

## Comments on SB 2290

The Senate spent a great deal of time last year on revision of the Administrative Procedures Act, which governs how executive branch agencies make rules and issue orders and how citizens are involved in those processes. Last year SB 536 passed both houses of the legislature with large majorities, but it was vetoed by the Governor.

The Governor then appointed an APA review commission to take a fresh look at the act. Senator Locke Burt, a member of the Joint Administrative Procedures Committee, served on that commission, as did Senator Dantzler.

SB2290 contains all of the major provisions of SB536, including:

1. There are provisions for mediation and summary hearing to resolve disputes between a person and an agency less formally.
2. There is legislative suspension of rules by general bill if an agency refuses to voluntarily respond to a JAPC objection.
3. In a hearing to challenge a proposed rule, the agency has the burden of proving that its rule is valid.
4. The policies that an agency enforces must still be adopted as rules, just as under present law.
5. The bill requires a closer connection between statutes and the rules that are supposed to be implementing them.

This bill also has some new provisions which have come out of the commission report and were not in SB536:

1. There is an overall simplification of the Administrative Procedure Act; it is renumbered and reorganized.
2. It requires legislative staff analysis of rulemaking that is required by all future bills before they are enacted into law.
3. An agency must prepare a statement of estimated regulatory costs whenever a regulated person offers an alternative to a proposed rule.
4. A person may petition an agency to waive its rules if the law can otherwise be met and the rule creates hardship.

## Elaboration on comments on SB 2290

Major provisions which were in SB 536, and which are in SB 2290:

1. There are provisions for mediation and summary hearings. When a person has a dispute with an agency, a process is set up to allow mediation of that dispute. Both the citizen and the agency must agree to the mediation process. If mediation is tried but it does not resolve the issue, the more formal APA process is then available. The bill also creates a new optional, less complicated “summary” hearing to attempt to resolve disputes. If a person doesn’t want to try mediation or the summary hearing process, the more formal hearing processes of the APA are always available.

2. There are provisions for legislative suspension of rules. The legislature can vote to suspend an invalid rule when an agency refuses to voluntarily change its rule in response to an objection from the Joint Administrative Procedures Committee. The suspension would be passed in bill form and be presented to the Governor for his consideration, just like any other bill. Of course, the legislature could have passed a law suspending a rule at any time without specific authorizing legislation, but this bill creates a process to bring these issues to the attention of the Legislature.

3. The agency has the burden of proof on proposed rules. When a person challenges an agency's proposed rule before an administrative law judge, the proposed rule is not presumed to be valid, and the burden is placed on the agency to prove that its rule is valid as to the objections raised in the petition.

4. The policies an agency enforces must still be adopted as rules. The commission recommended that those provisions of the Act that require policies to be adopted as rules be retained (Section 120.535, F.S.). Rulemaking allows public input, legislative oversight, and judicial review of agency policies. While section 120.535, F.S., was repealed, its provisions were left substantially unchanged, and were only moved to various other places in the act.

5. The bill requires a closer connection between statutes and rules. Rules must be closely connected to the specific provisions of the statute they are supposed to be implementing. The intention here is to legislatively overturn some court cases which have only required a rule to be “reasonably related” to the “purposes” of a statute in order to be valid. The APA will now make clear that administrative law judges should carefully consider the specific law being implemented when considering the validity of a rule.

This bill also has some new provisions which have come out of the Commission report and were not in SB 536:

1. There is an overall simplification of the Administrative Procedure Act. It has been substantially renumbered and reorganized, it has also been reworded in some sections to make it easier to understand.

2. The bill requires legislative staff analysis of rulemaking required in bills before they are enacted into law. Senator Kiser often said that the Legislature was partly to blame when agencies didn't follow the law, because adequate guidelines and standards are sometimes not given for the agencies to follow as they implement the statute. This bill will require attention to standards for agency implementation as new legislation by creating a statement on rulemaking to be presented with each bill is considered, just as estimates of economic impact are now prepared.

3. A person is given a right in response to a proposed agency rule to suggest an alternative to the agency which substantially accomplishes the objectives of the law, but which has a lower regulatory cost. If this is done, the agency must then prepare a statement of estimated regulatory costs, either adopting the alternative suggested, or giving reasons for rejecting it. SB 536 required an agency to prepare this statement for every rule, but preparing it in response to a suggested alternative is a good compromise.

4. This bill allows a regulated person to petition an agency to waive its rules or grant a variance to them. A waiver or variance is granted by an agency when the purposes of the underlying statute would still be achieved and application of the rule would create a substantial hardship or would violate principles of fairness. An agency may grant a waiver or variance only in response to a petition by the regulated person, and the agency must maintain records of the type and disposition of each petition filed. This should prevent uneven application of waiver and variance authority.