was published, shall notify those persons described in subparagraph (a)3. in accordance with the requirements of that subparagraph, and shall notify the Department of State if the rule is required to be filed with the Department of State.

5. After a rule has become effective, it may be repealed or amended only through the rulemaking procedures specified in this chapter.

(e) *Filing for final adoption; effective date.*—

1. If the adopting agency is required to publish its rules in the Florida Administrative Code, the agency, upon approval of the agency head, shall file with the Department of State three certified copies of the rule it proposes to adopt; one copy of any material incorporated by reference in the rule, certified by the agency; a summary of the rule; a summary of any hearings held on the rule; and a detailed written statement of the facts and circumstances justifying the rule. Agencies not required to publish their rules in the Florida Administrative Code shall file one certified copy of the proposed rule, and the other material required by this subparagraph, in the office of the agency head, and such rules shall be open to the public.

2. 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 a statement of estimated regulatory costs required under s. 120.541 has been provided to all persons who submitted a lower cost regulatory alternative and made available to the public, or until the administrative law judge has rendered a decision under s. 120.56(2), whichever applies. When a required notice of change is published prior to the expiration of the time to file the rule for adoption, the period during which a rule must be filed for adoption is extended to 45 days after the date of publication. If notice of a public hearing is published prior to the expiration of the time to file the rule for adoption, the period during which a rule must be filed for adoption is extended to 45 days after adjournment of the final hearing on the rule, 21 days after receipt of all material authorized to be submitted at the hearing, or 21 days after receipt of the transcript, if one is made, whichever is latest. The term “public hearing” includes any public meeting held by any agency at which the rule is considered. If a petition for an administrative determination under s. 120.56(2) is filed, the period during which a rule must be filed for adoption is extended to 60 days after the administrative law judge files the final order with the clerk or until 60 days after subsequent judicial review is complete.

3. At the time a rule is filed, the agency shall certify that the time limitations prescribed by this paragraph have been complied with, that all statutory rulemaking requirements have been met, and that there is no administrative determination pending on the rule.

4. At the time a rule is filed, the committee shall certify whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the committee. The department shall reject any rule that is not filed within the prescribed time limits; that does not comply with all statutory rulemaking requirements and rules of the department; upon which an agency has not responded in writing to all material and timely written inquiries or written comments; upon which an administrative determination is pending; or which does not include a statement of estimated regulatory costs, if required.

5. If a rule has not been adopted within the time limits imposed by this paragraph or has not been adopted in compliance with all statutory rulemaking requirements, the agency proposing the rule shall withdraw the rule and give notice of its action in the next available issue of the Florida Administrative Register.

6. The proposed rule shall be adopted on being filed with the Department of State and become effective 20 days after being filed, on a later date specified in the notice required by subparagraph (a)1., on a date required by statute, or upon ratification by the Legislature pursuant to s. 120.541(3). Rules not required to be filed with the Department of State shall become effective when adopted by the agency head, on a later date specified by rule or statute, or upon ratification by the Legislature pursuant to s. 120.541(3). If the committee notifies an agency that an objection to a rule is being considered, the agency may postpone the adoption of the rule to accommodate review of the rule by the committee. When an agency postpones adoption of a rule to accommodate review by the committee, the 90-day period for filing the rule is tolled until the committee notifies the agency that it has completed its review of the rule.

For the purposes of this paragraph, the term “administrative determination” does not include subsequent judicial review.

(4) EMERGENCY RULES.—

(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action 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 used is fair under the circumstances. In



any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Register and provided to the committee along with any material incorporated by reference in the rules. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

(b) Rules pertaining to the public health, safety, or welfare shall include rules pertaining to perishable agricultural commodities or rules pertaining to the interpretation and implementation of the requirements of chapters 97-102 and chapter 105 of the Election Code.

(c) An emergency rule adopted under this subsection shall not be effective for a period longer than 90 days and shall not be renewable, except when the agency has initiated rulemaking to adopt rules addressing the subject of the emergency rule and either:

1. A challenge to the proposed rules has been filed and remains pending; or
2. The proposed rules are awaiting ratification by the Legislature pursuant to s. 120.541(3).

Nothing in this paragraph prohibits the agency from adopting a rule or rules identical to the emergency rule through the rulemaking procedures specified in subsection (3).

(d) Subject to applicable constitutional and statutory provisions, an emergency rule becomes effective immediately on filing, or on a date less than 20 days thereafter if specified in the rule, if the adopting agency finds that such effective date is necessary because of immediate danger to the public health, safety, or welfare.

(5) UNIFORM RULES.—

(a)1. By July 1, 1997, the Administration Commission shall adopt one or more sets of uniform rules of procedure which shall be reviewed by the committee and filed with the Department of State. Agencies must comply with the uniform rules by July 1, 1998. The uniform rules shall establish procedures that comply with the requirements of this chapter. On filing with the department, the uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection.

2. An agency may seek exceptions to the uniform rules of procedure by filing a petition with the Administration Commission. The Administration Commission shall approve exceptions to the extent necessary to implement other statutes, to the extent necessary to conform to any requirement imposed as a condition precedent to receipt of federal funds or to permit persons in this state to receive tax benefits under federal law, or as required for the most efficient operation of the agency as determined by the Administration Commission. The reasons for the exceptions shall be published in the Florida Administrative Register.

3. Agency rules that provide exceptions to the uniform rules shall not be filed with the department

unless the Administration Commission has approved the exceptions. Each agency that adopts rules that provide exceptions to the uniform rules shall publish a separate chapter in the Florida Administrative Code that delineates clearly the provisions of the agency's rules that provide exceptions to the uniform rules and specifies each alternative chosen from among those authorized by the uniform rules. Each chapter shall be organized in the same manner as the uniform rules.

(b) The uniform rules of procedure adopted by the commission pursuant to this subsection shall include, but are not limited to:

1. Uniform rules for the scheduling of public meetings, hearings, and workshops.

2. Uniform rules for use by each state agency that provide procedures for conducting public meetings, hearings, and workshops, and for taking evidence, testimony, and argument at such public meetings, hearings, and workshops, in person and by means of communications media technology. The rules shall provide that all evidence, testimony, and argument presented shall be afforded equal consideration, regardless of the method of communication. If a public meeting, hearing, or workshop is to be conducted by means of communications media technology, or if attendance may be provided by such means, the notice shall so state. The notice for public meetings, hearings, and workshops utilizing communications media technology shall state how persons interested in attending may do so and shall name locations, if any, where communications media technology facilities will be available. Nothing in this paragraph shall be construed to diminish the right to inspect public records under chapter 119. Limiting points of access to public meetings, hearings, and workshops subject to the provisions of s. 286.011 to places not normally open to the public shall be presumed to violate the right of access of the public, and any official action taken under such circumstances is void and of no effect. Other laws relating to public meetings, hearings, and workshops, including penal and remedial provisions, shall apply to public meetings, hearings, and workshops conducted by means of communications media technology, and shall be liberally construed in their application to such public meetings, hearings, and workshops. As used in this subparagraph, "communications media technology" means the electronic transmission of printed matter, audio, full-motion video, freeze-frame video, compressed video, and digital video by any method available.

3. Uniform rules of procedure for the filing of notice of protests and formal written protests. The Administration Commission may prescribe the form and substantive provisions of a required bond.

4. Uniform rules of procedure for the filing of petitions for administrative hearings pursuant to s. 120.569 or s. 120.57. Such rules shall require the petition to include:

- a. The identification of the petitioner, including the petitioner's e-mail address, if any, for the transmittal of subsequent documents by electronic means.

b. A statement of when and how the petitioner received notice of the agency's action or proposed action.

c. An explanation of how the petitioner's substantial interests are or will be affected by the action or proposed action.

d. A statement of all material facts disputed by the petitioner or a statement that there are no disputed facts.

e. A statement of the ultimate facts alleged, including a statement of the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action.

f. A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.

g. A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the proposed action.

5. Uniform rules for the filing of request for administrative hearing by a respondent in agency enforcement and disciplinary actions. Such rules shall require a request to include:

a. The name, address, e-mail address, and telephone number of the party making the request and the name, address, and telephone number of the party's counsel or qualified representative upon whom service of pleadings and other papers shall be made;

b. A statement that the respondent is requesting an administrative hearing and disputes the material facts alleged by the petitioner, in which case the respondent shall identify those material facts that are in dispute, or that the respondent is requesting an administrative hearing and does not dispute the material facts alleged by the petitioner; and

c. A reference by file number to the administrative complaint that the party has received from the agency and the date on which the agency pleading was received.

The agency may provide an election-of-rights form for the respondent's use in requesting a hearing, so long as any form provided by the agency calls for the information in sub-subparagraphs a. through c. and does not impose any additional requirements on a respondent in order to request a hearing, unless such requirements are specifically authorized by law.

6. Uniform rules of procedure for the filing and prompt disposition of petitions for declaratory statements. The rules shall also describe the contents of the notices that must be published in the Florida Administrative Register under s. 120.565, including any applicable time limit for the filing of petitions to intervene or petitions for administrative hearing by persons whose substantial interests may be affected.

7. Provision of a method by which each agency head shall provide a description of the agency's organization and general course of its operations. The rules shall require that the statement concerning the agency's organization and operations be published on the agency's website.

8. Uniform rules establishing procedures for granting or denying petitions for variances and waivers pursuant to s. 120.542.

(6) ADOPTION OF FEDERAL STANDARDS.— Notwithstanding any contrary provision of this section, in the pursuance of state implementation, operation, or enforcement of federal programs, an agency is empowered to adopt rules substantively identical to regulations adopted pursuant to federal law, in accordance with the following procedures:

(a) The agency shall publish notice of intent to adopt a rule pursuant to this subsection in the Florida Administrative Register at least 21 days prior to filing the rule with the Department of State. The agency shall provide a copy of the notice of intent to adopt a rule to the committee at least 21 days prior to the date of filing with the Department of State. Prior to filing the rule with the Department of State, the agency shall consider any written comments received within 14 days after the date of publication of the notice of intent to adopt a rule. The rule shall be adopted upon filing with the Department of State. Substantive changes from the rules as noticed shall require republishing of notice as required in this subsection.

(b) Any rule adopted pursuant to this subsection shall become effective upon the date designated by the agency in the notice of intent to adopt a rule; however, no such rule shall become effective earlier than the effective date of the substantively identical federal regulation.

(c) Any substantially affected person may, within 14 days after the date of publication of the notice of intent to adopt a rule, file an objection to rulemaking with the agency. The objection shall specify the portions of the proposed rule to which the person objects and the specific reasons for the objection. The agency shall not proceed pursuant to this subsection to adopt those portions of the proposed rule specified in an objection, unless the agency deems the objection to be frivolous, but may proceed pursuant to subsection (3). An objection to a proposed rule, which rule in no material respect differs from the requirements of the federal regulation upon which it is based, is deemed to be frivolous.

(d) Whenever any federal regulation adopted as an agency rule pursuant to this subsection is declared invalid or is withdrawn, revoked, repealed, remanded, or suspended, the agency shall, within 60 days thereafter, publish a notice of repeal of the substantively identical agency rule in the Florida Administrative Register. Such repeal is effective upon publication of the notice. Whenever any federal regulation adopted as an agency rule pursuant to this subsection is substantially amended, the agency may adopt the amended regulation as a rule. If the amended regulation is not adopted as a rule within 180 days after the effective date of the amended regulation, the original rule is deemed repealed and the agency shall publish a notice of repeal of the original agency rule in the next available Florida Administrative Register.

(e) Whenever all or part of any rule proposed for adoption by the agency is substantively identical to a regulation adopted pursuant to federal law, such rule

shall be written in a manner so that the rule specifically references the regulation whenever possible.

(7) PETITION TO INITIATE RULEMAKING.—

(a) Any person regulated by an agency or having substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the minimum public information required by this chapter. The petition shall specify the proposed rule and action requested. Not later than 30 calendar days following the date of filing a petition, the agency shall initiate rulemaking proceedings under this chapter, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

(b) If the petition filed under this subsection is directed to an unadopted rule, the agency shall, not later than 30 days following the date of filing a petition, initiate rulemaking, or provide notice in the Florida Administrative Register that the agency will hold a public hearing on the petition within 30 days after publication of the notice. The purpose of the public hearing is to consider the comments of the public directed to the agency rule which has not been adopted by the rulemaking procedures or requirements of this chapter, its scope and application, 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 set forth in this chapter.

(c) If the agency does not initiate rulemaking or otherwise comply with the requested action within 30 days after the public hearing provided for in paragraph (b), the agency shall publish in the Florida Administrative Register a statement of its reasons for not initiating rulemaking or otherwise complying with the requested action and of any changes it will make in the scope or application of the unadopted rule. The agency shall file the statement with the committee. The committee shall forward a copy of the statement to the substantive committee with primary oversight jurisdiction of the agency in each house of the Legislature. The committee or the committee with primary oversight jurisdiction may hold a hearing directed to the statement of the agency. The committee holding the hearing may recommend to the Legislature the introduction of legislation making the rule a statutory standard or limiting or otherwise modifying the authority of the agency.

(d) If the agency initiates rulemaking after the public hearing provided for in paragraph (b), the agency shall publish a notice of rule development within 30 days after the hearing and file a notice of proposed rule within 180 days after the notice of rule development unless, before the 180th day, the agency publishes in the Florida Administrative Register a statement explaining its reasons for not having filed the notice. If rulemaking is initiated under this paragraph, the agency may not rely on the unadopted rule unless the agency publishes in the Florida Administrative Register a statement explaining why rulemaking under paragraph (1)(a) is not feasible or practicable until the conclusion of the rulemaking proceeding.

(8) RULEMAKING RECORD.—In all rulemaking proceedings the agency shall compile a rulemaking record. The record shall include, if applicable, copies of:

- (a) All notices given for the proposed rule.
- (b) Any statement of estimated regulatory costs for the rule.
- (c) A written summary of hearings on the proposed rule.
- (d) The written comments and responses to written comments as required by this section and s. 120.541.
- (e) All notices and findings made under subsection (4).
- (f) All materials filed by the agency with the committee under subsection (3).
- (g) All materials filed with the Department of State under subsection (3).
- (h) All written inquiries from standing committees of the Legislature concerning the rule.

Each state agency shall retain the record of rulemaking as long as the rule is in effect. When a rule is no longer in effect, the record may be destroyed pursuant to the records-retention schedule developed under s. 257.36(6).

**History.**—s. 1, ch. 74-310; s. 3, ch. 75-191; s. 3, ch. 76-131; ss. 1, 2, ch. 76-276; s. 1, ch. 77-174; s. 13, ch. 77-290; s. 3, ch. 77-453; s. 2, ch. 78-28; s. 2, ch. 78-425; s. 7, ch. 79-3; s. 3, ch. 79-299; s. 69, ch. 79-400; s. 5, ch. 80-391; s. 1, ch. 81-309; s. 2, ch. 83-351; s. 1, ch. 84-173; s. 2, ch. 84-203; s. 7, ch. 85-104; s. 1, ch. 86-30; s. 3, ch. 87-385; s. 36, ch. 90-302; ss. 2, 4, 7, ch. 92-166; s. 63, ch. 93-187; s. 758, ch. 95-147; s. 6, ch. 95-295; s. 10, ch. 96-159; s. 6, ch. 96-320; s. 9, ch. 96-370; s. 3, ch. 97-176; s. 3, ch. 98-200; s. 4, ch. 99-379; s. 9, ch. 2001-75; s. 2, ch. 2003-94; s. 50, ch. 2005-278; s. 3, ch. 2006-82; ss. 5, 6, ch. 2008-104; s. 7, ch. 2008-149; s. 4, ch. 2009-187; ss. 1, 5, ch. 2010-279; HJR 9-A, 2010 Special Session A; s. 49, ch. 2011-142; s. 8, ch. 2011-208; s. 1, ch. 2011-225; s. 2, ch. 2012-27; s. 1, ch. 2012-63; s. 4, ch. 2013-14; s. 13, ch. 2013-15; s. 1, ch. 2015-162; s. 1, ch. 2016-116.

**120.541 Statement of estimated regulatory costs.—**

(1)(a) Within 21 days after publication of the notice required under s. 120.54(3)(a), a substantially affected person may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. The proposal may include the alternative of not adopting any rule if the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule. If such a proposal is submitted, the 90-day period for filing the rule is extended 21 days. Upon the submission of the lower cost regulatory alternative, the agency shall prepare a statement of estimated regulatory costs as provided in subsection (2), or shall revise its prior statement of estimated regulatory costs, and either adopt the alternative or provide a statement of the reasons for rejecting the alternative in favor of the proposed rule.

(b) If a proposed rule will have an adverse impact on small business or if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate within 1 year after the implementation of the rule, the agency shall prepare a statement of estimated regulatory costs as required by s. 120.54(3)(b).

(c) The agency shall revise a statement of estimated regulatory costs if any change to the rule made under s. 120.54(3)(d) increases the regulatory costs of the rule.

(d) At least 21 days before filing the rule for adoption, an agency that is required to revise a statement of estimated regulatory costs shall provide the statement to the person who submitted the lower cost regulatory alternative and to the committee and shall provide notice on the agency's website that it is available to the public.

(e) Notwithstanding s. 120.56(1)(c), the failure of the agency to prepare a statement of estimated regulatory costs or to respond to a written lower cost regulatory alternative as provided in this subsection is a material failure to follow the applicable rulemaking procedures or requirements set forth in this chapter.

(f) An agency's failure to prepare a statement of estimated regulatory costs or to respond to a written lower cost regulatory alternative may not be raised in a proceeding challenging the validity of a rule pursuant to s. 120.52(8)(a) unless:

1. Raised in a petition filed no later than 1 year after the effective date of the rule; and

2. Raised by a person whose substantial interests are affected by the rule's regulatory costs.

(g) A rule that is challenged pursuant to s. 120.52(8)(f) may not be declared invalid unless:

1. The issue is raised in an administrative proceeding within 1 year after the effective date of the rule;

2. The challenge is to the agency's rejection of a lower cost regulatory alternative offered under paragraph (a) or s. 120.54(3)(b)2.b.; and

3. The substantial interests of the person challenging the rule are materially affected by the rejection.

(2) A statement of estimated regulatory costs shall include:

(a) An economic analysis showing whether the rule directly or indirectly:

1. 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;

2. 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

3. 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.

(b) 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.

(c) A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues.

(d) 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.

(e) An analysis of the impact on small businesses as defined by s. 288.703, and an analysis of the impact on small counties and small cities as defined in s. 120.52. The impact analysis for small businesses must include the basis for the agency's decision not to implement alternatives that would reduce adverse impacts on small businesses.

(f) Any additional information that the agency determines may be useful.

(g) In the statement or revised statement, whichever applies, a description of any regulatory alternatives submitted under paragraph (1)(a) and a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule.

(3) If the adverse impact or regulatory costs of the rule exceed any of the criteria established in paragraph (2)(a), the rule shall be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.

<sup>1</sup>(4) Subsection (3) does not apply to the adoption of:

(a) Federal standards pursuant to s. 120.54(6).

(b) Triennial updates of and amendments to the Florida Building Code which are expressly authorized by s. 553.73.

(c) Triennial updates of and amendments to the Florida Fire Prevention Code which are expressly authorized by s. 633.202.

(5) For purposes of subsections (2) and (3), adverse impacts and regulatory costs likely to occur within 5 years after implementation of the rule include adverse impacts and regulatory costs estimated to occur within 5 years after the effective date of the rule. However, if any provision of the rule is not fully implemented upon the effective date of the rule, the adverse impacts and regulatory costs associated with such provision must be adjusted to include any additional adverse impacts and regulatory costs estimated to occur within 5 years after implementation of such provision.

**History.**—s. 11, ch. 96-159; s. 4, ch. 97-176; ss. 2, 5, ch. 2010-279; HJR 9-A, 2010 Special Session A; s. 1, ch. 2011-222; s. 2, ch. 2011-225; s. 92, ch. 2013-183; s. 1, ch. 2016-232.

**Note.**—As amended by s. 92, ch. 2013-183, which amended subsection (4) as amended by s. 1, ch. 2011-222. Section 2, ch. 2011-225, also amended subsection (4), and the language of that version conflicted with the version by s. 1, ch. 2011-222. As amended by s. 2, ch. 2011-225, subsection (4) reads:

(4) This section does not apply to the adoption of emergency rules pursuant to s. 120.54(4) or the adoption of federal standards pursuant to s. 120.54(6).

#### **120.542 Variances and waivers.—**

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose

of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the appropriate agency of the Federal Government. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(3) The Governor and Cabinet, sitting as the Administration Commission, shall adopt uniform rules of procedure pursuant to the requirements of s. 120.54(5) establishing procedures for granting or denying petitions for variances and waivers. The uniform rules shall include procedures for the granting, denying, or revoking of emergency and temporary variances and waivers. Such provisions may provide for expedited timeframes, waiver of or limited public notice, and limitations on comments on the petition in the case of such temporary or emergency variances and waivers.

(4) Agencies shall advise persons of the remedies available through this section and shall provide copies of this section, the uniform rules on variances and waivers, and, if requested, the underlying statute, to persons who inquire about the possibility of relief from rule requirements.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the uniform rules, each petition shall specify:

(a) The rule from which a variance or waiver is requested.

(b) The type of action requested.

(c) The specific facts that would justify a waiver or variance for the petitioner.

(d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

(6) Within 15 days after receipt of a petition for variance or waiver, an agency shall provide notice of the petition to the Department of State, which shall publish notice of the petition in the first available issue of the Florida Administrative Register. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which variance or waiver is sought, and an explanation of how a copy of the petition can be obtained. The uniform rules shall provide a means for interested persons to provide comments on the petition.

(7) Except for requests for emergency variances or waivers, within 30 days after receipt of a petition for a variance or waiver, an agency shall review the petition and request submittal of all additional information that the agency is permitted by this section to require. Within 30 days after receipt of such additional information, the agency shall review it and may request only that information needed to clarify the additional information or to answer new questions raised by or directly related to the additional information. If the petitioner asserts that any request for additional information is not authorized by law or by rule of the affected agency, the agency shall proceed, at the petitioner's written request, to process the petition.

(8) An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition. A petition not granted or denied within 90 days after receipt of a completed petition is deemed approved. A copy of the order granting or denying the petition shall be filed with the committee and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency shall provide notice of the disposition of the petition to the Department of State, which shall publish the notice in the next available issue of the Florida Administrative Register. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which the waiver or variance is sought, a reference to the place and date of publication of the notice of the petition, the date of the order denying or approving the variance or waiver, the general basis for the agency decision, and an explanation of how a copy of the order can be obtained. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

(9) Each agency shall maintain a record of the type and disposition of each petition, including temporary or emergency variances and waivers, filed pursuant to this section.

*History.*—s. 12, ch. 96-159; s. 5, ch. 97-176; s. 37, ch. 2010-102; s. 5, ch. 2013-14.

**120.545 Committee review of agency rules.—**

(1) As a legislative check on legislatively created authority, the committee shall examine each proposed rule, except for those proposed rules exempted by s. 120.81(1)(e) and (2), and its accompanying material, and each emergency rule, and may examine any existing rule, for the purpose of determining whether:

(a) The rule is an invalid exercise of delegated legislative authority.

(b) The statutory authority for the rule has been repealed.

(c) The rule reiterates or paraphrases statutory material.

(d) The rule is in proper form.

(e) The notice given prior to its adoption was sufficient to give adequate notice of the purpose and effect of the rule.

(f) The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements.

(g) The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements.

(h) 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.

(i) The rule could be made less complex or more easily comprehensible to the general public.

(j) The rule's statement of estimated regulatory costs complies with the requirements of s. 120.541 and whether 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 objectives.

(k) The rule will require additional appropriations.

(l) If the rule is an emergency rule, there exists an emergency justifying the adoption of such rule, the agency is within its statutory authority, and the rule was adopted in compliance with the requirements and limitations of s. 120.54(4).

(2) The committee may request from an agency such information as is reasonably necessary for examination of a rule as required by subsection (1). The committee shall consult with legislative standing committees having jurisdiction over the subject areas. If the committee objects to a rule, the committee shall, within 5 days after the objection, certify that fact to the agency whose rule has been examined and include with the certification a statement detailing its objections with particularity. The committee shall notify the Speaker of the House of Representatives and the President of the Senate of any objection to an agency rule concurrent with certification of that fact to the agency. Such notice shall include a copy of the rule and the statement detailing the committee's objections to the rule.

(3) Within 30 days after receipt of the objection, if the agency is headed by an individual, or within 45 days after receipt of the objection, if the agency is headed by a collegial body, the agency shall:

(a) If the rule is not yet in effect:

1. File notice pursuant to s. 120.54(3)(d) of only such modifications as are necessary to address the committee's objection;

2. File notice pursuant to s. 120.54(3)(d) of withdrawal of the rule; or

3. Notify the committee in writing that it refuses to modify or withdraw the rule.

(b) If the rule is in effect:

1. File notice pursuant to s. 120.54(3)(a), without prior notice of rule development, to amend the rule to address the committee's objection;

2. File notice pursuant to s. 120.54(3)(a) to repeal the rule; or

3. Notify the committee in writing that the agency refuses to amend or repeal the rule.

(c) If the objection is to the statement of estimated regulatory costs:

1. Prepare a corrected statement of estimated regulatory costs, give notice of the availability of the corrected statement in the first available issue of the Florida Administrative Register, and file a copy of the corrected statement with the committee; or

2. Notify the committee that it refuses to prepare a corrected statement of estimated regulatory costs.

(4) Failure of the agency to respond to a committee objection to a rule that is not yet in effect within the time prescribed in subsection (3) constitutes withdrawal of the rule in its entirety. In this event, the committee shall notify the Department of State that the agency, by its failure to respond to a committee objection, has elected to withdraw the rule. Upon receipt of the committee's notice, the Department of State shall publish a notice to that effect in the next available issue of the Florida Administrative Register. Upon publication of the notice, the rule shall be stricken from the files of the Department of State and the files of the agency.

(5) Failure of the agency to respond to a committee objection to a rule that is in effect within the time prescribed in subsection (3) constitutes a refusal to amend or repeal the rule.

(6) Failure of the agency to respond to a committee objection to a statement of estimated regulatory costs within the time prescribed in subsection (3) constitutes a refusal to prepare a corrected statement of estimated regulatory costs.

(7) If the committee objects to a rule and the agency refuses to modify, amend, withdraw, or repeal the rule, the committee shall file with the Department of State a notice of the objection, detailing with particularity the committee's objection to the rule. The Department of State shall publish this notice in the Florida Administrative Register. If the rule is published in the Florida Administrative Code, a reference to the committee's objection and to the issue of the Florida Administrative Register in which the full text thereof appears shall be recorded in a history note.

(8)(a) If the committee objects to a rule, or portion of a rule, and the agency fails to initiate administrative action to modify, amend, withdraw, or repeal the rule consistent with the objection within 60 days after the objection, or thereafter fails to proceed in good faith to complete such action, the committee may submit to the President of the Senate and the Speaker of the House of Representatives a recommendation that legislation be introduced to address the committee's objection.

(b)1. If the committee votes to recommend the introduction of legislation to address the committee's objection, the committee shall, within 5 days after this determination, certify that fact to the agency whose rule or proposed rule has been examined. The committee may request that the agency temporarily suspend the rule or suspend the adoption of the proposed rule, pending consideration of proposed legislation during the next regular session of the Legislature.

2. Within 30 days after receipt of the certification, if the agency is headed by an individual, or within 45 days after receipt of the certification, if the agency is headed by a collegial body, the agency shall:

a. Temporarily suspend the rule or suspend the adoption of the proposed rule; or

b. Notify the committee in writing that the agency refuses to temporarily suspend the rule or suspend the adoption of the proposed rule.

3. If the agency elects to temporarily suspend the rule or suspend the adoption of the proposed rule, the agency shall give notice of the suspension in the Florida Administrative Register. The rule or the rule adoption process shall be suspended upon publication of the notice. An agency may not base any agency action on a suspended rule or suspended proposed rule, or portion of such rule, prior to expiration of the suspension. A suspended rule or suspended proposed rule, or portion of such rule, continues to be subject to administrative determination and judicial review as provided by law.

4. Failure of an agency to respond to committee certification within the time prescribed by subparagraph 2. constitutes a refusal to suspend the rule or to suspend the adoption of the proposed rule.

(c) The committee shall prepare proposed legislation to address the committee's objection in accordance with the rules of the Senate and the House of Representatives for pre-filing and introduction in the next regular session of the Legislature. The proposed legislation shall be presented to the President of the Senate and the Speaker of the House of Representatives with the committee recommendation.

(d) If proposed legislation addressing the committee's objection fails to become law, any temporary agency suspension shall expire.

**History.**—s. 4, ch. 76-131; s. 1, ch. 77-174; s. 6, ch. 80-391; s. 3, ch. 81-309; s. 4, ch. 87-385; s. 8, ch. 92-166; s. 20, ch. 95-280; s. 14, ch. 96-159; s. 16, ch. 2000-151; s. 18, ch. 2008-4; s. 7, ch. 2008-104; s. 6, ch. 2013-14.

### 120.55 Publication.—

(1) The Department of State shall:

(a)1. Through a continuous revision and publication system, compile and publish electronically, on a website managed by the department, the "Florida Administrative Code." The Florida Administrative Code shall contain all rules adopted by each agency, citing the grant of rulemaking authority and the specific law implemented pursuant to which each rule was adopted, all history notes as authorized in s. 120.545(7), complete indexes to all rules contained in the code, and any other material required or authorized by law or deemed useful by the department. The electronic code shall display each rule chapter currently in effect in browse mode and allow full text search of the code and each rule chapter. The department may contract with a publishing firm for a

printed publication; however, the department shall retain responsibility for the code as provided in this section. The electronic publication shall be the official compilation of the administrative rules of this state. The Department of State shall retain the copyright over the Florida Administrative Code.

2. Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or state university rules relating to internal personnel or business and finance shall not be published in the Florida Administrative Code. Exclusion from publication in the Florida Administrative Code shall not affect the validity or effectiveness of such rules.

3. At the beginning of the section of the code dealing with an agency that files copies of its rules with the department, the department shall publish the address and telephone number of the executive offices of each agency, the manner by which the agency indexes its rules, a listing of all rules of that agency excluded from publication in the code, and a statement as to where those rules may be inspected.

4. Forms shall not be published in the Florida Administrative Code; but any form which an agency uses in its dealings with the public, along with any accompanying instructions, shall be filed with the committee before it is used. Any form or instruction which meets the definition of "rule" provided in s. 120.52 shall be incorporated by reference into the appropriate rule. The reference shall specifically state that the form is being incorporated by reference and shall include the number, title, and effective date of the form and an explanation of how the form may be obtained. Each form created by an agency which is incorporated by reference in a rule notice of which is given under s. 120.54(3)(a) after December 31, 2007, must clearly display the number, title, and effective date of the form and the number of the rule in which the form is incorporated.

5. The department shall allow adopted rules and material incorporated by reference to be filed in electronic form as prescribed by department rule. When a rule is filed for adoption with incorporated material in electronic form, the department's publication of the Florida Administrative Code on its website must contain a hyperlink from the incorporating reference in the rule directly to that material. The department may not allow hyperlinks from rules in the Florida Administrative Code to any material other than that filed with and maintained by the department, but may allow hyperlinks to incorporated material maintained by the department from the adopting agency's website or other sites.

(b) Electronically publish on a website managed by the department a continuous revision and publication entitled the "Florida Administrative Register," which shall serve as the official publication and must contain:

1. All notices required by s. 120.54(2) and (3)(a), showing the text of all rules proposed for consideration.

2. All notices of public meetings, hearings, and workshops conducted in accordance with s. 120.525, including a statement of the manner in which a copy of the agenda may be obtained.

3. A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules.

4. Notice of petitions for declaratory statements or administrative determinations.

5. A summary of each objection to any rule filed by the Administrative Procedures Committee.

6. A list of rules filed for adoption in the previous 7 days.

7. A list of all rules filed for adoption pending legislative ratification under s. 120.541(3). A rule shall be removed from the list once notice of ratification or withdrawal of the rule is received.

8. Any other material required or authorized by law or deemed useful by the department.

The department may contract with a publishing firm for a printed publication of the Florida Administrative Register and make copies available on an annual subscription basis.

(c) Prescribe by rule the style and form required for rules, notices, and other materials submitted for filing.

(d) Charge each agency using the Florida Administrative Register a space rate to cover the costs related to the Florida Administrative Register and the Florida Administrative Code.

(e) Maintain a permanent record of all notices published in the Florida Administrative Register.

(2) The Florida Administrative Register website must allow users to:

(a) Search for notices by type, publication date, rule number, word, subject, and agency.

(b) Search a database that makes available all notices published on the website for a period of at least 5 years.

(c) Subscribe to an automated e-mail notification of selected notices to be sent out before or concurrently with publication of the electronic Florida Administrative Register. Such notification must include in the text of the e-mail a summary of the content of each notice.

(d) View agency forms and other materials submitted to the department in electronic form and incorporated by reference in proposed rules.

(e) Comment on proposed rules.

(3) Publication of material required by paragraph (1)(b) on the Florida Administrative Register website does not preclude publication of such material on an agency's website or by other means.

(4) Each agency shall provide copies of its rules upon request, with citations to the grant of rulemaking authority and the specific law implemented for each rule.

(5) Each agency that provides an e-mail notification service to inform licensees or other registered recipients of notices shall use that service to notify recipients of each notice required under s. 120.54(2) and (3) and provide Internet links to the appropriate rule page on the Secretary of State's website or Internet links to an agency website that contains the proposed rule or final rule.

(6) Any publication of a proposed rule promulgated by an agency, whether published in the Florida Administrative Register or elsewhere, shall include, along with the rule, the name of the person or persons originating

such rule, the name of the agency head who approved the rule, and the date upon which the rule was approved.

(7) Access to the Florida Administrative Register website and its contents, including the e-mail notification service, shall be free for the public.

(8)(a) All fees and moneys collected by the Department of State under this chapter shall be deposited in the Records Management Trust Fund for the purpose of paying for costs incurred by the department in carrying out this chapter.

(b) The unencumbered balance in the Records Management Trust Fund for fees collected pursuant to this chapter may not exceed \$300,000 at the beginning of each fiscal year, and any excess shall be transferred to the General Revenue Fund.

(9) The failure to comply with this section may not be raised in a proceeding challenging the validity of a rule pursuant to s. 120.52(8)(a).

**History.**—s. 1, ch. 74-310; s. 1, ch. 75-107; s. 4, ch. 75-191; s. 5, ch. 76-131; s. 1, ch. 77-174; s. 4, ch. 77-453; s. 3, ch. 78-425; s. 4, ch. 79-299; s. 7, ch. 80-391; s. 4, ch. 81-309; s. 1, ch. 82-19; s. 1, ch. 82-47; s. 3, ch. 83-351; s. 3, ch. 84-203; s. 17, ch. 87-224; s. 1, ch. 87-322; s. 20, ch. 91-45; s. 15, ch. 96-159; s. 896, ch. 2002-387; s. 5, ch. 2004-235; s. 14, ch. 2004-335; s. 4, ch. 2006-82; ss. 8, 9, ch. 2008-104; ss. 11, 12, ch. 2010-5; s. 2, ch. 2012-63; s. 2, ch. 2016-116.

### **120.555 Summary removal of published rules no longer in force and effect.**

—When, as part of the continuous revision system authorized in s. 120.55(1)(a)1. or as otherwise provided by law, the Department of State is in doubt whether a rule published in the official version of the Florida Administrative Code is still in full force and effect, the procedure in this section shall be employed.

(1) The Department of State shall submit to the head of the agency with authority to repeal or amend the rule, if any, or if no such agency can be identified, to the Governor, a written request for a statement as to whether the rule is still in full force and effect. A copy of the request shall be promptly delivered to the committee and to the Attorney General. The Department of State shall publish a notice of the request together with a copy of the request in the Florida Administrative Register next available after delivery of the request to the head of the agency or the Governor.

(2) No later than 90 days after the date the notice required in subsection (1) is published, the agency or the Governor, notified pursuant to subsection (1), shall file a written response with the Department of State stating whether the rule is in full force and effect and under the jurisdiction of an agency with full authority to amend or repeal the rule. Failure to respond timely under this subsection constitutes an acknowledgment by the agency or the Governor that the rule is no longer in effect and is subject to summary repeal under this section.

(3) The Department of State shall publish a notice of the agency's or Governor's timely response or the acknowledgment determined under subsection (2) in the Florida Administrative Register next available after receipt of the response or the expiration of the response period, whichever occurs first.

(4) If the response states that the rule is no longer in effect, or if no response is filed timely with the



Department of State, the notice required in subsection (3) shall also give notice of the following:

(a) Based on the agency's or Governor's written response or the acknowledgment determined under subsection (2), the rule will be repealed summarily pursuant to this section and removed from the Florida Administrative Code.

(b) Any objection to the summary repeal under this section must be filed as a petition challenging a proposed rule under s. 120.56 and must be filed no later than 21 days after the date the notice is published in the Florida Administrative Register.

(c) For purposes only of challenging a summary repeal under this section, the agency with current authority to repeal the rule under s. 120.54 shall be named as the respondent in the petition and shall be the proper party in interest. In such circumstances, the Department of State shall not be named as a party in a petition filed under paragraph (b) and this paragraph.

(d) If no agency currently has authority to repeal the rule under s. 120.54, the Department of State shall be named as the respondent in a petition filed under paragraph (b) and this paragraph. The Attorney General shall represent the Department of State in all proceedings under this paragraph.

(5) Upon the expiration of the 21-day period to file an objection to a notice of summary repeal published pursuant to subsection (4), if no timely objection is filed, or, if a timely objection is filed, on the date a decision finding the rule is no longer in effect becomes final, the Department of State shall update the Florida Administrative Code to remove the rule and shall provide historical notes identifying the manner in which the rule ceased to have effect, including the summary repeal pursuant to this section.

**History.**—s. 2, ch. 2012-31; s. 7, ch. 2013-14.

### **120.56 Challenges to rules.—**

#### **(1) GENERAL PROCEDURES.—**

(a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

(b) The petition challenging the validity of a proposed or adopted rule under this section must state:

1. The particular provisions alleged to be invalid and a statement of the facts or grounds for the alleged invalidity.

2. Facts sufficient to show that the petitioner is substantially affected by the challenged adopted rule or would be substantially affected by the proposed rule.

(c) The petition shall be filed by electronic means with the division which shall, immediately upon filing, forward by electronic means copies to the agency whose rule is challenged, the Department of State, and the committee. Within 10 days after receiving the petition, the division director shall, if the petition complies with paragraph (b), assign an administrative law judge 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. Evidence of good cause includes, but is not limited to, written notice of an agency's

decision to modify or withdraw the proposed rule or a written notice from the chair of the committee stating that the committee will consider an objection to the rule at its next scheduled meeting. The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.

(d) Within 30 days after the hearing, the administrative law judge shall render a decision and state the reasons for his or her decision in writing. The division shall forthwith transmit by electronic means copies of the administrative law judge's decision to the agency, the Department of State, and the committee.

(e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. Hearings shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. Failure to proceed under this section does not constitute failure to exhaust administrative remedies.

#### **(2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—**

(a) A petition alleging the invalidity of a proposed rule shall be filed within 21 days after the date of publication of the notice required by s. 120.54(3)(a); within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(e)2.; within 20 days after the statement of estimated regulatory costs or revised statement of estimated regulatory costs, if applicable, has been prepared and made available as provided in s. 120.54(1)(d); or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). The petitioner has the burden to prove by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. A person who is not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the resulting proposed rule.

(b) The administrative law judge may declare the proposed rule wholly or partly invalid. Unless the decision of the administrative law judge is reversed on appeal, the proposed rule or provision of a proposed rule declared invalid shall not be adopted. After a petition for administrative determination has been filed, the agency may proceed with all other steps in the rulemaking process, including the holding of a factfinding hearing. In the event part of a proposed rule is declared invalid, the adopting agency may, in its sole discretion, withdraw the proposed rule in its entirety. The agency whose proposed rule has been

declared invalid in whole or part shall give notice of the decision in the first available issue of the Florida Administrative Register.

(c) When any substantially affected person seeks determination of the invalidity of a proposed rule pursuant to this section, the proposed rule is not presumed to be valid or invalid.

**(3) CHALLENGING RULES IN EFFECT; SPECIAL PROVISIONS.—**

(a) A petition alleging the invalidity of an existing rule may be filed at any time during which the rule is in effect. The petitioner has the burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

(b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Register in the first available issue after the rule has become void.

**(4) CHALLENGING AGENCY STATEMENTS DEFINED AS UNADOPTED RULES; SPECIAL PROVISIONS.—**

(a) Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3), such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings pending rulemaking shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule.

(c) If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible or not practicable under s. 120.54(1)(a).

(d) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Register.

(e) If an administrative law judge enters a final order that all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action.

(f) If proposed rules addressing the challenged unadopted rule are determined to be an invalid exercise

of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance upon the unadopted rule and any substantially similar statement until rules addressing the subject are properly adopted, and the administrative law judge shall enter a final order to that effect.

(g) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under subsection (3) or under any other section of this chapter. This paragraph does not prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

**(5) CHALLENGING EMERGENCY RULES; SPECIAL PROVISIONS.—**Challenges to the validity of an emergency rule shall be subject to the following time schedules in lieu of those established by paragraphs (1)(c) and (d). Within 7 days after receiving the petition, the division director shall, if the petition complies with paragraph (1)(b), assign an administrative law judge, who shall conduct a hearing within 14 days, unless the petition is withdrawn. The administrative law judge shall render a decision within 14 days after the hearing.

**History.**—s. 1, ch. 74-310; s. 5, ch. 75-191; s. 6, ch. 76-131; s. 1, ch. 77-174; s. 4, ch. 78-425; s. 759, ch. 95-147; s. 16, ch. 96-159; s. 6, ch. 97-176; s. 5, ch. 99-379; s. 3, ch. 2003-94; s. 5, ch. 2006-82; ss. 10, 11, ch. 2008-104; ss. 3, 5, ch. 2010-279; HJR 9-A, 2010 Special Session A; s. 10, ch. 2011-208; s. 3, ch. 2011-225; s. 8, ch. 2013-14; s. 3, ch. 2016-116.

**120.565 Declaratory statement by agencies.—**

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

(3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Register and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Register. Agency disposition of petitions shall be final agency action.

**History.**—s. 6, ch. 75-191; s. 7, ch. 76-131; s. 5, ch. 78-425; s. 5, ch. 79-299; s. 760, ch. 95-147; s. 17, ch. 96-159; s. 9, ch. 2013-14.

**120.569 Decisions which affect substantial interests.—**

(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases. If a disputed issue of material fact arises during a proceeding under s. 120.57(2), then, unless

waived by all parties, the proceeding under s. 120.57(2) shall be terminated and a proceeding under s. 120.57(1) shall be conducted. Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

(2)(a) Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division by electronic means through the division's website within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. On the request of any agency, the division shall assign an administrative law judge with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1). Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

(b) All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. The notice shall include:

1. A statement of the time, place, and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b). Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable. This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition.

(d) The agency may refer a petition to the division for the assignment of an administrative law judge only if the petition is in substantial compliance with the requirements of paragraph (c).

(e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(f) The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure, including the imposition of sanctions, except contempt. However, no presiding officer has the authority to issue any subpoena or order directing discovery to any member or employee of the Legislature when the subpoena or order commands the production of documents or materials or compels testimony relating to the legislative duties of the member or employee. Any subpoena or order directing discovery directed to a member or an employee of the Legislature shall show on its face that the testimony sought does not relate to legislative duties.

(g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

(h) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties shall be given an opportunity to compare the copy with the original, if available.

(i) When official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material.

(j) A party shall be permitted to conduct cross-examination when testimony is taken or documents are made a part of the record.

(k)1. Any person subject to a subpoena may, before compliance and on timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material.

2. A party may seek enforcement of a subpoena, order directing discovery, or order imposing sanctions issued under the authority of this chapter by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena or order resides. A failure to comply with an order of the court shall result in a finding of contempt of

court. However, no person shall be in contempt while a subpoena is being challenged under subparagraph 1. The court may award to the prevailing party all or part of the costs and attorney's fees incurred in obtaining the court order whenever the court determines that such an award should be granted under the Florida Rules of Civil Procedure.

3. Any public employee subpoenaed to appear at an agency proceeding shall be entitled to per diem and travel expenses at the same rate as that provided for state employees under s. 112.061 if travel away from such public employee's headquarters is required. All other witnesses appearing pursuant to a subpoena shall be paid such fees and mileage for their attendance as is provided in civil actions in circuit courts of this state. In the case of a public employee, such expenses shall be processed and paid in the manner provided for agency employee travel expense reimbursement, and in the case of a witness who is not a public employee, payment of such fees and expenses shall accompany the subpoena.

(l) Unless the time period is waived or extended with the consent of all parties, the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated, and it must be rendered within 90 days:

1. After the hearing is concluded, if conducted by the agency;

2. After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by an administrative law judge; or

3. After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

(m) Findings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, must be accompanied by a concise and explicit statement of the underlying facts of record which support the findings.

(n) If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoined from the date rendered.

(o) On the request of any party, the administrative law judge shall enter an initial scheduling order to facilitate the just, speedy, and inexpensive determination of the proceeding. The initial scheduling order shall establish a discovery period, including a deadline by which all discovery shall be completed, and the date by which the parties shall identify expert witnesses and their opinions. The initial scheduling order also may require the parties to meet and file a joint report by a date certain.

(p) For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed

by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the license, permit, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence. The permit applicant and agency may on rebuttal present any evidence relevant to demonstrating that the application meets the conditions for issuance. Notwithstanding subsection (1), this paragraph applies to proceedings under s. 120.574.

**History.**—s. 18, ch. 96-159; s. 7, ch. 97-176; s. 4, ch. 98-200; s. 4, ch. 2003-94; s. 6, ch. 2006-82; s. 14, ch. 2008-104; s. 11, ch. 2011-208; s. 10, ch. 2011-225.

### **120.57 Additional procedures for particular cases.—**

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—

(a) Except as provided in ss. 120.80 and 120.81, an administrative law judge assigned by the division shall conduct all hearings under this subsection, except for hearings before agency heads or a member thereof. If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.

(b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(d) Notwithstanding s. 120.569(2)(g), similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such

evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal.

(e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.

2. In a matter initiated as a result of agency action proposing to determine the substantial interests of a party, the party's timely petition for hearing may challenge the proposed agency action based on a rule that is an invalid exercise of delegated legislative authority or based on an alleged unadopted rule. For challenges brought under this subparagraph:

a. The challenge may be pled as a defense using the procedures set forth in s. 120.56(1)(b).

b. Section 120.56(3)(a) applies to a challenge alleging that a rule is an invalid exercise of delegated legislative authority.

c. Section 120.56(4)(c) applies to a challenge alleging an unadopted rule.

d. This subparagraph does not preclude the consolidation of any proceeding under s. 120.56 with any proceeding under this paragraph.

3. Notwithstanding subparagraph 1., if an agency demonstrates that the statute being implemented directs it to adopt rules, that the agency has not had time to adopt those rules because the requirement was so recently enacted, and that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules, then the agency's action may be based upon those unadopted rules if the administrative law judge determines that rulemaking is neither feasible nor practicable and the unadopted rules would not constitute an invalid exercise of delegated legislative authority if adopted as rules. An unadopted rule shall not be presumed valid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority vested in the agency by the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;

e. Is not being applied to the substantially affected party without due notice; and

f. Does not impose excessive regulatory costs on the regulated person, county, or city.

4. The recommended and final orders in any proceeding shall be governed by paragraphs (k) and

(l), except that the administrative law judge's determination regarding an unadopted rule under subparagraph 1. or subparagraph 2. shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney fee for the initial proceeding and the proceeding for review.

5. A petitioner may pursue a separate, collateral challenge under s. 120.56 even if an adequate remedy exists through a proceeding under this section. The administrative law judge may consolidate the proceedings.

(f) The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.

2. Evidence admitted.

3. Those matters officially recognized.

4. Proffers of proof and objections and rulings thereon.

5. Proposed findings and exceptions.

6. Any decision, opinion, order, or report by the presiding officer.

7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records.

8. All matters placed on the record after an ex parte communication.

9. The official transcript.

(g) The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost.

(h) Any party to a proceeding in which an administrative law judge has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

(i) When, in any proceeding conducted pursuant to this subsection, a dispute of material fact no longer exists, any party may move the administrative law judge to relinquish jurisdiction to the agency. An order relinquishing jurisdiction shall be rendered if the

administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists. If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge. An order entered by an administrative law judge relinquishing jurisdiction to the agency based upon a determination that no genuine dispute of material fact exists, need not contain findings of fact, conclusions of law, or a recommended disposition or penalty.

(j) Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

(k) The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. All proceedings conducted under this subsection shall be de novo. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

(l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

(m) If a recommended order is submitted to an agency, the agency shall provide a copy of its final order and any exceptions to the division within 15 days after the order is filed with the agency clerk.

(n) Notwithstanding any law to the contrary, when statutes or rules impose conflicting time requirements for the scheduling of expedited hearings or issuance of recommended or final orders, the director of the division shall have the authority to set the proceedings for the orderly operation of this chapter.

**(2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.**—In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) An agency may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority.

(c) The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.

3. All written statements submitted.

4. Any decision overruling objections.

5. All matters placed on the record after an ex parte communication.

6. The official transcript.

7. Any decision, opinion, order, or report by the presiding officer.

**(3) ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT SOLICITATION OR AWARD.**—Agencies subject to this chapter shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process. Such rules shall at least provide that:

(a) The agency shall provide notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting. This notice shall contain the following statement: "Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

(b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. With respect to a protest of the terms,

conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

(c) Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

(d)1. The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of a formal written protest.

2. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to subsection (2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.

3. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is a disputed issue of material fact, the agency shall refer the protest to the division by electronic means through the division's website for proceedings under subsection (1).

(e) Upon receipt of a formal written protest referred pursuant to this subsection, the director of the division shall expedite the hearing and assign an administrative law judge who shall commence a hearing within 30 days after the receipt of the formal written protest by the division and enter a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript by the administrative law judge, whichever is later. Each party shall be allowed 10 days in which to submit written exceptions to the recommended order. A final order shall be entered by the agency within 30 days of the entry of a recommended order. The provisions of this paragraph may be waived upon stipulation by all parties.

(f) In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions

made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

(g) For purposes of this subsection, the definitions in s. 287.012 apply.

(4) **INFORMAL DISPOSITION.**—Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

(5) **APPLICABILITY.**—This section does not apply to agency investigations preliminary to agency action.

**History.**—s. 1, ch. 74-310; s. 7, ch. 75-191; s. 8, ch. 76-131; s. 1, ch. 77-174; s. 5, ch. 77-453; ss. 6, 11, ch. 78-95; s. 6, ch. 78-425; s. 8, ch. 79-7; s. 7, ch. 80-95; s. 4, ch. 80-289; s. 57, ch. 81-259; s. 2, ch. 83-78; s. 9, ch. 83-216; s. 2, ch. 84-173; s. 4, ch. 84-203; ss. 1, 2, ch. 86-108; s. 44, ch. 87-6; ss. 1, 2, ch. 87-54; s. 5, ch. 87-385; s. 1, ch. 90-283; s. 4, ch. 91-30; s. 1, ch. 91-191; s. 22, ch. 92-315; s. 7, ch. 94-218; s. 1420, ch. 95-147; s. 1, ch. 95-328; s. 19, ch. 96-159; s. 1, ch. 96-423; s. 8, ch. 97-176; s. 5, ch. 98-200; s. 3, ch. 98-279; s. 47, ch. 99-2; s. 6, ch. 99-379; s. 2, ch. 2002-207; s. 5, ch. 2003-94; s. 7, ch. 2006-82; s. 12, ch. 2008-104; s. 12, ch. 2011-208; s. 4, ch. 2016-116.

**120.573 Mediation of disputes.**—Each announcement of an agency action that affects substantial interests shall advise whether mediation of the administrative dispute for the type of agency action announced is available and that choosing mediation does not affect the right to an administrative hearing. If the agency and all parties to the administrative action agree to mediation, in writing, within 10 days after the time period stated in the announcement for election of an administrative remedy under ss. 120.569 and 120.57, the time limitations imposed by ss. 120.569 and 120.57 shall be tolled to allow the agency and parties to mediate the administrative dispute. The mediation shall be concluded within 60 days of such agreement unless otherwise agreed by the parties. The mediation agreement shall include provisions for mediator selection, the allocation of costs and fees associated with mediation, and the mediating parties' understanding regarding the confidentiality of discussions and documents introduced during mediation. If mediation results in settlement of the administrative dispute, the agency shall enter a final order incorporating the agreement of the parties. If mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.57 are resumed.

**History.**—s. 20, ch. 96-159; s. 9, ch. 97-176.

**120.574 Summary hearing.—**

(1)(a) Within 5 business days following the division's receipt of a petition or request for hearing, the division shall issue and serve on all original parties an initial order that assigns the case to a specific administrative law judge and provides general information regarding practice and procedure before the division. The initial order shall also contain a statement advising the addressees that a summary hearing is available upon the agreement of all parties under subsection (2) and briefly describing the expedited time sequences, limited discovery, and final order provisions of the summary procedure.

(b) Within 15 days after service of the initial order, any party may file with the division a motion for summary hearing in accordance with subsection (2). If all original parties agree, in writing, to the summary proceeding, the proceeding shall be conducted within 30 days of the agreement, in accordance with the provisions of subsection (2).

(c) Intervenors in the proceeding shall be governed by the decision of the original parties regarding whether the case will proceed in accordance with the summary hearing process and shall not have standing to challenge that decision.

(d) If a motion for summary hearing is not filed within 15 days after service of the division's initial order, the matter shall proceed in accordance with ss. 120.569 and 120.57.

(2) In any case to which this subsection is applicable, the following procedures apply:

(a) Motions shall be limited to the following:

1. A motion in opposition to the petition.
2. A motion requesting discovery beyond the informal exchange of documents and witness lists described in paragraph (b). Upon a showing of necessity, additional discovery may be permitted in the discretion of the administrative law judge, but only if it can be completed not later than 5 days prior to the final hearing.

3. A motion for continuance of the final hearing date.

4. A motion requesting a prehearing conference, or the administrative law judge may require a prehearing conference, for the purpose of identifying: the legal and factual issues to be considered at the final hearing; the names and addresses of witnesses who may be called to testify at the final hearing; documentary evidence that will be offered at the final hearing; the range of penalties that may be imposed upon final hearing; and any other matter that the administrative law judge determines would expedite resolution of the proceeding. The prehearing conference may be held by telephone conference call.

5. During or after any preliminary hearing or conference, any party or the administrative law judge may suggest that the case is no longer appropriate for summary disposition. Following any argument requested by the parties, the administrative law judge may enter an order referring the case back to the formal adjudicatory process described in s. 120.57(1), in which event the parties shall proceed accordingly.

(b) Not later than 5 days prior to the final hearing, the parties shall furnish to each other copies of documentary evidence and lists of witnesses who may testify at the final hearing.

(c) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, and to be represented by counsel or other qualified representative.

(d) The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.
2. Evidence received.
3. A statement of matters officially recognized.
4. Proffers of proof and objections and rulings thereon.
5. Matters placed on the record after an ex parte communication.

6. The written decision of the administrative law judge presiding at the final hearing.

7. The official transcript of the final hearing.

(e) The agency shall accurately and completely preserve all testimony in the proceeding and, upon request by any party, shall make a full or partial transcript available at no more than actual cost.

(f) The decision of the administrative law judge shall be rendered within 30 days after the conclusion of the final hearing or the filing of the transcript thereof, whichever is later. The administrative law judge's decision, which shall be final agency action subject to judicial review under s. 120.68, shall include the following:

1. Findings of fact based exclusively on the evidence of record and matters officially recognized.
2. Conclusions of law.
3. Imposition of a fine or penalty, if applicable.
4. Any other information required by law or rule to be contained in a final order.

**History.**—s. 21, ch. 96-159; s. 10, ch. 97-176; s. 11, ch. 2000-158; s. 10, ch. 2000-336.

**120.595 Attorney's fees.—**

(1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—

(a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such



two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

(2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).—If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed \$50,000.

(3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3) AND (5). If the appellate court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency

demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed \$50,000.

(4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4).—

(a) If the appellate court or administrative law judge determines that all or part of an agency statement violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance on the statement and any substantially similar statement pursuant to s. 120.56(4)(f), a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

(b) Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3)(a), such notice shall automatically operate as a stay of proceedings pending rulemaking. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings under this paragraph remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The administrative law judge shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the notice was published, unless the agency proves to the administrative law judge that it did not know and should not have known that the statement was an unadopted rule. Attorneys' fees and costs under this paragraph and paragraph (a) shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before a petition under s. 120.56(4) was filed and that the agency failed to publish the required notice of rulemaking pursuant to s. 120.54(3) that addresses the statement within that 30-day period. Notice to the agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing substantially the same information, or a petition filed pursuant to s. 120.54(7). An award of attorney's fees as provided by this paragraph may not exceed \$50,000.

(c) Notwithstanding the provisions of chapter 284, an award shall be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency, and the agency shall not be entitled to payment of an award or reimbursement for payment of an award under any provision of law.

(d) If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and attorney's fees against a party if

the appellate court or administrative law judge determines that the party participated in the proceedings for an improper purpose as defined in paragraph (1)(e) or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts.

(5) **APPEALS.**—When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

(6) **OTHER SECTIONS NOT AFFECTED.**—Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney's fees and costs in administrative proceedings. Nothing in this section shall affect the availability of attorney's fees and costs as provided in those sections.

**History.**—s. 25, ch. 96-159; s. 11, ch. 97-176; s. 48, ch. 99-2; s. 6, ch. 2003-94; s. 13, ch. 2008-104; s. 3, ch. 2017-3.

### **120.60 Licensing.—**

(1) Upon receipt of a license application, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. The agency may establish by rule the time period for submitting any additional information requested by the agency. For good cause shown, the agency shall grant a request for an extension of time for submitting the additional information. If the applicant believes the agency's request for additional information is not authorized by law or rule, the agency, at the applicant's request, shall proceed to process the application. An application is complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. An application for a license must be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period is tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any application for a license which is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. Subject

to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable conditions as are authorized by law. Any applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection, and may not take any action based upon the default license until after receipt of such notice by the agency clerk.

(2) If an applicant seeks a license for an activity that is exempt from licensure, the agency shall notify the applicant and return any tendered application fee within 30 days after receipt of the original application.

(3) Each applicant shall be given written notice, personally or by mail, that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record and to each person who has made a written request for notice of agency action. Each notice must inform the recipient of the basis for the agency decision, inform the recipient of any administrative hearing pursuant to ss. 120.569 and 120.57 or judicial review pursuant to s. 120.68 which may be available, indicate the procedure that must be followed, and state the applicable time limits. The issuing agency shall certify the date the notice was mailed or delivered, and the notice and the certification must be filed with the agency clerk.

(4) When a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by statute, the existing license shall not expire until the application for renewal has been finally acted upon by the agency or, in case the application is denied or the terms of the license are limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(5) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57. When personal service cannot be made and the certified mail notice is returned undelivered, the agency shall cause a short, plain notice to the licensee to be published once each week for 4 consecutive weeks in a newspaper published in the county of the licensee's last known address as it appears on the records of the agency. If no newspaper is published in that county, the notice may be published in a newspaper of general circulation in that county.

(6) If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a

license, the agency may take such action by any procedure that is fair under the circumstances if:

(a) The procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution;

(b) The agency takes only that action necessary to protect the public interest under the emergency procedure; and

(c) The agency states in writing at the time of, or prior to, its action 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 used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57 shall also be promptly instituted and acted upon.

(7) No agency shall include as a condition of approval of any license any provision that is based upon a statement, policy, or guideline of another agency unless the statement, policy, or guideline is within the jurisdiction of the other agency. The other agency shall identify for the licensing agency the specific legal authority for each such statement, policy, or guideline. The licensing agency must provide the licensee with an opportunity to challenge the condition as invalid. If the licensing agency bases a condition of approval or denial of the license upon the statement, policy, or guideline of the other agency, any party to an administrative proceeding that arises from the approval with conditions or denial of the license may require the other agency to join as a party in determining the validity of the condition.

**History.**—s. 1, ch. 74-310; s. 10, ch. 76-131; s. 1, ch. 77-174; ss. 6, 9, ch. 77-453; s. 57, ch. 78-95; s. 8, ch. 78-425; s. 1, ch. 79-142; s. 6, ch. 79-299; s. 2, ch. 81-180; s. 6, ch. 84-203; s. 2, ch. 84-265; s. 1, ch. 85-82; s. 14, ch. 90-51; s. 762, ch. 95-147; s. 26, ch. 96-159; s. 326, ch. 96-410; s. 12, ch. 97-176; s. 7, ch. 2003-94; ss. 4, 5, ch. 2010-279; HJR 9-A, 2010 Special Session A; s. 10, ch. 2012-212.

### 120.62 Agency investigations.—

(1) Every person who responds to a request or demand by any agency or representative thereof for written data or an oral statement shall be entitled to a transcript or recording of his or her oral statement at no more than cost.

(2) Any person compelled to appear, or who appears voluntarily, before any presiding officer or agency in an investigation or in any agency proceeding has the right, at his or her own expense, to be accompanied, represented, and advised by counsel or by other qualified representatives.

**History.**—s. 1, ch. 74-310; s. 763, ch. 95-147; s. 28, ch. 96-159.

### 120.63 Exemption from act.—

(1) Upon application of any agency, the Administration Commission may exempt any process or proceeding governed by this act from one or more requirements of this act:

(a) When the agency head has certified that the requirement would conflict with any provision of federal law or rules with which the agency must comply;

(b) In order to permit persons in the state to receive tax benefits or federal funds under any federal law; or

(c) When the commission has found that conformity with the requirements of the part or parts of this act for which exemption is sought would be so inconvenient or impractical as to defeat the purpose of the agency proceeding involved or the purpose of this act and would not be in the public interest in light of the nature of the intended action and the enabling act or other laws affecting the agency.

(2) The commission may not exempt an agency from any requirement of this act pursuant to this section until it establishes alternative procedures to achieve the agency's purpose which shall be consistent, insofar as possible, with the intent and purpose of the act.

(a) Prior to the granting of any exemption authorized by this section, the commission shall hold a public hearing after notice given as provided in s. 120.525. Upon the conclusion of the hearing, the commission, through the Executive Office of the Governor, shall issue an order specifically granting or denying the exemption and specifying any processes or proceedings exempted and the extent of the exemption; transmit to the committee and to the Department of State a copy of the petition, a certified copy of the order granting or denying the petition, and a copy of any alternative procedures prescribed; and give notice of the petition and the commission's response in the Florida Administrative Register.

(b) An exemption and any alternative procedure prescribed shall terminate 90 days following adjournment sine die of the then-current or next regular legislative session after issuance of the exemption order, or upon the effective date of any subsequent legislation incorporating the exemption or any partial exemption related thereto, whichever is earlier. The exemption granted by the commission shall be renewable upon the same or similar facts not more than once. Such renewal shall terminate as would an original exemption.

**History.**—s. 1, ch. 74-310; s. 11, ch. 76-131; s. 1, ch. 77-53; s. 8, ch. 77-453; s. 87, ch. 79-190; s. 7, ch. 79-299; s. 70, ch. 79-400; s. 58, ch. 81-259; s. 29, ch. 96-159; s. 10, ch. 2013-14.

### 120.65 Administrative law judges.—

(1) The Division of Administrative Hearings within the Department of Management Services shall be headed by a director who shall be appointed by the Administration Commission and confirmed by the Senate. The director, who shall also serve as the chief administrative law judge, and any deputy chief administrative law judge must possess the same minimum qualifications as the administrative law judges employed by the division. The Deputy Chief Judge of Compensation Claims must possess the minimum qualifications established in s. 440.45(2) and shall report to the director. The division shall be a separate budget entity, and the director shall be its agency head for all purposes. The Department of Management Services shall provide administrative support and service to the division to the extent requested by the director. The division shall not be subject to control, supervision, or direction by the Department of Management Services in any manner, including, but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters.

(2) The director has the right to appeal actions by the Executive Office of the Governor that affect amendments to the division's approved operating budget or any personnel actions pursuant to chapter 216 to the Administration Commission, which shall decide such issue by majority vote. The appropriations committees may advise the Administration Commission on the issue. If the President of the Senate and the Speaker of the House of Representatives object in writing to the effects of the appeal, the appeal may be affirmed by the affirmative vote of two-thirds of the commission members present.

(3) Each state agency as defined in chapter 216 and each political subdivision shall make its facilities available, at a time convenient to the provider, for use by the division in conducting proceedings pursuant to this chapter.

(4) The division shall employ administrative law judges to conduct hearings required by this chapter or other law. Any person employed by the division as an administrative law judge must have been a member of The Florida Bar in good standing for the preceding 5 years.

(5) If the division cannot furnish a division administrative law judge promptly in response to an agency request, the director shall designate in writing a qualified full-time employee of an agency other than the requesting agency to conduct the hearing. The director shall have the discretion to designate such a hearing officer who is located in that part of the state where the parties and witnesses reside.

(6) The division is authorized to provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by this section.

(7) Rules promulgated by the division may authorize any reasonable sanctions except contempt for violation of the rules of the division or failure to comply with a reasonable order issued by an administrative law judge, which is not under judicial review.

(8) Not later than February 1 of each year, the division shall issue a written report to the Administrative Procedures Committee and the Administration Commission, including at least the following information:

(a) A summary of the extent and effect of agencies' utilization of administrative law judges, court reporters, and other personnel in proceedings under this chapter.

(b) Recommendations for change or improvement in the Administrative Procedure Act or any agency's practice or policy with respect thereto.

(c) Recommendations as to those types of cases or disputes which should be conducted under the summary hearing process described in s. 120.574.

(d) A report regarding each agency's compliance with the filing requirement in s. 120.57(1)(m).

(9) The division shall be reimbursed for administrative law judge services and travel expenses by the following entities: water management districts, regional planning councils, school districts, community colleges, the Division of Florida Colleges, state universities, the Board of Governors of the State University System, the State Board of Education, the Florida School for the Deaf and the Blind, and the Commission for

Independent Education. These entities shall contract with the division to establish a contract rate for services and provisions for reimbursement of administrative law judge travel expenses and video teleconferencing expenses attributable to hearings conducted on behalf of these entities. The contract rate must be based on a total-cost-recovery methodology.

**History.**—s. 1, ch. 74-310; s. 9, ch. 75-191; s. 14, ch. 76-131; s. 9, ch. 78-425; s. 46, ch. 79-190; s. 1, ch. 86-297; s. 46, ch. 87-6; s. 25, ch. 87-101; s. 54, ch. 88-1; s. 30, ch. 88-277; s. 51, ch. 92-279; s. 23, ch. 92-315; s. 55, ch. 92-326; s. 764, ch. 95-147; s. 31, ch. 96-159; s. 13, ch. 97-176; s. 38, ch. 2000-371; s. 4, ch. 2001-91; s. 1, ch. 2004-247; s. 8, ch. 2006-82; s. 14, ch. 2007-217; s. 8, ch. 2009-228; s. 8, ch. 2013-18.

**120.651 Designation of two administrative law judges to preside over actions involving department or boards.**—The Division of Administrative Hearings shall designate at least two administrative law judges who shall specifically preside over actions involving the Department of Health or boards within the Department of Health. Each designated administrative law judge must be a member of The Florida Bar in good standing and must have legal, managerial, or clinical experience in issues related to health care or have attained board certification in health care law from The Florida Bar.

**History.**—s. 32, ch. 2003-416.

**120.655 Withholding funds to pay for administrative law judge services to school boards.**—If a district school board fails to make a timely payment for the services provided by an administrative law judge of the Division of Administrative Hearings as provided annually in the General Appropriations Act, the Commissioner of Education shall withhold, from any general revenue funds the district is eligible to receive, an amount sufficient to pay for the administrative law judge's services. The commissioner shall transfer the amount withheld to the Division of Administrative Hearings in payment of such services.

**History.**—s. 1, ch. 92-121; s. 32, ch. 96-159.

**120.66 Ex parte communications.**—

(1) In any proceeding under ss. 120.569 and 120.57, no ex parte communication relative to the merits, threat, or offer of reward shall be made to the agency head, after the agency head has received a recommended order, or to the presiding officer by:

(a) An agency head or member of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter.

(b) A party to the proceeding, the party's authorized representative or counsel, or any person who, directly or indirectly, would have a substantial interest in the proposed agency action.

Nothing in this subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding or to any rulemaking proceedings under s. 120.54.

(2) A presiding officer, including an agency head or designee, who is involved in the decisional process and who receives an ex parte communication in violation of subsection (1) shall place on the record of the pending

matter all written communications received, all written responses to such communications, and a memorandum stating the substance of all oral communications received and all oral responses made, and shall also advise all parties that such matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, if such party requests the opportunity for rebuttal within 10 days after notice of such communication. The presiding officer may, if necessary to eliminate the effect of an ex parte communication, withdraw from the proceeding, in which case the entity that appointed the presiding officer shall assign a successor.

(3) Any person who makes an ex parte communication prohibited by subsection (1), and any presiding officer, including an agency head or designee, who fails to place in the record any such communication, is in violation of this act and may be assessed a civil penalty not to exceed \$500 or be subjected to other disciplinary action.

**History.**—s. 1, ch. 74-310; s. 10, ch. 75-191; s. 12, ch. 76-131; s. 1, ch. 77-174; s. 10, ch. 78-425; s. 765, ch. 95-147; s. 33, ch. 96-159; s. 14, ch. 97-176.

### 120.665 Disqualification of agency personnel.

(1) Notwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding. If the disqualified individual was appointed, the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified. If the individual is an elected official, the Governor may appoint a substitute to serve in the matter from which the individual is disqualified. However, if a quorum remains after the individual is disqualified, it shall not be necessary to appoint a substitute.

(2) Any agency action taken by a duly appointed substitute for a disqualified individual shall be as conclusive and effective as if agency action had been taken by the agency as it was constituted prior to any substitution.

**History.**—s. 1, ch. 74-310; s. 12, ch. 78-425; s. 2, ch. 83-329; s. 767, ch. 95-147; s. 34, ch. 96-159; s. 18, ch. 2013-36.

**Note.**—Former s. 120.71.

### 120.68 Judicial review.—

(1)(A) A party who is adversely affected by final agency action is entitled to judicial review.

(b) A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2)(a) Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed. If the appeal is of an order rendered in a proceeding initiated

under s. 120.56, the agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee.

(b) When proceedings under this chapter are consolidated for final hearing and the parties to the consolidated proceeding seek review of final or interlocutory orders in more than one district court of appeal, the courts of appeal are authorized to transfer and consolidate the review proceedings. The court may transfer such appellate proceedings on its own motion, upon motion of a party to one of the appellate proceedings, or by stipulation of the parties to the appellate proceedings. In determining whether to transfer a proceeding, the court may consider such factors as the interrelationship of the parties and the proceedings, the desirability of avoiding inconsistent results in related matters, judicial economy, and the burden on the parties of reproducing the record for use in multiple appellate courts.

(3) The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency also may grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. In any event the court shall specify the conditions, if any, upon which the stay or supersedeas is granted.

(4) Judicial review of any agency action shall be confined to the record transmitted and any additions made thereto in accordance with paragraph (7)(a).

(5) The record for judicial review shall be compiled in accordance with the Florida Rules of Appellate Procedure.

(6)(a) The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

1. Order agency action required by law; order agency exercise of discretion when required by law; set aside agency action; remand the case for further agency proceedings; or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and

2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(b) If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:

(a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;

(b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;

(c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;

(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or

(e) The agency's exercise of discretion was:

1. Outside the range of discretion delegated to the agency by law;

2. Inconsistent with agency rule;

3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

4. Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(8) Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(9) A petition challenging an agency rule as an invalid exercise of delegated legislative authority shall not be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.56 or s. 120.57(1)(e)1. or (2)(b) or an agency's findings of immediate danger, necessity, and procedural fairness prerequisite to the adoption of an emergency rule pursuant to s. 120.54(4), unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

(10) If an administrative law judge's final order depends on any fact found by the administrative law judge, the court shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside the final order of the administrative law judge or remand the case to the administrative law judge, if it finds that the final order depends on any finding of fact that is not supported by competent substantial evidence in the record of the proceeding.

**History.**—s. 1, ch. 74-310; s. 13, ch. 76-131; s. 38, ch. 77-104; s. 1, ch. 77-174; s. 11, ch. 78-425; s. 4, ch. 84-173; s. 7, ch. 87-385; s. 36, ch. 90-302; s. 6, ch. 91-30; s. 1, ch. 91-191; s. 10, ch. 92-166; s. 35, ch. 96-159; s. 15, ch. 97-176; s. 8, ch. 2003-94; s. 5, ch. 2016-116.

### **120.69 Enforcement of agency action.—**

(1) Except as otherwise provided by statute:

(a) Any agency may seek enforcement of an action by filing a petition for enforcement, as provided in this section, in the circuit court where the subject matter of the enforcement is located.

(b) A petition for enforcement of any agency action may be filed by any substantially interested person who is a resident of the state. However, no such action may be commenced:

1. Prior to 60 days after the petitioner has given notice of the violation of the agency action to the head of the agency concerned, the Attorney General, and any alleged violator of the agency action.

2. If an agency has filed, and is diligently prosecuting, a petition for enforcement.

(c) A petition for enforcement filed by a nongovernmental person shall be in the name of the State of Florida on the relation of the petitioner, and the doctrines of res judicata and collateral estoppel shall apply.

(d) In an action brought under paragraph (b), the agency whose action is sought to be enforced, if not a party, may intervene as a matter of right.

(2) A petition for enforcement may request declaratory relief; temporary or permanent equitable relief; any fine, forfeiture, penalty, or other remedy provided by statute; any combination of the foregoing; or, in the absence of any other specific statutory authority, a fine not to exceed \$1,000.

(3) After the court has rendered judgment on a petition for enforcement, no other petition shall be filed or adjudicated against the same agency action, on the basis of the same transaction or occurrence, unless expressly authorized on remand. The doctrines of res judicata and collateral estoppel shall apply, and the court shall make such orders as are necessary to avoid multiplicity of actions.

(4) In all enforcement proceedings:

(a) If enforcement depends on any facts other than those appearing in the record, the court may ascertain such facts under procedures set forth in s. 120.68(7)(a).

(b) If one or more petitions for enforcement and a petition for review involving the same agency action are pending at the same time, the court considering the review petition may order all such actions transferred to and consolidated in one court. Each party shall be under an affirmative duty to notify the court when it becomes aware of multiple proceedings.

(c) Should any party willfully fail to comply with an order of the court, the court shall punish that party in accordance with the law applicable to contempt committed by a person in the trial of any other action.

(5) In any enforcement proceeding the respondent may assert as a defense the invalidity of any relevant statute, the inapplicability of the administrative determination to respondent, compliance by the respondent, the inappropriateness of the remedy sought by the agency, or any combination of the foregoing. In addition, if the petition for enforcement is filed during the time within which the respondent could petition for judicial review of the agency action, the respondent may assert the invalidity of the agency action.

(6) Notwithstanding any other provision of this section, upon receipt of evidence that an alleged violation of an agency's action presents an imminent and substantial threat to the public health, safety, or welfare, the agency may bring suit for immediate temporary relief in an appropriate circuit court, and

the granting of such temporary relief shall not have res judicata or collateral estoppel effect as to further relief sought under a petition for enforcement relating to the same violation.

(7) In any final order on a petition for enforcement the court may award to the prevailing party all or part of the costs of litigation and reasonable attorney's fees and expert witness fees, whenever the court determines that such an award is appropriate.

**History.**—s. 1, ch. 74-310; s. 766, ch. 95-147; s. 36, ch. 96-159.

**120.695 Notice of noncompliance; designation of minor violation of rules.—**

(1) It is the policy of the state that the purpose of regulation is to protect the public by attaining compliance with the policies established by the Legislature. Fines and other penalties may be provided in order to assure compliance; however, the collection of fines and the imposition of penalties are intended to be secondary to the primary goal of attaining compliance with an agency's rules. It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it.

(2)(a) Each agency shall issue a notice of noncompliance as a first response to a minor violation of a rule. A "notice of noncompliance" is a notification by the agency charged with enforcing the rule issued to the person or business subject to the rule. A notice of noncompliance may not be accompanied with a fine or other disciplinary penalty. It must identify the specific rule that is being violated, provide information on how to comply with the rule, and specify a reasonable time for the violator to comply with the rule. A rule is agency action that regulates a business, occupation, or profession, or regulates a person operating a business, occupation, or profession, and that, if not complied with, may result in a disciplinary penalty.

(b) Each agency shall review all of its rules and designate those for which a violation would be a minor violation and for which a notice of noncompliance must be the first enforcement action taken against a person or business subject to regulation. A violation of a rule is a minor violation if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm.

(c)1. No later than June 30, 2017, and after such date within 3 months after any request of the rules ombudsman in the Executive Office of the Governor, each agency shall review its rules and certify to the President of the Senate, the Speaker of the House of Representatives, the committee, and the rules ombudsman those rules that have been designated as rules the violation of which would be a minor violation under paragraph (b), consistent with the legislative intent stated in subsection (1).

2. Beginning July 1, 2017, each agency shall:

a. Publish all rules that the agency has designated as rules the violation of which would be a minor violation, either as a complete list on the agency's

website or by incorporation of the designations in the agency's disciplinary guidelines adopted as a rule.

b. Ensure that all investigative and enforcement personnel are knowledgeable about the agency's designations under this section.

3. For each rule filed for adoption, the agency head shall certify whether any part of the rule is designated as a rule the violation of which would be a minor violation and shall update the listing required by sub-subparagraph 2.a.

(d) The Governor or the Governor and Cabinet, as appropriate, may evaluate the review and designation effects of each agency subject to the direction and supervision of such authority and may direct a different designation than that applied by such agency.

(e) Notwithstanding s. 120.52(1)(a), this section does not apply to:

1. The Department of Corrections;
2. Educational units;
3. The regulation of law enforcement personnel; or
4. The regulation of teachers.

(f) Designation pursuant to this section is not subject to challenge under this chapter.

**History.**—s. 1, ch. 95-402; s. 6, ch. 2016-116.

**120.72 Legislative intent; references to chapter 120 or portions thereof.—**Unless expressly provided otherwise, a reference in any section of the Florida Statutes to chapter 120 or to any section or sections or portion of a section of chapter 120 includes, and shall be understood as including, all subsequent amendments to chapter 120 or to the referenced section or sections or portions of a section.

**History.**—s. 3, ch. 74-310; s. 1, ch. 76-207; s. 1, ch. 77-174; s. 57, ch. 78-95; s. 13, ch. 78-425; s. 38, ch. 96-159.

**120.73 Circuit court proceedings; declaratory judgments.—**Nothing in this chapter shall be construed to repeal any provision of the Florida Statutes which grants the right to a proceeding in the circuit court in lieu of an administrative hearing or to divest the circuit courts of jurisdiction to render declaratory judgments under the provisions of chapter 86.

**History.**—s. 11, ch. 75-191; s. 14, ch. 78-425.

**120.74 Agency annual rulemaking and regulatory plans; reports.—**

(1) REGULATORY PLAN.—By October 1 of each year, each agency shall prepare a regulatory plan.

(a) The plan must include a listing of each law enacted or amended during the previous 12 months which creates or modifies the duties or authority of the agency. If the Governor or the Attorney General provides a letter to the committee stating that a law affects all or most agencies, the agency may exclude the law from its plan. For each law listed by an agency under this paragraph, the plan must state:

1. Whether the agency must adopt rules to implement the law.
2. If rulemaking is necessary to implement the law:
  - a. Whether a notice of rule development has been published and, if so, the citation to such notice in the Florida Administrative Register.

b. The date by which the agency expects to publish the notice of proposed rule under s. 120.54(3)(a).

3. If rulemaking is not necessary to implement the law, a concise written explanation of the reasons why the law may be implemented without rulemaking.

(b) The plan must also include a listing of each law not otherwise listed pursuant to paragraph (a) which the agency expects to implement by rulemaking before the following July 1, except emergency rulemaking. For each law listed under this paragraph, the plan must state whether the rulemaking is intended to simplify, clarify, increase efficiency, improve coordination with other agencies, reduce regulatory costs, or delete obsolete, unnecessary, or redundant rules.

(c) The plan must include any desired update to the prior year's regulatory plan or supplement published pursuant to subsection (7). If, in a prior year, a law was identified under this paragraph or under subparagraph (a)1. as a law requiring rulemaking to implement but a notice of proposed rule has not been published:

1. The agency shall identify and again list such law, noting the applicable notice of rule development by citation to the Florida Administrative Register; or

2. If the agency has subsequently determined that rulemaking is not necessary to implement the law, the agency shall identify such law, reference the citation to the applicable notice of rule development in the Florida Administrative Register, and provide a concise written explanation of the reason why the law may be implemented without rulemaking.

(d) The plan must include a certification executed on behalf of the agency by both the agency head, or, if the agency head is a collegial body, the presiding officer; and the individual acting as principal legal advisor to the agency head. The certification must:

1. Verify that the persons executing the certification have reviewed the plan.

2. Verify that the agency regularly reviews all of its rules and identify the period during which all rules have most recently been reviewed to determine if the rules remain consistent with the agency's rulemaking authority and the laws implemented.

(2) PUBLICATION AND DELIVERY TO THE COMMITTEE.—

(a) By October 1 of each year, each agency shall:

1. Publish its regulatory plan on its website or on another state website established for publication of administrative law records. A clearly labeled hyperlink to the current plan must be included on the agency's primary website homepage.

2. Electronically deliver to the committee a copy of the certification required in paragraph (1)(d).

3. Publish in the Florida Administrative Register a notice identifying the date of publication of the agency's regulatory plan. The notice must include a hyperlink or website address providing direct access to the published plan.

(b) To satisfy the requirements of paragraph (a), a board established under s. 20.165(4), and any other board or commission receiving administrative support from the Department of Business and Professional Regulation, may coordinate with the Department of Business and Professional Regulation, and a board

established under s. 20.43(3)(g) may coordinate with the Department of Health, for inclusion of the board's or commission's plan and notice of publication in the coordinating department's plan and notice and for the delivery of the required documentation to the committee.

(c) A regulatory plan prepared under subsection (1) and any regulatory plan published under this chapter before July 1, 2014, shall be maintained at an active website for 10 years after the date of initial publication on the agency's website or another state website.

(3) DEPARTMENT REVIEW OF BOARD PLAN.— By October 15 of each year:

(a) For each board established under s. 20.165(4) and any other board or commission receiving administrative support from the Department of Business and Professional Regulation, the Department of Business and Professional Regulation shall file with the committee a certification that the department has reviewed each board's and commission's regulatory plan. A certification may relate to more than one board or commission.

(b) For each board established under s. 20.43(3)(g), the Department of Health shall file with the committee a certification that the department has reviewed the board's regulatory plan. A certification may relate to more than one board.

(4) DEADLINE FOR RULE DEVELOPMENT.—By November 1 of each year, each agency shall publish a notice of rule development under s. 120.54(2) for each law identified in the agency's regulatory plan pursuant to subparagraph (1)(a)1. for which rulemaking is necessary to implement but for which the agency did not report the publication of a notice of rule development under subparagraph (1)(a)2.

(5) DEADLINE TO PUBLISH PROPOSED RULE. For each law for which implementing rulemaking is necessary as identified in the agency's plan pursuant to subparagraph (1)(a)1. or subparagraph (1)(c)1., the agency shall publish a notice of proposed rule pursuant to s. 120.54(3)(a) by April 1 of the year following the deadline for the regulatory plan. This deadline may be extended if the agency publishes a notice of extension in the Florida Administrative Register identifying each rulemaking proceeding for which an extension is being noticed by citation to the applicable notice of rule development as published in the Florida Administrative Register. The agency shall include a concise statement in the notice of extension identifying any issues that are causing the delay in rulemaking. An extension shall expire on October 1 after the April 1 deadline, provided that the regulatory plan due on October 1 may further extend the rulemaking proceeding by identification pursuant to subparagraph (1)(c)1. or conclude the rulemaking proceeding by identification pursuant to subparagraph (1)(c)2. A published regulatory plan may be corrected at any time to accomplish the purpose of extending or concluding an affected rulemaking proceeding and is deemed corrected as of the October 1 due date. Upon publication of a correction, the agency shall publish in the Florida Administrative Register a notice of the date of the correction identifying the



affected rulemaking proceeding by applicable citation to the Florida Administrative Register.

(6) **CERTIFICATIONS.**—Each agency shall file a certification with the committee upon compliance with subsection (4) and upon filing a notice under subsection (5) of either a deadline extension or a regulatory plan correction. A certification may relate to more than one notice or contemporaneous act. The date or dates of compliance shall be noted in each certification.

(7) **SUPPLEMENTING THE REGULATORY PLAN.** After publication of the regulatory plan, the agency shall supplement the plan within 30 days after a bill becomes a law if the law is enacted before the next regular session of the Legislature and the law substantively modifies the agency's specifically delegated legal duties, unless the law affects all or most state agencies as identified by letter to the committee from the Governor or the Attorney General. The supplement must include the information required in paragraph (1)(a) and shall be published as required in subsection (2), but no certification or delivery to the committee is required. The agency shall publish in the Florida Administrative Register notice of publication of the supplement, and include a hyperlink on its website or web address for direct access to the published supplement. For each law reported in the supplement, if rulemaking is necessary to implement the law, the agency shall publish a notice of rule development by the later of the date provided in subsection (4) or 60 days after the bill becomes a law, and a notice of proposed rule shall be published by the later of the date provided in subsection (5) or 120 days after the bill becomes a law. The proposed rule deadline may be extended to the following October 1 by notice as provided in subsection (5). If such proposed rule has not been filed by October 1, a law included in a supplement shall also be included in the next annual plan pursuant to subsection (1).

(8) **FAILURE TO COMPLY.**—If an agency fails to comply with a requirement of paragraph (2)(a) or subsection (5), within 15 days after written demand from the committee or from the chair of any other legislative committee, the agency shall deliver a written explanation of the reasons for noncompliance to the committee, the President of the Senate, the Speaker of the House of Representatives, and the chair of any legislative committee requesting the explanation of the reasons for noncompliance.

(9) **EDUCATIONAL UNITS.**—This section does not apply to educational units.

**History.**—s. 46, ch. 96-399; s. 16, ch. 97-176; s. 9, ch. 2006-82; s. 15, ch. 2008-104; s. 8, ch. 2008-149; s. 4, ch. 2011-225; s. 20, ch. 2014-17; s. 2, ch. 2014-39; s. 2, ch. 2015-162.

## **120.80 Exceptions and special requirements; agencies.—**

### **(1) DIVISION OF ADMINISTRATIVE HEARINGS.**

(a) *Division as a party.*—Notwithstanding s. 120.57(1)(a), a hearing in which the division is a party may not be conducted by an administrative law judge assigned by the division. An attorney assigned by the Administration Commission shall be the hearing officer.

(b) *Workers' compensation.*—Notwithstanding s. 120.52(1), a judge of compensation claims, in

adjudicating matters under chapter 440, is not an agency or part of an agency for purposes of this chapter.

### **(2) DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES.—**

(a) Marketing orders under chapter 527, chapter 573, or chapter 601 are not rules.

(b) Notwithstanding s. 120.57(1)(a), hearings held by the Department of Agriculture and Consumer Services pursuant to chapter 601 need not be conducted by an administrative law judge assigned by the division.

### **(3) OFFICE OF FINANCIAL REGULATION.—**

(a) Notwithstanding s. 120.60(1), in proceedings for the issuance, denial, renewal, or amendment of a license or approval of a merger pursuant to title XXXVIII:

1.a. The Office of Financial Regulation of the Financial Services Commission shall have published in the Florida Administrative Register notice of the application within 21 days after receipt.

b. Within 21 days after publication of notice, any person may request a hearing. Failure to request a hearing within 21 days after notice constitutes a waiver of any right to a hearing. The Office of Financial Regulation or an applicant may request a hearing at any time prior to the issuance of a final order. Hearings shall be conducted pursuant to ss. 120.569 and 120.57, except that the Financial Services Commission shall by rule provide for participation by the general public.

2. Should a hearing be requested as provided by sub-subparagraph 1.b., the applicant or licensee shall publish at its own cost a notice of the hearing in a newspaper of general circulation in the area affected by the application. The Financial Services Commission may by rule specify the format and size of the notice.

3. Notwithstanding s. 120.60(1), and except as provided in subparagraph 4., an application for license for a new bank, new trust company, new credit union, new savings and loan association, or new licensed family trust company must be approved or denied within 180 days after receipt of the original application or receipt of the timely requested additional information or correction of errors or omissions. An application for such a license or for acquisition of such control which is not approved or denied within the 180-day period or within 30 days after conclusion of a public hearing on the application, whichever is later, shall be deemed approved subject to the satisfactory completion of conditions required by statute as a prerequisite to license and approval of insurance of accounts for a new bank, a new savings and loan association, a new credit union, or a new licensed family trust company by the appropriate insurer.

4. In the case of an application for license to establish a new bank, trust company, or capital stock savings association in which a foreign national proposes to own or control 10 percent or more of any class of voting securities, and in the case of an application by a foreign national for approval to acquire control of a bank, trust company, or capital stock savings association, the Office of Financial Regulation shall request that a public hearing be conducted pursuant to ss. 120.569 and 120.57. Notice of such hearing shall be published by the applicant as provided in subparagraph 2. The failure of such foreign national to appear personally at the hearing

shall be grounds for denial of the application. Notwithstanding s. 120.60(1) and subparagraph 3., every application involving a foreign national shall be approved or denied within 1 year after receipt of the original application or any timely requested additional information or the correction of any errors or omissions, or within 30 days after the conclusion of the public hearing on the application, whichever is later.

(b) In any application for a license or merger pursuant to title XXXVIII which is referred by the agency to the division for hearing, the administrative law judge shall complete and submit to the agency and to all parties a written report consisting of findings of fact and rulings on evidentiary matters. The agency shall allow each party at least 10 days in which to submit written exceptions to the report.

(4) DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION.—

(a) *Business regulation.*—The Division of Pari-mutuel Wagering is exempt from the hearing and notice requirements of ss. 120.569 and 120.57(1)(a), but only for stewards, judges, and boards of judges when the hearing is to be held for the purpose of the imposition of fines or suspensions as provided by rules of the Division of Pari-mutuel Wagering, but not for revocations, and only upon violations of subparagraphs 1.-6. The Division of Pari-mutuel Wagering shall adopt rules establishing alternative procedures, including a hearing upon reasonable notice, for the following violations:

1. Horse riding, harness riding, greyhound interference, and jai alai game actions in violation of chapter 550.

2. Application and usage of drugs and medication to horses, greyhounds, and jai alai players in violation of chapter 550.

3. Maintaining or possessing any device which could be used for the injection or other infusion of a prohibited drug to horses, greyhounds, and jai alai players in violation of chapter 550.

4. Suspensions under reciprocity agreements between the Division of Pari-mutuel Wagering and regulatory agencies of other states.

5. Assault or other crimes of violence on premises licensed for pari-mutuel wagering.

6. Prearranging the outcome of any race or game.

(b) *Professional regulation.*—Notwithstanding s. 120.57(1)(a), formal hearings may not be conducted by the Secretary of Business and Professional Regulation or a board or member of a board within the Department of Business and Professional Regulation for matters relating to the regulation of professions, as defined by chapter 455.

(5) FLORIDA LAND AND WATER ADJUDICATORY COMMISSION.—Notwithstanding the provisions of s. 120.57(1)(a), when the Florida Land and Water Adjudicatory Commission receives a notice of appeal pursuant to s. 380.07, the commission shall notify the division within 60 days after receipt of the notice of appeal if the commission elects to request the assignment of an administrative law judge.

(6) DEPARTMENT OF LAW ENFORCEMENT.—Law enforcement policies and procedures of the

Department of Law Enforcement which relate to the following are not rules as defined by this chapter:

(a) The collection, management, and dissemination of active criminal intelligence information and active criminal investigative information; management of criminal investigations; and management of undercover investigations and the selection, assignment, and fictitious identity of undercover personnel.

(b) The recruitment, management, identity, and remuneration of confidential informants or sources.

(c) Surveillance techniques, the selection of surveillance personnel, and electronic surveillance, including court-ordered and consensual interceptions of communication conducted pursuant to chapter 934.

(d) The safety and release of hostages.

(e) The provision of security and protection to public figures.

(f) The protection of witnesses.

(7) DEPARTMENT OF CHILDREN AND FAMILIES.—Notwithstanding s. 120.57(1)(a), hearings conducted within the Department of Children and Families in the execution of those social and economic programs administered by the former Division of Family Services of the former Department of Health and Rehabilitative Services prior to the reorganization effected by chapter 75-48, Laws of Florida, need not be conducted by an administrative law judge assigned by the division.

(8) DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES.—

(a) *Driver licenses.*—

1. Notwithstanding s. 120.57(1)(a), hearings regarding driver licensing pursuant to chapter 322 need not be conducted by an administrative law judge assigned by the division.

2. Notwithstanding s. 120.60(5), cancellation, suspension, or revocation of a driver license shall be by personal delivery to the licensee or by first-class mail as provided in s. 322.251.

(b) *Wrecker operators.*—Notwithstanding s. 120.57(1)(a), hearings held by the Division of the Florida Highway Patrol of the Department of Highway Safety and Motor Vehicles to deny, suspend, or remove a wrecker operator from participating in the wrecker rotation system established by s. 321.051 need not be conducted by an administrative law judge assigned by the division. These hearings shall be held by a hearing officer appointed by the director of the Division of the Florida Highway Patrol.

(9) OFFICE OF INSURANCE REGULATION.—Notwithstanding s. 120.60(1), every application for a certificate of authority as required by s. 624.401 shall be approved or denied within 180 days after receipt of the original application. Any application for a certificate of authority which is not approved or denied within the 180-day period, or within 30 days after conclusion of a public hearing held on the application, shall be deemed approved, subject to the satisfactory completion of conditions required by statute as a prerequisite to licensure.

(10) DEPARTMENT OF ECONOMIC OPPORTUNITY.—

(a) Notwithstanding s. 120.54, the rulemaking provisions of this chapter do not apply to reemployment assistance appeals referees.

(b) Notwithstanding s. 120.54(5), the uniform rules of procedure do not apply to appeal proceedings conducted under chapter 443 by the Reemployment Assistance Appeals Commission, special deputies, or reemployment assistance appeals referees.

(c) Notwithstanding s. 120.57(1)(a), hearings under chapter 443 may not be conducted by an administrative law judge assigned by the division, but instead shall be conducted by the Reemployment Assistance Appeals Commission in reemployment assistance appeals, reemployment assistance appeals referees, and the Department of Economic Opportunity or its special deputies under s. 443.141.

(11) NATIONAL GUARD.—Notwithstanding s. 120.52(16), the enlistment, organization, administration, equipment, maintenance, training, and discipline of the militia, National Guard, organized militia, and unorganized militia, as provided by s. 2, Art. X of the State Constitution, are not rules as defined by this chapter.

(12) PUBLIC EMPLOYEES RELATIONS COMMISSION.—

(a) Notwithstanding s. 120.57(1)(a), hearings within the jurisdiction of the Public Employees Relations Commission need not be conducted by an administrative law judge assigned by the division.

(b) Section 120.60 does not apply to certification of employee organizations pursuant to s. 447.307.

(13) FLORIDA PUBLIC SERVICE COMMISSION.

(a) Agency statements that relate to cost-recovery clauses, factors, or mechanisms implemented pursuant to chapter 366, relating to public utilities, are exempt from the provisions of s. 120.54(1)(a).

(b) Notwithstanding ss. 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

(c) The Florida Public Service Commission is exempt from the time limitations in s. 120.60(1) when issuing a license.

(d) Notwithstanding the provisions of this chapter, in implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, the Public Service Commission is authorized to employ procedures consistent with that act.

(e) Notwithstanding the provisions of this chapter, s. 350.128, or s. 364.381, appellate jurisdiction for Public Service Commission decisions that implement the Telecommunications Act of 1996, Pub. L. No. 104-104, shall be consistent with the provisions of that act.

(f) Notwithstanding any provision of this chapter, all public utilities and companies regulated by the Public Service Commission shall be entitled to proceed under the interim rate provisions of chapter 364 or the procedures for interim rates contained in chapter 74-195, Laws of Florida, or as otherwise provided by law.

(14) DEPARTMENT OF REVENUE.—

(a) *Assessments.*—An assessment of tax, penalty, or interest by the Department of Revenue is not a final

order as defined by this chapter. Assessments by the Department of Revenue shall be deemed final as provided in the statutes and rules governing the assessment and collection of taxes.

(b) *Taxpayer contest proceedings.*—

1. In any administrative proceeding brought pursuant to this chapter as authorized by s. 72.011(1), the taxpayer shall be designated the “petitioner” and the Department of Revenue shall be designated the “respondent,” except that for actions contesting an assessment or denial of refund under chapter 207, the Department of Highway Safety and Motor Vehicles shall be designated the “respondent,” and for actions contesting an assessment or denial of refund under chapters 210, 550, 561, 562, 563, 564, and 565, the Department of Business and Professional Regulation shall be designated the “respondent.”

2. In any such administrative proceeding, the applicable department’s burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the applicable department made the assessment.

3.a. Prior to filing a petition under this chapter, the taxpayer shall pay to the applicable department the amount of taxes, penalties, and accrued interest assessed by that department which are not being contested by the taxpayer. Failure to pay the uncontested amount shall result in the dismissal of the action and imposition of an additional penalty of 25 percent of the amount taxed.

b. The requirements of s. 72.011(2) and (3)(a) are jurisdictional for any action under this chapter to contest an assessment or denial of refund by the Department of Revenue, the Department of Highway Safety and Motor Vehicles, or the Department of Business and Professional Regulation.

4. Except as provided in s. 220.719, further collection and enforcement of the contested amount of an assessment for nonpayment or underpayment of any tax, interest, or penalty shall be stayed beginning on the date a petition is filed. Upon entry of a final order, an agency may resume collection and enforcement action.

5. The prevailing party, in a proceeding under ss. 120.569 and 120.57 authorized by s. 72.011(1), may recover all legal costs incurred in such proceeding, including reasonable attorney’s fees, if the losing party fails to raise a justiciable issue of law or fact in its petition or response.

6. Upon review pursuant to s. 120.68 of final agency action concerning an assessment of tax, penalty, or interest with respect to a tax imposed under chapter 212, or the denial of a refund of any tax imposed under chapter 212, if the court finds that the Department of Revenue improperly rejected or modified a conclusion of law, the court may award reasonable attorney’s fees and reasonable costs of the appeal to the prevailing appellant.

(c) *Proceedings to establish paternity or paternity and child support; orders to appear for genetic testing; proceedings for administrative support orders.*—In proceedings to establish paternity or paternity and

child support pursuant to s. 409.256 and proceedings for the establishment of administrative support orders pursuant to s. 409.2563, final orders in cases referred by the Department of Revenue to the Division of Administrative Hearings shall be entered by the division's administrative law judge and transmitted to the Department of Revenue for filing and rendering. The Department of Revenue has the right to seek judicial review under s. 120.68 of a final order entered by an administrative law judge. The Department of Revenue or the person ordered to appear for genetic testing may seek immediate judicial review under s. 120.68 of an order issued by an administrative law judge pursuant to s. 409.256(5)(b). Final orders that adjudicate paternity or paternity and child support pursuant to s. 409.256 and administrative support orders rendered pursuant to s. 409.2563 may be enforced pursuant to s. 120.69 or, alternatively, by any method prescribed by law for the enforcement of judicial support orders, except contempt. Hearings held by the Division of Administrative Hearings pursuant to ss. 409.256, 409.2563, and 409.25635 shall be held in the judicial circuit where the person receiving services under Title IV-D resides or, if the person receiving services under Title IV-D does not reside in this state, in the judicial circuit where the respondent resides. If the department and the respondent agree, the hearing may be held in another location. If ordered by the administrative law judge, the hearing may be conducted telephonically or by videoconference.

(15) DEPARTMENT OF HEALTH.—Notwithstanding s. 120.57(1)(a), formal hearings may not be conducted by the State Surgeon General, the Secretary of Health Care Administration, or a board or member of a board within the Department of Health or the Agency for Health Care Administration for matters relating to the regulation of professions, as defined by chapter 456. Notwithstanding s. 120.57(1)(a), hearings conducted within the Department of Health in execution of the Special Supplemental Nutrition Program for Women, Infants, and Children; Child Care Food Program; Children's Medical Services Program; the Brain and Spinal Cord Injury Program; and the exemption from disqualification reviews for certified nurse assistants program need not be conducted by an administrative law judge assigned by the division. The Department of Health may contract with the Department of Children and Families for a hearing officer in these matters.

(16) FLORIDA BUILDING COMMISSION.—

(a) Notwithstanding the provisions of s. 120.542, the Florida Building Commission may not accept a petition for waiver or variance and may not grant any waiver or variance from the requirements of the Florida Building Code.

(b) The Florida Building Commission shall adopt within the Florida Building Code criteria and procedures for alternative means of compliance with the code or local amendments thereto, for enforcement by local governments, local enforcement districts, or other entities authorized by law to enforce the Florida Building Code. Appeals from the denial of the use of alternative means shall be heard by the local board, if one exists,

and may be appealed to the Florida Building Commission.

(c) Notwithstanding ss. 120.565, 120.569, and 120.57, the Florida Building Commission and hearing officer panels appointed by the commission in accordance with s. 553.775(3)(c)1. may conduct proceedings to review decisions of local building code officials in accordance with s. 553.775(3)(c).

(d) Section 120.541(3) does not apply to the adoption of amendments and the triennial update to the Florida Building Code expressly authorized by s. 553.73.

(17) STATE FIRE MARSHAL.—Section 120.541(3) does not apply to the adoption of amendments and the triennial update to the Florida Fire Prevention Code expressly authorized by s. 633.202.

(18) DEPARTMENT OF TRANSPORTATION.—Sections 120.54(3)(b) and 120.541 do not apply to the adjustment of tolls pursuant to s. 338.165(3).

**History.**—s. 41, ch. 96-159; s. 13, ch. 98-166; s. 10, ch. 99-8; s. 4, ch. 99-397; s. 1, ch. 2000-141; s. 17, ch. 2000-151; s. 2, ch. 2000-160; s. 11, ch. 2000-304; s. 4, ch. 2000-305; ss. 2, 11, ch. 2000-312; s. 4, ch. 2000-355; s. 3, ch. 2000-367; s. 18, ch. 2001-158; s. 2, ch. 2001-279; s. 8, ch. 2002-173; s. 1, ch. 2002-239; s. 3, ch. 2003-36; s. 139, ch. 2003-261; s. 1, ch. 2004-52; s. 7, ch. 2004-334; ss. 12, 13, ch. 2005-39; s. 1, ch. 2005-96; s. 13, ch. 2005-147; s. 1, ch. 2005-209; s. 5, ch. 2006-45; s. 9, ch. 2008-6; s. 16, ch. 2008-104; s. 5, ch. 2009-187; s. 1, ch. 2011-64; s. 50, ch. 2011-142; s. 8, ch. 2011-225; s. 43, ch. 2012-30; s. 12, ch. 2013-14; s. 120, ch. 2013-183; s. 32, ch. 2014-19; s. 37, ch. 2014-97.

### **120.81 Exceptions and special requirements; general areas.—**

(1) EDUCATIONAL UNITS.—

(a) Notwithstanding s. 120.536(1) and the flush left provisions of s. 120.52(8), district school boards may adopt rules to implement their general powers under s. 1001.41.

(b) The preparation or modification of curricula by an educational unit is not a rule as defined by this chapter.

(c) Notwithstanding s. 120.52(16), any tests, test scoring criteria, or testing procedures relating to student assessment which are developed or administered by the Department of Education pursuant to s. 1003.4282, s. 1008.22, or s. 1008.25, or any other statewide educational tests required by law, are not rules.

(d) Notwithstanding any other provision of this chapter, educational units shall not be required to include the full text of the rule or rule amendment in notices relating to rules and need not publish these or other notices in the Florida Administrative Register, but notice shall be made:

1. By publication in a newspaper of general circulation in the affected area;

2. By mail to all persons who have made requests of the educational unit for advance notice of its proceedings and to organizations representing persons affected by the proposed rule; and

3. By posting in appropriate places so that those particular classes of persons to whom the intended action is directed may be duly notified.

(e) Educational units, other than the Florida School for the Deaf and the Blind, shall not be required to make filings with the committee of the documents required to be filed by s. 120.54 or s. 120.55(1)(a)4.

(f) Notwithstanding s. 120.57(1)(a), hearings which involve student disciplinary suspensions or expulsions may be conducted by educational units.

(g) Sections 120.569 and 120.57 do not apply to any proceeding in which the substantial interests of a student are determined by a state university or a community college.

(h) Notwithstanding ss. 120.569 and 120.57, in a hearing involving a student disciplinary suspension or expulsion conducted by an educational unit, the 14-day notice of hearing requirement may be waived by the agency head or the hearing officer without the consent of parties.

(i) For purposes of s. 120.68, a district school board whose decision is reviewed under the provisions of s. 1012.33 and whose final action is modified by a superior administrative decision shall be a party entitled to judicial review of the final action.

(j) Notwithstanding s. 120.525(2), the agenda for a special meeting of a district school board under authority of s. 1001.372(1) shall be prepared upon the calling of the meeting, but not less than 48 hours prior to the meeting.

(k) Students are not persons subject to regulation for the purposes of petitioning for a variance or waiver to rules of educational units under s. 120.542.

(l) Sections 120.54(3)(b) and 120.541 do not apply to the adoption of rules pursuant to s. 1012.22, s. 1012.27, s. 1012.335, s. 1012.34, or s. 1012.795.

#### (2) LOCAL UNITS OF GOVERNMENT.—

(a) Local units of government with jurisdiction in only one county or part thereof shall not be required to make filings with the committee of the documents required to be filed by s. 120.54.

(b) Notwithstanding any other provision of this chapter, units of government with jurisdiction in only one county or part thereof need not publish required notices in the Florida Administrative Register, but shall publish these notices in the manner required by their enabling acts for notice of rulemaking or notice of meeting. Notices relating to rules are not required to include the full text of the rule or rule amendment.

#### (3) PRISONERS AND PAROLEES.—

(a) Notwithstanding s. 120.52(13), prisoners, as defined by s. 944.02, shall not be considered parties in any proceedings other than those under s. 120.54(3)(c) or (7), and may not seek judicial review under s. 120.68 of any other agency action. Prisoners are not eligible to seek an administrative determination of an agency statement under s. 120.56(4). Parolees shall not be considered parties for purposes of agency action or judicial review when the proceedings relate to the rescission or revocation of parole.

(b) Notwithstanding s. 120.54(3)(c), prisoners, as defined by s. 944.02, may be limited by the Department of Corrections to an opportunity to present evidence and argument on issues under consideration by submission of written statements concerning intended action on any department rule.

(c) Notwithstanding ss. 120.569 and 120.57, in a preliminary hearing for revocation of parole, no less than 7 days' notice of hearing shall be given.

(4) REGULATION OF PROFESSIONS.—Notwithstanding s. 120.569(2)(g), in a proceeding against a licensed professional or in a proceeding for licensure of an applicant for professional licensure which involves allegations of sexual misconduct:

(a) The testimony of the victim of the sexual misconduct need not be corroborated.

(b) Specific instances of prior consensual sexual activity between the victim of the sexual misconduct and any person other than the offender is inadmissible, unless:

1. It is first established to the administrative law judge in a proceeding in camera that the victim of the sexual misconduct is mistaken as to the identity of the perpetrator of the sexual misconduct; or

2. If consent by the victim of the sexual misconduct is at issue and it is first established to the administrative law judge in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of such victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.

(c) Reputation evidence relating to the prior sexual conduct of a victim of sexual misconduct is inadmissible.

(5) HUNTING AND FISHING REGULATION.—Agency action which has the effect of altering established hunting or fishing seasons, or altering established annual harvest limits for saltwater fishing if the procedure for altering such harvest limits is set out by rule of the Fish and Wildlife Conservation Commission, is not a rule as defined by this chapter, provided such action is adequately noticed in the area affected through publishing in a newspaper of general circulation or through notice by broadcasting by electronic media.

(6) RISK IMPACT STATEMENT.—The Department of Environmental Protection shall prepare a risk impact statement for any rule that is proposed for approval by the Environmental Regulation Commission and that establishes or changes standards or criteria based on impacts to or effects upon human health. The Department of Agriculture and Consumer Services shall prepare a risk impact statement for any rule that is proposed for adoption that establishes standards or criteria based on impacts to or effects upon human health.

(a) This subsection does not apply to rules adopted pursuant to federally delegated or mandated programs where such rules are identical or substantially identical to the federal regulations or laws being adopted or implemented by the Department of Environmental Protection or Department of Agriculture and Consumer Services, as applicable. However, the Department of Environmental Protection and the Department of Agriculture and Consumer Services shall identify any risk analysis information available to them from the Federal Government that has formed the basis of such a rule.

(b) This subsection does not apply to emergency rules adopted pursuant to this chapter.

(c) The Department of Environmental Protection and the Department of Agriculture and Consumer Services shall prepare and publish notice of the availability of a clear and concise risk impact statement

for all applicable rules. The risk impact statement must explain the risk to the public health addressed by the rule and shall identify and summarize the source of the scientific information used in evaluating that risk.

(d) Nothing in this subsection shall be construed to create a new cause of action or basis for challenging a rule nor diminish any existing cause of action or basis for challenging a rule.

**History.**—s. 42, ch. 96-159; s. 17, ch. 97-176; s. 49, ch. 99-2; s. 65, ch. 99-245; s. 7, ch. 99-379; s. 28, ch. 99-398; s. 4, ch. 2000-214; s. 897, ch. 2002-387; s. 17, ch. 2008-104; s. 4, ch. 2010-78; s. 9, ch. 2011-225; s. 13, ch. 2013-14; s. 37, ch. 2013-35; s. 21, ch. 2014-17; s. 3, ch. 2014-39; s. 24, ch. 2014-184.

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