

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Governmental Operations Committee

BILL: SB 704

INTRODUCER: Senator Bennett

SUBJECT: Administrative Procedure Act

DATE: January 16, 2008      REVISED: 1/24/08 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>McKay</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>TA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

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

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

The bill also modifies provisions of the APA concerning the incorporation by reference of materials into agency rules. In addition to technical or administrative refinements to ch. 120, F.S., the bill makes the following significant changes:

- Provides definitions of the terms “law implemented” and “rulemaking authority”;
- Provides additional requirements for the use of material that is being incorporated by reference in rules;
- Requires electronic publication of the Florida Administrative Code (FAC);
- Provides for material incorporated by reference to be filed in electronic form, unless doing so would constitute a violation of federal copyright law;
- Provides that if an agency head is a board or other collegial body, then the agency head may not delegate the responsibility to conduct requested public hearings;
- Provides an award of attorney’s fees to the petitioner in an unadopted rule challenge if, prior to the final hearing, the agency initiates rulemaking and the agency knew or should have known that the agency statement was an unadopted rule; and

- Provides the granting of a stay in an unadopted rule challenge when certain conditions are met.

This bill amends the following sections of the Florida Statutes: 120.52, 120.536, 120.54, 120.545, 120.55, 120.56, 120.569, 120.57, 120.595, 120.74, 120.80, 120.81, 409.175, 420.9072, and 420.9075.

## II. Present Situation:

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

Because administrative agencies have been granted extensive investigative, rulemaking, and adjudicating powers, statutes such as the Florida Administrative Procedure Act (APA) have been adopted to provide parties in administrative proceedings with procedural protection and due process.<sup>1</sup> The APA allows individuals who feel that their interests are being or will be affected by the preliminary decisions of agencies to challenge those decisions.<sup>2</sup> The central purpose of the APA is to provide the basic fairness that should surround all governmental activity, such as:

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

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

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

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

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

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

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

- Other units of government in the state, including counties and municipalities, to the extent they are expressly made subject to the act by general or special law or existing judicial decisions.

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

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

### **The Joint Administrative Procedures Committee and Agency Rulemaking**

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

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

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

- A short, plain explanation of the purpose and effect of the proposed action;
- The full text of the proposed rule or amendment and a summary thereof;
- A reference to the specific rulemaking authority pursuant to which the rule is adopted;
- A reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific;

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

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

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

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

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

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

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

- A summary of the agency's statement of the estimated regulatory costs, if one is prepared;
- A statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs must do so in writing within 21 days after publication of the notice; and
- The procedure for requesting a public hearing on the proposed rule.

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

- A copy of the proposed rule;
- A detailed written statement of the facts and circumstances justifying the proposed rule;
- A copy of any statement of estimated regulatory costs that has been prepared pursuant to s. 120.541, F.S.;
- A statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and
- A copy of the notice of intent to adopt, amend, or repeal a rule, as required by s. 120.54(3)(a)1., F.S.

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

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

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

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

Upon receipt of the objection, an agency must:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In February 2006, JAPC released a report on unadopted rules, which contained a background and history of unadopted rules, and provided recommendations and proposals for consideration. The report confirmed that the application of unadopted rules by agencies is a legitimate concern; however, the underlying cause of the problem and the appropriate means to address it were not readily clear.<sup>22</sup>

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

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

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

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

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

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

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

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

## Florida Administrative Code and Florida Administrative Weekly

Section 120.55(1), F.S., requires the Department of State (department) to publish all rules adopted by each agency. This compilation of rules is entitled the *Florida Administrative Code* (FAC). The publication is the official compilation of the administrative rules of the state. The FAC must cite the specific rulemaking authority pursuant to which each rule was adopted, all history notes, and complete indexes to all rules contained in the code. Supplementation is required to occur at least monthly.

Pursuant to s. 120.55(1)(b), F.S., the department is required to publish notices and various other materials filed by the state's administrative agencies in the *Florida Administrative Weekly* (FAW). The FAW must contain:

- Notice of adoption of, and an index to, all rules filed during the preceding week;
- All notices required by s. 120.54(3)(a), F.S., concerning agency rulemaking, showing the text of all rules proposed for consideration or a reference to the location in the FAW where the text of the proposed rules is published;
- All notices of public meetings, hearings, and workshops, including a statement of the manner in which a copy of the agenda may be obtained;
- A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules;
- Notice of petitions for declaratory statements or administrative determinations;
- A summary of each objection to any rule filed by the Joint Administrative Procedures Committee during the preceding week; and
- Any other material required or authorized by law or deemed useful by the department.<sup>24</sup>

During the 2006 Regular Session, the Legislature passed CS/SB 262, enacted as ch. 2006-82, L.O.F., which requires the department to start publishing the FAW on its Internet website with certain search capabilities, effective December 31, 2007.<sup>25</sup> The law requires the department to continue to publish a printed version of the FAW.

### III. Effect of Proposed Changes:

#### Section 1. Short Title

The bill provides that the act may be cited as the "Open Government Act."

#### Section 2. Definitions

The APA requires agencies to adopt as a rule, pursuant to s. 120.54(1)(a), F.S., any agency statement that meets the definition of a rule, as defined in s. 120.52(15), F.S. The APA definition of a rule is a functional one, meaning that an agency statement is a rule depending upon how it *functions*. Accordingly, if a rule is not adopted, the statement does not cease to be a rule; it simply becomes an "unadopted rule" in violation of ch. 120, F.S., requirements.<sup>26</sup>

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<sup>24</sup> Section 120.55(1)(b), F.S.

<sup>25</sup> The department's website is located at <https://www.flrules.org/default.asp>.

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

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

The terms “law implemented” and “rulemaking authority” are not currently defined.

**Proposed Changes:** The bill amends and adds definitions to s. 120.52, F.S., which provides definitions for terms used in the APA. The bill adds subsection (9) to s. 120.52, F.S.,<sup>28</sup> which provides that “law implemented” means “the statutory language being carried out or interpreted by an agency through rulemaking.”

The term “rulemaking authority” is also added as subsection (17) to mean “statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of ‘rule.’”

This bill adds a definition for “unadopted rule” as subsection (20) to mean “an agency statement that meets the definition of ‘rule,’ but has not been adopted pursuant to the requirements of s. 120.54, F.S.”

The bill also amends the definition of “invalid exercise of delegated legislative authority” to remove the phrase “. . . by the same statute,” which therefore removes the limitation that a statute granting rulemaking authority cannot be interpreted to extend beyond the implementation of any powers and duties that are conferred by the same statute.

### **Section 3. Rulemaking authority; repeal; challenge**

Florida law states that statutory language which grants general rulemaking authority (i.e., authority to adopt rules on an issue) must not be construed to go beyond the implementation or interpretation of any specified powers and duties conferred by the same statute.

**Proposed Changes:** The bill amends s. 120.536(1), F.S., to clarify language relating to the source of statutory authority granting rulemaking authority by removing the phrase “. . . by the same statute” found at the end of subsection (1). Eliminating this phrase removes the limitation that a statute granting rulemaking authority cannot be interpreted to extend beyond the implementation of any powers and duties that are conferred by the same statute.

### **Section 4. Rulemaking**

Under current law, an affected person is given the opportunity to present evidence and argument on all issues of consideration when a rule is to be adopted, amended, or repealed.<sup>29</sup> A public hearing on the rule must be held if requested by the affected person or at the discretion of the agency.<sup>30</sup>

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

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

<sup>28</sup> The bill renumbers subsequent subsections accordingly.

<sup>29</sup> Section 120.54(3)(c)1., F.S.

<sup>30</sup> *Id.*



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

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

- Begin rulemaking on the issue;
- Otherwise comply with the requested action; or
- Deny the petition stating in writing its reasons for the denial.<sup>31</sup>

However, if the petition addresses an existing agency statement that has not yet been adopted as a rule, within 30 days the agency must either begin rulemaking or publish a notice in the *Florida Administrative Weekly* (FAW) that it will hold a public hearing on the petition within 30 days of publishing the notice.<sup>32</sup> The purpose of the public hearing is to receive public comments on the unadopted rule and to “consider whether the public interest is served adequately by the application of the rule on a case-by-case basis, as contrasted with its adoption by the rulemaking procedures or requirements [of the APA].”<sup>33</sup> Within 30 days after the public hearing, the agency is required to either initiate rulemaking or publish a statement of its reasons for not doing so.<sup>34</sup>

Section 120.54, F.S., authorizes agencies to adopt certain types of materials by incorporating them by reference in a rule, instead of reproducing all of the material in the rule. This helps ensure that rules will not be voluminous or full of technical jargon. It also ensures that the public is informed that the materials constitute part of the rules and helps the public find the material.

**Proposed Changes:** This bill amends s. 120.54(1)(i), F.S., by requiring that material incorporated by reference in a rule cannot incorporate other material by reference unless the rule refers to the additional material. For example, if a rule wishes to incorporate a reference to a Canadian health report, it would violate the proposed bill language if the Canadian health report contained a statement incorporating a European health report, unless the rule specifically referenced the European health report.

This bill adds a provision to subsection (1) of s. 120.54, F.S., which clarifies that in all instances when an agency rule incorporates by reference another rule of that agency, all future revisions to the incorporated rule automatically apply to the host rule unless a contrary intent is clearly indicated. The bill also states that when changes to a rule that has been incorporated by reference in other rules are noticed, the notice must explain the effect of the changes on the referencing rule. For example, if an agency rule on travel authorization incorporates another rule of the same

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

<sup>32</sup> Section 120.54(7)(b), F.S.

<sup>33</sup> *Id.*

<sup>34</sup> Section 120.54(7)(c), F.S.

agency that deals with travel documentation, then any revisions to the travel documentation rule automatically apply to the travel authorization rule. Additionally, if changes to the travel documentation rule are noticed, such notification must explain the effect of the changes on the travel authorization rule.

For rules adopted after December 31, 2010, material may not be incorporated by reference unless it has been submitted in the appropriate electronic format to the Department of State (department) and is made available to the public free of charge by providing a hyperlink from the reference in the rule (as published in the *Florida Administrative Code* (FAC)) to the incorporated materials on file at the department. However, the agency does not have to submit material incorporated by reference in electronic format if the agency determines that posting the material on the Internet for purposes of public examination and inspection would constitute a violation of federal copyright law. If the agency makes this determination, it must submit a statement to that effect, along with the address of locations at the department and the agency in which the material is available, in the notice required by s. 120.54(3)(a)1., F.S.

This bill provides that rulemaking responsibilities of an agency head relating to notice requirements in rule adopting procedures, and procedures for filing for final adoption of a rule, may not be delegated or transferred.<sup>35</sup>

The bill amends s. 120.54(3), F.S., to clarify language relating to grants of rulemaking authority, and to require that agencies, when filing a rule with the Joint Administrative Procedures Committee (JAPC or the committee), file copies of any materials incorporated by reference in the rule. If the rule is required to be published in the FAC, a certified copy of any material incorporated by reference in the rule must be filed with the department. The department must reject any rule presented for adoption if it does not comply with the department's rules.

The bill provides that if an agency head is a board or other collegial body created under ss. 20.165(4) or 20.43(3)(g), F.S., then the agency head may not delegate the responsibility to conduct requested public hearings without the consent of the persons requesting the public hearing.

The bill amends s. 120.54(4), F.S., by requiring that in adopting an emergency rule, an agency must provide the JAPC with any material incorporated by reference in the rule.

The bill moves a provision allowing the department to provide rules governing the incorporation of materials by reference from the middle of subsection (1) of s. 120.54, F.S., to the end of the subsection.

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

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<sup>35</sup> Subparagraphs (3)(a)1., (3)(e)1., and (3)(e)6. of section 120.54, F.S.

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

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

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

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

### **Section 5. Committee review of agency rules**

The Joint Administrative Procedures Committee is statutorily authorized to review proposed agency rules to determine if the rule conforms to the requirements of ch. 120, F.S.<sup>36</sup> The APA authorizes JAPC to request any information from an agency that is reasonably necessary to help it determine if the rule being examined complies with the rule promulgation provisions of ch. 120, F.S.<sup>37</sup> The law also requires that agencies provide the committee with any information it requests that may help it conduct such review. If the committee objects to an agency rule or proposed rule, it must certify the objection to the agency and the agency has several alternatives, depending on the status of the rule. If the committee objects to a proposed rule, the agency must modify, withdraw or refuse to modify or withdraw the rule.<sup>38</sup> If the committee objects to an existing rule, the agency must notify the committee that it will amend, repeal, or not amend or repeal the rule.<sup>39</sup>

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

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

If an agency refuses to begin proceedings to modify, amend, withdraw, or repeal a rule, the committee may submit a recommendation to legislative leaders to modify or suspend adoption of a proposed rule or amend or repeal an existing rule.<sup>40</sup> If legislation is to be introduced, the agency must be notified so it can either temporarily suspend the rule or inform the committee in writing that it refuses to temporarily suspend the rule. The APA provides procedures the agency must follow depending on which action the agency takes upon being notified that legislation is to be introduced.<sup>41</sup>

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<sup>36</sup> Section 120.545(1), F.S.

<sup>37</sup> Section 120.545(2), F.S.

<sup>38</sup> Section 120.545(3)(a), F.S.

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

<sup>40</sup> Section 120.545(10)(a), F.S.

<sup>41</sup> Section 120.545(10)(b)3. and 4., F.S.

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

**Proposed Changes:** This bill amends s. 120.545, F.S., by changing the duties of agencies and JAPC with respect to rules and review of rules. The bill amends s. 120.545(2), F.S., by providing that JAPC may also request information necessary to examine an unadopted agency statement from an agency.

The bill authorizes JAPC to examine whether a rule's statement of estimated regulatory costs complies with statutory requirements. Furthermore, JAPC is empowered to request from an agency any information necessary to examine an unadopted agency statement, and the bill provides specific measures that must be taken by an agency when JAPC objects to a rule, including an unadopted rule.<sup>42</sup> If the rule is unadopted, the agency must file notice of an intent to adopt the rule, file a notice in the FAW that the agency has abandoned its reliance on the statement as a basis for agency action, or notify JAPC that it refuses to adopt a rule or abandon reliance on the statement.

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

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

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

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

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<sup>42</sup> The bill also deletes the terms "proposed rule" and "existing rule" and instead references a rule "not yet in effect" or "in effect."

**Sections 6, 8, and 9. Publication**

Section 120.55(1), F.S., requires the Department of State (department) to publish all rules adopted by each agency in the FAC, which must include:

- All rules adopted by agencies;
- Citations specifying the rulemaking authority for each rule;
- History notes for each rule; and
- Complete indexes to all rules in the FAC.

Any agency that publishes proposed rules in the FAC or other place must designate the supervisor or person who approved the rule.

Additionally, the department is required to publish notices and various other materials filed by the state's administrative agencies weekly in the *Florida Administrative Weekly* (FAW). The statute authorizes the department to promulgate rules specifying the style and form of rules, notices, and other items submitted for filing, as well as the form for certifying rules.<sup>43</sup>

The department may contract with a publishing firm to print the FAC, but the law specifies that the department retains responsibility for it. In addition, the law provides that this publication is the official compilation of Florida's administrative rules.<sup>44</sup>

Section 120.55, F.S., as amended by s. 4 of ch. 2006-82, L.O.F., effective December 31, 2007, requires that an FAW Internet website be developed and that this website allow users to:

- Search for notices by type, publication date, rule number, agency, and word/subject;
- Search a database that makes available all notices published on the website for a period of at least five years;
- Subscribe to an automated e-mail notification of selected notices;
- View agency forms incorporated by reference in proposed rules; and
- Comment on proposed rules.

**Proposed Changes:** The bill amends s. 120.55(1)(a)1., F.S., to require that the FAC cite the grant of rulemaking authority and the specific law implemented, for all rules adopted by agencies.

The bill amends s. 120.55(1)(d), F.S., to authorize the department to promulgate rules specifying content requirements, as well as the style and form, of rules, notices, and other materials submitted for filing. The bill removes language authorizing the department to promulgate rules establishing the form for certifying such items. The bill makes identical changes to s. 120.55(1)(d), F.S., effective December 31, 2007, pursuant to ch. 2006-82, L.O.F.

The bill also requires, under s. 120.55(3), F.S., that the name of the agency head, not a delegate, be published with proposed rules. The bill makes an identical change to s. 120.55(5), F.S., effective December 31, 2007, pursuant to ch. 2006-82, L.O.F.

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<sup>43</sup> Section 120.55(1)(c), F.S.

<sup>44</sup> Section 120.55(1)(a)1., F.S.

Section 120.55(2), F.S., is amended, effective December 31, 2008, to change the requirements associated with the FAC Internet website subscription system. The bill requires that the e-mail notification be sent out before, or at the same time, as such notice is published in hardcopy and electronically in the FAW. A requirement is added that the e-mail include a summary of the content of each notice. The bill also amends this subsection to add language requiring that a user on the system can view all other materials that are incorporated by reference in a proposed rule, not just proposed forms.

This bill amends s. 120.55(1), F.S., effective December 31, 2009, to require the department to publish an electronic version of the FAC, in which each rule must contain a cite to the specific law implemented. The on-line FAC must contain all required or useful information, display rules in browse mode, and allow for a full text search. The bill requires that the department continue to publish a printed version of the FAC, which must be supplemented at least monthly. The bill adds a new provision authorizing the department to prescribe rules governing the electronic filing of materials incorporated by reference. It provides that if materials incorporated by reference in a rule are filed electronically, the department must provide a hyperlink on its Internet website from the FAC text that incorporates the materials to the actual materials.

#### **Section 10. Challenges to rules**

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

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

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

#### **Section 11. Challenging agency statements defined as rules**

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

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

determination, the agency must discontinue reliance on the statement as a basis for agency action until:

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

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

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

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

According to JAPC, under the bill an agency could no longer avoid an adverse ruling simply by initiating the rulemaking process.<sup>45</sup>

### **Section 12. Additional procedures for particular cases**

The recent report by JAPC noted that early case law granted agencies the option of engaging in "policy by adjudication" but described such a "prove up" option as an incentive to rulemaking. However, instead of requiring an agency to prove up the facts at issue in the course of adjudication as an alternative to adopting policy statements by rule, the statute permitted an agency to prove up the agency policy contained in an unadopted statement.<sup>46</sup>

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

- Is within the powers, functions, and duties given to the agency by the Legislature or the state constitution;
- Does not enlarge, modify, or overcome any specific law that is being implemented;
- Is not vague;
- Does not give the agency unrestricted discretion;
- Sets adequate standards for agency decisions;
- Is not arbitrary or capricious;
- Is not applied to an affected party without due notice;
- Does not apply excessive regulatory costs on the affected party.

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<sup>45</sup> *Supplement to Report, supra* note 22, at 4.

<sup>46</sup> *Id.* at 5.

**Proposed Changes:** This bill amends s. 120.57(1)(e), F.S., to repeal existing “prove up” language by providing that agency action that determines the substantial interest of a party may not be based on an unadopted rule. Neither an agency nor an ALJ may enforce policy based on an unadopted rule when an agency fails to prove rulemaking is not feasible or practicable. An agency may still forego rulemaking as long as the agency proves up the facts or conduct at issue in each adjudicatory proceeding, rather than proving up the unadopted policy itself.<sup>47</sup>

The bill eliminates the current statutory language relating to the showing an agency has to make to establish that an action is valid.

### **Section 13. Attorney’s fees**

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

Current law provides for an award of attorney’s fees to a party or agency depending upon who prevails in challenges to proposed or existing agency rules. Such judgments for attorney’s fees are capped at \$15,000.<sup>48</sup> However, in challenges to unadopted rules, upon entry of a final order that all or part of an agency statement is an unadopted rule, the administrative law judge must award reasonable costs and attorney’s fees to the petitioner, unless the agency demonstrates that the statement is required by the Federal Government.<sup>49</sup> Current law does not provide a cap on these attorney’s fees.

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

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

In a challenge to an unadopted rule, if prior to the final hearing the agency requests a stay of the proceedings pending rulemaking, the ALJ must award reasonable costs and fees accrued by the petitioner up to the date of the request, if the agency adopts the statement as a rule. A request for fees and costs may only be granted if the agency knew or should have known at the time the petition was filed that the agency statement was an unadopted rule.

If the agency prevails in the proceedings, the agency must receive costs and fees if it is determined that the party initiating the proceeding did so for an improper purpose.

### **Section 14. Decisions which affect substantial interests**

Currently, section 120.569(1), F.S., provides that, unless waived by all parties, s. 120.57(1), F.S., applies to all proceedings involving a disputed issue of material fact and s. 120.57(2), F.S., applies in all other cases.

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<sup>47</sup> *Id.*

<sup>48</sup> Sections 120.595(2) and (3), F.S.

<sup>49</sup> Section 120.595(4), F.S.



The Uniform Rules of Procedure for administrative actions, adopted by the Administration Commission pursuant to s. 120.54(5), F.S., specify the procedures to be followed in the APA. Until amendment in January of 2007, Rule 28-106.305, F.A.C., specified that if during the course of a disputed issue of material fact arose in proceeding under s.120.57(2), F.S., the proceeding should be terminated and a proceeding under s. 120.57(1), F.S., should be initiated.

Section 120.569(2)(c), F.S., provides that unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.55(5)(b)4., F.S.

**Proposed Changes:** The bill provides that if a disputed issue of material fact arises during a proceeding under s. 120.57(2), F.S., the proceeding must be terminated and a proceeding under s. 120.57(1), F.S., must be initiated, unless waived by all parties. The bill would thus codify in statute that which had been part of the Uniform Rules of Procedure for nearly ten years, before recent amendment.

The bill also contains a technical change in s. 120.569, F.S., to a statutory cross-reference to the uniform rules adopted pursuant to s. 120.54(5)(b), F.S.

#### **Section 15. Agency rules review**

Section 120.74, F.S., provides that the head of every agency must submit a report every two years to specified legislative officers and committees which certifies that the agency has complied with the rule review activities specified by this statute.

**Proposed Changes:** The bill makes a technical change in s. 120.74, F.S., by substituting the word "section" for "subsection," to clarify the existing reporting requirements.

#### **Sections 16, 17, 18, 19, and 20. Cross references**

These sections correct cross references in sections 120.80, 120.81, 409.175, 420.9072, and 420.9075, F.S.

#### **Sections 7 and 21. Records management trust fund and appropriation**

Section 120.55(5)(c), F.S., requires the unencumbered balance in the Records Management Trust Fund for fees collected not to exceed \$300,000 at the beginning of each fiscal year, and requires any excess to be transferred to the General Revenue Fund. The bill raises the cap on the trust fund, for the 2008-2009 fiscal year only, from \$300,000 to \$400,000.

According to the Department of State, electronically accepting and publishing incorporated materials will entail \$345,000 in nonrecurring costs to upgrade existing systems. The Department of State has stated it will be required to increase its fees for advertising in the Florida Administrative Weekly in order to gain the revenue to support the appropriation. The bill provides that the money will be appropriated from the Records Management Trust Fund.

#### **Section 22. Effective date**

The bill provides that as otherwise expressly provided in this act, this act shall take effect July 1, 2008.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

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

## C. Government Sector Impact:

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

At least one agency has claimed that it will incur costs associated with the requirements to: 1) electronically supply materials referenced in rules, and 2) terminate a s. 120.57(2), F.S., proceeding and initiate a s. 120.57(1), F.S., proceeding if a disputed issue of material fact arises in the former. First, though there may be costs associated with scanning documents to be submitted electronically, those costs may be less than the costs associated with providing hard copies of incorporated materials, as is currently required. The second concern appears misplaced, since the Uniform Rules of Procedure, for ten years and until recently, required exactly what the bill would require.

The bill provides that the nonrecurring sum of \$345,000 is appropriated from the Records Management Trust Fund to the Department of State for the purpose of carrying out its duties. The department asserts that it will need \$450,920 for non-recurring expenses to upgrade IT hardware and programming, and a recurring \$39,614 for one FTE to comply with the bill requirements. The department also asserts that since all trust funds are used for other purposes, it will need to increase the per line cost to agencies for advertising in the *Florida Administrative Weekly*.

**VI. Technical Deficiencies:**

The bill provides that the act may be cited as the “Open Government Act,” even though the bill is amending provisions within the Administrative Procedure Act, and “open government” traditionally refers to the public records provisions of ch. 119, F.S., and the public meeting provisions of ch. 286, F.S. More specifically, the “Open Government Sunset Review Act,” of s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements, and does not reference the Administrative Procedure Act, ch. 120, F.S.

**VII. Related Issues:**

This bill is substantially the same bill that was passed during the 2007 Regular Session (HB 7183), and subsequently vetoed. The bill sponsor has apparently been informed by a representative from the Governor’s office that any concerns with this bill will be worked out in advance.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.