

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1225 Administrative Procedures
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee; Adkins
TIED BILLS: **IDEN./SIM. BILLS:** SB 1696

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee	12 Y, 0 N, As CS	Rubottom	Rubottom
2) Government Operations Appropriations Subcommittee		White	Topp
3) State Affairs Committee			

SUMMARY ANALYSIS

The bill amends five provisions of ch. 120, Florida Statutes, the Administrative Procedure Act (APA) to enhance the opportunity of substantially affected parties to challenge rules, mediate declaratory statements, and be awarded attorney fees in certain challenges. Specifically, the bill:

- Adopts a definition of "small business" applicable to the entire APA;
- Expands the class of small businesses benefiting from attorney fee awards under the Equal Access to Justice Act;¹
- Clarifies the burden of pleading and proof of challengers and agencies in challenges to proposed and unadopted rules;
- Removes the defense to an unadopted rule challenge that an agency did not know or should not have known that an agency statement or policy was an unadopted rule in cases where notice is actually provided;
- Extends the time to appeal certain final orders when notice thereof to the party appealing was delayed;
- Authorizes rule challenges in defense of agency actions on the same terms as petitions challenging rules and unadopted rules, including the award of attorney fees to prevailing challengers;
- Authorizes parties to request mediation in proceedings relating to declaratory statements and in rule challenges;
- Removes discretion of agencies, the Governor and the Governor and Cabinet to identify rules for which first time, minor violations, should be addressed by a notice of noncompliance;
- Removes discretion of cabinet officers to exempt certain licensing rules from the notice of noncompliance provisions;

The bill also makes conforming changes to statutes cross-referencing provisions renumbered in the bill.

The bill has an indeterminate negative fiscal impact to the state. It would eliminate the ability of agencies to collect fines for many first-time violations of rules that do not cause harm. This would likely have a significant negative fiscal impact on revenues collected by the state.

The bill is effective July 1, 2013.

¹ Section 57.111, F.S.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current situation

Small business

Florida's Administrative Procedure Act (APA) provides certain accommodations for small businesses² but does not provide a definition of "small business". In rulemaking, an agency must consider the impact on small businesses defined for that purpose as employing less than 200 employees and having a net worth less than \$5 million,³ but agencies are authorized to define "small business" to include businesses having more than 200 employees. By contrast, Florida's Equal Access to Justice Act provides for attorney fees to be awarded in administrative proceedings to prevailing parties who are small businesses, defined as having not more than 25 employees with a net worth not more than \$2 million.⁴

Notice of Rules

Presently, the only notice of adopted rules is the filing with the Department of State. The Department publishes such rules in the Florida Administrative Code. However, as a courtesy, the DOS, once each week, lists newly adopted rules in the Florida Administrative Register, and includes a cumulative list of rules filed for adoption pending legislative ratification.

Attorney fees

In addition to the special attorney fee provisions in the Equal Access to Justice Act, the APA provides for the recovery of attorney fees when a non-prevailing party has participated for an improper purpose, when an agency's actions are not substantially justified, when an agency relies upon an unadopted rule and is successfully challenged after 30 days' notice of the need to adopt rules, and when an agency loses an appeal in a proceeding challenging an unadopted rule.⁵ These attorney fee provisions supplement the attorney fee provisions provided by other laws.⁶

For purposes of the Equal Access to Justice Act, awarding attorney fees to small businesses, an agency action is reasonably justified if it has a reasonable basis in law and fact at the time the agency acted. In such cases, no fees are allowable.

Burden of proof

In general, laws carry a presumption of validity and those challenging the validity of a law carry the burden of proving invalidity. The APA retains this presumption of validity by requiring those challenging adopted rules to carry the burden of proving that a rule constitutes an invalid exercise of delegated authority.⁷ However, in the case of proposed rules, the APA places the burden on the agency to demonstrate the validity of the rule as proposed, once the challenger has raised specific objections to the rule's validity.⁸ In addition, a rule may not be filed for adoption until any pending challenge is resolved.⁹

In the case of a statement or policy in force that was not adopted as a rule, a challenger must prove that the statement or policy meets the definition of a rule under the APA. If so, and if the statement or policy has not been validly adopted, the agency must prove that rulemaking is not feasible or practicable.¹⁰

² Sections 120.54, 120.541, and 120.74, F.S.

³ Section 120.54(3)(b), F.S., incorporates by reference the definition of "small business" in s. 288.703(6), F.S.

⁴ Section 57.111, F.S.

⁵ Section 120.595, F.S.

⁶ See, for example, ss. 57.105, 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.

⁷ Section 120.56(3), F.S. Section 120.52(8), F.S., defines "invalid exercise of delegated legislative authority."

⁸ Section 120.56(2), F.S.

⁹ Section 120.54(3)(e)2., F.S.

¹⁰ Section 120.56(4), F.S.

Proceedings Involving Rule Challenges

The APA presently applies different procedures when proposed rules, existing rules and unadopted rules are challenged by petition, compared to a challenge to the validity of an existing rule, or an unadopted rule defensively in a proceeding initiated by agency action. In addition to the attorney fees awardable to small businesses under the Equal Access to Justice Act, the APA provides attorney fee awards when a party petitions for invalidation of a rule or unadopted rule, but not when the same successful legal case is made in defense of an enforcement action or grant or denial of a permit or license.

The APA does provide that a DOAH judge may determine that an agency has attempted to rely on an unadopted rule in proceedings initiated by agency action. However, this is qualified by a provision that an agency may overrule the DOAH determination if clearly erroneous, and if the agency rejects the DOAH determination and is later reversed on appeal, the challenger is awarded attorney fees for the entire proceeding.¹¹ Additionally, in proceedings initiated by agency action, when a DOAH judge determines that a rule constitutes an invalid exercise of delegated legislative authority the agency has full de novo authority to reject or modify such conclusions of law, provided the final order states with particularity the reasons for rejection or modifying such determination.¹²

In proceedings initiated by a party challenging a rule or unadopted rule, the DOAH judge enters a final order that cannot be overturned by the agency. The only appeal is to the District Court of Appeals.

Final Orders

An agency has 90 days to render a final order in any proceeding, after the hearing if the agency conducts the hearing, or after the recommended order is submitted to the agency if DOAH conducts the hearing (excepting the rule challenge proceedings described above in which the DOAH judge enters the final order).

Mediation

The APA provides for mediation by agreement of the parties in those cases where the agency offers mediation to a person whose substantial interests are affected by an agency's action.¹³ The APA does not require mediation in any particular case. Mediation is a process that is most likely to be effective when the parties agree to that form of dispute resolution. Because mediation is only concluded by agreement, rather than the determination of a third party—a judge or arbiter—compelling mediation is not often practical. Without any formal mediation, many administrative disputes are resolved by negotiation prior to or after the initiation of formal proceedings in the Division of Administrative Hearings.

Declaratory Statements

The APA provides for the opportunity to request, for notice and opportunity for public input, and for the issuance of a "declaratory statement" of an agency's opinion on the applicability of a law or rule over which the agency has authority to a particular set of facts set forth in the petition.¹⁴ When issued, a declaratory statement is the agency's legal opinion that binds the agency under principles of estoppel. An agency has the option to deny the petition, and will typically do so if a live enforcement action is pending with respect to similar facts. Anecdotal evidence indicates that the declaratory statement process in the APA has not proven productive in Florida. By contrast, the Internal Revenue Service and the Florida Department of Revenue each frequently issue binding opinions upon request of taxpayers.

Judicial Review

A notice of appeal of an appealable order under the APA must be filed within 30 days of the rendering of the order.¹⁵ An order, however, is rendered when filed with the agency clerk. On occasion, a party may not receive notice of the order in time to meet the 30 day appeal deadline. Under the current

¹¹ Section 120.57(1)(e)3., F.S.

¹² Section 120.57(1)(k-l), F.S.

¹³ Section 120.573, F.S.

¹⁴ Section 120.565, F.S.

¹⁵ Section 120.68(2)(a), F.S.

statute, a party may not seek judicial review of the validity of a rule by appealing its adoption but authorizes an appeal from a final order in a rule challenge.¹⁶

Minor Violations

The APA directs agencies to issue a "notice of noncompliance" as the first response when the agency encounters a first minor violation of a rule.¹⁷ The law provides that a violation 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". Agencies are authorized to designate those rules for which a violation would be a minor violation. An agency's designation of rules under the provision is excluded from challenge under the APA but may be subject to review and revision by the Governor or Governor and Cabinet.¹⁸ An agency under the direction of a cabinet officer has the discretion not to use the "notice of noncompliance" once each licensee is provided a copy of all rules upon issuance of a license, and annually thereafter.

Effect of the Bill

Section 1 amends s. 57.111(3) to expand the definition of small business for the purpose of awarding attorney fees in administrative proceedings from 25 employees to 200 and from \$2 million net worth to \$5 million. This will greatly expand the number of businesses protected in administrative proceedings by the Equal Access to Justice Act.

In addition, the bill provides that an agency may not establish that its action is substantially justified if it acts in contradiction to its own declaratory statement or the agency denies a petition for declaratory statement and thereafter pursues enforcement on facts submitted in the petition. This will only apply when the agency is wrong on the law. While agencies do not like to issue declaratory statements on facts that have already occurred, the change should motivate an agency to review its legal position carefully before denying the petition and then attempting to punish the circumstances raised by the petition.

Section 2 amends s. 120.52, F.S., to adopt a definition of "small business" for the APA. The definition references s. 288.703 which defines "small business" as a business having less than 200 employees and \$5 million in net worth. As described above, that definition is already incorporated elsewhere in the APA. The effect might be interpreted to reduce the flexibility allowed in rulemaking for agencies to expand the definition to businesses with 200 or more employees. However, the definition would likely not have any effect on the operation of the APA.

Section 3 amends s. 120.55, F.S., to enhance notice of new rules. The bill requires the Department of State to publish in the Florida Administrative Register a listing of rules filed for adoption in the previous 7 days and a listing of all rules filed for adoption but awaiting legislative ratification.

The bill also requires those agencies with e-mail alert services that provide regulatory information to interested parties to include notices of new rule development, proposed rules and notice of adoption of rules in those e-mail alerts.

Section 4 amends s. 120.56, F.S., relating to petitions challenging the validity of rules, proposed rules and unadopted rules. The changes clarify the terminology relating to unadopted rules. The amendments also clarify the initial burden of pleading for proposed rules and unadopted rules. For unadopted rules the revision requires the agency to prove the statement alleged to be an unadopted rule is not a rule, that it was validly adopted, or that rulemaking is not feasible or not practicable.

¹⁶ Section 120.68(9), F.S.

¹⁷ Section 120.695, F.S. The statute contains the following legislative intent: "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."

¹⁸ Section 120.695(2)(c), (d), F.S. The statute provides for final review and revision of these agency designations to be at the discretion of elected constitutional officers.

Section 5 amends s. 120.569(2)(l) to alter the time for entry of final orders in proceedings relating to agency actions to allow, at the agency's discretion, for legal appeals of rule challenges proceeding concurrently with the enforcement action. An agency will have 10 days after the determination of the appeal to enter the final order on a related matter.

Section 6 amends s. 120.57, F.S., relating to DOAH hearings of agency initiated actions involving disputed issues of material fact. The bill incorporates many of the provisions of s. 120.56, allows the DOAH hearing officer to enter a final order on the challenge to the validity of a rule or to an unadopted rule, to treat a challenge to a rule in defensive position much as a challenge in an action initiated by the non-agency party. The bill allows the agency, within 15 days of notice of the challenge, to waive its reliance on an unadopted rule or a rule alleged to be invalid, and thereby eliminate that aspect of the litigation, without prejudice to the agency reasserting its position in another matter or lawsuit. This will help an agency advance a proceeding beyond a weak legal position on the rule issue, particularly in matters initiated by field investigators without the benefit of legal deliberation by counsel.

To conform to the intention that rule challenges be fairly litigated in defensive cases, the bill excludes those challenges from summary final order procedures that are not well suited to the resolution of the claims.

The section also revises the procedures of using challenges to the validity of rules and unadopted rules in defensive cases where there is no dispute of material fact, staying the proceeding on agency action during a separate proceeding challenging the rule.

Section 7 amends s. 120.573, F.S., relating to mediation of disputes, to authorize a party to request mediation in any case involving a challenge to the validity of an existing rule, proposed rule or an unadopted rule, or a proceeding pursuant to a petition seeking declaratory statement. This would have no substantial impact on the effect of present law, particularly in light of the nature of the matters referenced, which constitute determinations of law that are not ordinarily amenable to mediation.

Section 8 amends s. 120.595, F.S., relating to attorney fees in APA proceedings, to clarify the statute respecting participating in a proceeding for improper purposes and applying the attorney fee provisions for petitions challenging the validity of rules or unadopted rules to the defensive challenges revised in Section 6 of the bill. It also makes conforming changes to the revised terminology regarding unadopted rules supplied in Section 4 of the bill.

The bill provides that reasonable costs and attorney fees incurred in proving and prosecuting a claim for attorney fees under the statute are not subject to the fee cap applicable to costs and fees awardable in the underlying action.

The bill eliminates the defense that an agency's action can be "substantially justified" when a rule or unadopted rule is successfully challenged. It also eliminates a defense that the agency "did not know or should not have known" that it was relying on an unadopted rule. The bill retains an equitable defense of "special circumstances".

The bill rewrites the provisions for notice of an invalid rule or proposed rule, or of an unadopted rule, requiring notice 30 days prior to filing of a petition challenging a rule or unadopted rule, and 5 days prior to filing the petition challenging a proposed rule. Reasonable costs and attorney fees may be awarded only for the period beginning after notice. The agency may avoid an award of attorney fees and costs if, within the notice period provided, the agency provides notice that it will not adopt the proposed rule or will not rely upon the adopted rule or statement challenged as an unadopted rule until after the agency has complied with the rulemaking procedures of the APA to ensure its rules conform to the law. The bill also provides that taking such steps to cure its faults would constitute "special circumstances" protecting the agency from an attorney fees judgment on the rule challenge.

The bill clarifies that the notice provisions do not apply to rule challenges raised in defense to agency actions.

Section 9 alters the appellate provisions to clarify that a final order on a rule challenge in a defensive action is directly appealable in the same manner as a final order in a petition challenging a rules. The bill also provides that the 30 day time to file a notice of appeal is extended 10 days if the party receives notice of the final order more than 25 days after the order was rendered. This section also makes conforming technical changes resulting from other amendments in the bill.

Section 10 amends s. 120.695, F.S., to remove the discretion of agencies to designate rules for which minor violations would be subject to a notice of noncompliance and the discretion of cabinet officers to opt out of the provisions of the section by keeping licensees regularly advised of the content of governing rules. As a result, every first violation of a rule that does not cause harm or threaten the public health, safety or welfare could only be addressed by a notice of noncompliance. This would likely reduce the deterrence of many rules not currently designated for treatment as minor violations, would likely increase litigation over what is or is not a minor violation, and likely increase the cost of enforcement to counter-balance the lost deterrence, while reducing the revenues generated from fines for first violations of many rules.

Sections 11-13 are conforming changes to separate statutes which do not add to the effect of the bill.

B. SECTION DIRECTORY:

Section 1 amends s. 57.111(3) relating to attorney fees for small businesses in administrative proceedings.

Section 2 creates a new s.120.52(18), F.S., and renumbers existing subsections (18)-(22), to adopt a definition of "small business" for purposes of the APA.

Section 3 amends s. 120.55, F.S., relating to publication of APA notices.

Section 4 amends s. 120.56(1), (2) and (4), F.S., relating to petitions challenging existing rules, proposed rules and unadopted rules.

Section 5 amends s. 120.569(2)(l), F.S., relating to the deadline for an agency to render a final order after a DOAH proceeding.

Section 6 amends s. 120.57(1)(e) and (h) and (2), F.S., revising the procedures when rules or unadopted rules are challenged defensively in proceedings on agency actions.

Section 7 amends s. 120.573, F.S., relating to mediation of disputes.

Section 8 amends s. 120.595, F.S., relating to attorney fees in certain APA proceedings.

Section 9 amends s. 120.68(1), (2) and (9), F.S., relating to judicial review of final agency actions.

Section 10 amends s. 120.695(2), F.S., relating to notice of noncompliance and minor violations of rules.

Section 11 makes conforming changes to s. 420.9072, F.S.

Section 12 makes conforming changes to s. 420.9075, F.S.

Section 13 makes conforming changes to s. 443.092, F.S.

Section 14 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill would eliminate the ability of agencies to collect fines for many first-time violations of rules that do not cause harm. This would likely have a significant negative fiscal impact on revenues collected by the state. Three examples of potential lost fine revenues using actual fiscal year 2011-12 receipts are \$25.5 million in the Department of Health, \$24.5 million in the Department of Financial Services, and \$4.7 million in the Department of Business and Professional Regulation. While these examples are of total fines collected, not just fines from first-time violators, it does indicate that the potential loss of revenue could be significant.

2. Expenditures:

The bill might require additional enforcement expenditures in some regulatory areas where penalties for first-time violations actually deter wrongdoing. The bill may require some additional expenditures by the Department of State complying with additional Florida Administrative Register notice requirements. However, some of the notices the bill would require are currently being published weekly by the Department as a public convenience. In addition, the ability of prevailing parties to recover attorney fees and costs will also likely have a negative fiscal impact on state agencies.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Local governments are not typically governed by the APA, but some are made subject to it by special law. In such cases, some revenues presently raised by fines for first time violations of rules would be lost.

2. Expenditures:

The bill would be unlikely to impact local government expenditures. Local governments might benefit from a reduction in fines assessed by state agencies, but those governed by the APA might have to increase enforcement expenditures to overcome the loss of deterrence described in A.2 above. Those governed by the APA may also experience a reduction in revenues from fines for first time violations of rules.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The private sector might see some positive impact from a reduction of fines for first time violations of many rules. However, the impact upon business costs of any increase in investigations might offset any reduction in fines paid. The private sector may benefit slightly by the increased incentives for agencies to conform their rules to the law, thereby increasing clarity and certainty in the application of the law.

D. FISCAL COMMENTS:

The fiscal impacts described above are indeterminate, but likely have a negative significant fiscal impact to the state.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

It is unlikely that the fiscal impact on local governments would be significant enough to implicate the provisions of s. 18, Art. VII, Florida Constitution.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not alter rulemaking authority except by abolishing the discretion, exempt from the rulemaking provisions of the APA, to designate rules for which first-time violations might be addressed through a notice of noncompliance.

The bill enhances the procedures provided by the APA for challenging rules, particularly in the defense against agency actions that are not based on valid rules. As such, it provides incentives and opportunities for private parties to hold agency rulemaking accountable under the law.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 27, 2013, the Rulemaking Oversight & Repeal Subcommittee adopted two amendments to the original House Bill. The first amendment redrafted the following sections of the original bill:

- Section 2 (amending s. 120.56, F.S.) is completely revised in Section 4 of the CS version. The amendment restored present law on burden of proof, while clarifying the present law.
- Section 3 (amending s. 120.595, F.S.) is completely revised in Section 8 of the CS. The amendment restores the 30 day period between notice of an unadopted rule and the filing of a petition challenging the unadopted rule, while allowing fees to accrue from the time of notice. The provisions as amended are more fully explained in the analysis above.

The amendment added new sections:

- Section 1 (amending s. 57.111(3), F.S.)
- Section 3 (amending s. 120.55, F.S.)
- Section 5 (amending s. 120.569(2)(l), F.S.)
- Section 6 (amending s. 120.57, F.S.)
- Section 9 (amending s. 120.68, F.S.)

The amendment retains the following sections of the original bill:

- Section 1 (amending s. 120.52, F.S.) becomes Section 2 in the CS.
- Section 4 (amending s. 120.573, F.S.) becomes Section 7 of the CS.
- Section 5 (amending s. 120.695, F.S.) becomes Section 10 of the CS.
- Sections 6-8 making conforming changes become Sections 11-13 of the CS.

An amendment to the amendment was also adopted providing that attorney fees may be awarded above the fee caps in the APA for the litigation to establish and collect fees properly awarded. That language was incorporated into Section 8 of the CS.

The substance of the amendments is fully explained in the analysis above.