



**RULEMAKING OVERSIGHT
&
REPEAL
SUBCOMMITTEE
MEETING**

**Tuesday, October 20, 2015
1:00 p.m. – 3:00 p.m.**

306 House Office Building

MEETING PACKET

Steve Crisafulli
Speaker

Lake Ray
Chair

Committee Meeting Notice
HOUSE OF REPRESENTATIVES

Rulemaking Oversight & Repeal Subcommittee

Start Date and Time: Tuesday, October 20, 2015 01:00 pm
End Date and Time: Tuesday, October 20, 2015 03:00 pm
Location: 306 HOB
Duration: 2.00 hrs

Consideration of the following bill(s):

HB 183 Administrative Procedures by Adkins

NOTICE FINALIZED on 10/13/2015 3:46PM by Powell-Battles.Sonja



FLORIDA HOUSE OF REPRESENTATIVES
Rules, Calendar & Ethics Committee
Rulemaking Oversight & Repeal Subcommittee

Steve Crisafulli
Speaker

Lake Ray
Chair

AGENDA

Tuesday, October 20th, 2015

1:00 p.m. – 3:00 p.m.

306 House Office Building

- **Opening Remarks by Chair Ray**
- **Roll Call by Sonja Powell-Battles, CAA**
- **Announcements**
- **Consideration of the following bill(s):**
 - **HB 183 Administrative Procedures by Adkins**
- **Closing Remarks**
- **Meeting Adjourned**

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 183 Administrative Procedures
SPONSOR(S): Adkins
TIED BILLS: IDEN./SIM. BILLS: SB 372

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee		Stranburg	Rubottom
2) Government Operations Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

The Administrative Procedure Act (APA) provides uniform procedures for the exercise of specified administrative authority. The bill amends provisions of the APA to enhance the opportunities for substantially affected parties to challenge rules. Specifically, the bill makes the following changes to the APA, including, but not limited to:

- Revising rulemaking procedures based on petitions to initiate rulemaking alleging an unadopted rule;
- Expanding the listing of information that must be published on the Florida Administrative Register to include rules filed for adoption in the previous seven days and a listing of all rules filed for adoption but awaiting legislative ratification;
- Revising the pleading requirements and burden of going forward with evidence in challenges to proposed and unadopted rules;
- Clarifying which rule validity decisions may be appealed; and
- Requiring agencies to identify and certify all of the rules the violation of which would be a minor violation.

The bill may have an indeterminate but likely insignificant negative fiscal impact to the state.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Rulemaking

The Administrative Procedure Act (APA)¹ sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency.² Rulemaking authority is delegated by the Legislature through statute and authorizes an agency to “adopt, develop, establish, or otherwise create” a rule.³ Agencies do not have discretion whether or not to engage in rulemaking.⁴ To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.⁵ The grant of rulemaking authority itself need not be detailed. The specific statute being implemented or interpreted through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.

Petitions to Initiate Rulemaking

The APA authorizes a substantially interested party to file a petition to adopt, amend, or repeal a rule.⁶ The agency must initiate rulemaking or provide a written explanation for denial of the petition. If the petition is directed to an unadopted rule, the agency must hold a workshop before it may deny the petition.⁷ If, after the workshop, the agency does not initiate rulemaking, the agency is required to publish in the Florida Administrative Register (F.A.R.) a notice explaining why the agency is denying the petition and explaining any changes it will make in the scope or application of the statement asserted in the petition to be an unadopted rule.⁸ However, the APA does not require rulemaking before an agency has had sufficient time to acquire the knowledge and experience reasonably necessary, or has otherwise resolved matters sufficiently to address a statement by rulemaking.⁹ The clear implication is that an agency may apply law and establish procedures by statements of general applicability without adopting the statement as a rule until adoption is feasible and practicable.¹⁰

Notice of Rules

Presently, the only notice of adopted rules is the filing with the Department of State (DOS). DOS publishes such rules in the Florida Administrative Code (F.A.C.). A rule requiring ratification as a condition of effectiveness¹¹ is not published in the F.A.C. until ratified. However, as a courtesy, DOS, once each week, lists newly adopted rules in the F. A. R., and includes a cumulative list of rules filed for adoption pending legislative ratification. In addition to F.A.R. publication, many agencies also use web sites and email notification systems to inform constituents of rulemaking proceedings.

¹ Chapter 120, F.S.

² Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

³ Section 120.52(17), F.S.

⁴ Section 120.54(1)(a), F.S.

⁵ Section 120.52(8) and 120.536(1), F.S.

⁶ Section 120.54(7)(a), F.S.

⁷ Section 120.54(7)(b), F.S.

⁸ Section 120.54(7)(c), F.S.

⁹ Section 120.54(1)(a)1., F.S.

¹⁰ *See s.* 120.52(16), F.S.

¹¹ *See s.* 120.541(3), F.S. (requiring ratification of rules having an economic impact beyond a particular threshold).

Burden of Proof

In general, laws carry a presumption of validity, and as such, 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.¹² 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.¹³ In addition, a proposed rule may not be filed for adoption until any pending challenge is resolved.¹⁴

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.¹⁵

Proceedings Involving Rule Challenges

The APA presently applies different procedures when proposed rules, existing rules, and statements defined as rules ("unadopted rules") are challenged by petition, as compared to a challenge to the validity of an existing rule or an unadopted rule when raised defensively in a proceeding initiated as a result of agency action. The APA provides attorney fee awards when a party petitions for invalidation of a rule, proposed rule, or unadopted rule, but not when the same successful legal case is made in defense of an enforcement action or challenging a grant or denial of a permit or license.

The APA does provide that a Division of Administrative Hearings (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.¹⁶ 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 rejecting or modifying such determination.¹⁷

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 (except for the rule challenge proceedings described above in which the DOAH judge enters the final order).

Judicial Review

Under the current 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.¹⁸

¹² Section 120.56(3), F.S. Section 120.52(8), F.S., defines "invalid exercise of delegated legislative authority."

¹³ Section 120.56(2), F.S.

¹⁴ Section 120.54(3)(e)2., F.S.

¹⁵ Section 120.56(4), F.S.

¹⁶ Section 120.57(1)(e)3., F.S.

¹⁷ Section 120.57(1)(k-l), F.S.

¹⁸ Section 120.68(9), F.S.

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.¹⁹ 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.²⁰ 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.

Rules Ombudsman

Section 288.7015, F.S., requires the Governor to appoint a rules ombudsman in the Executive Office of the Governor for considering the impact of agency rules on the state's citizens and businesses. The rules ombudsman must carry out the duties related to rule adoption procedures with respect to small businesses; review state agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses; and make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to business. Each state agency must cooperate fully with the rules ombudsman in identifying such rules, and take the necessary steps to waive, modify, or otherwise minimize such adverse effects of any such rules.

Effect of the Bill

Petition to Initiate Rulemaking

Section 1 amends s. 120.54(7), F.S., to add new rulemaking requirements when an agency initiates rulemaking after a workshop on a petition to initiate rulemaking that alleges an unadopted rule. The provision will require the agency to file its Notice of Rule Development within 30 days of a mandatory hearing on the petition. Unless the agency publishes a notice explaining the reasons it cannot do so, the Notice of Proposed Rule must be filed within 180 days after the Notice of Rule Development. Lastly, unless the agency publishes a statement explaining why rulemaking is not feasible or practicable under s. 120.54(1), F.S., the bill prohibits the agency from relying on the unadopted rule until rulemaking is complete. This limitation mirrors that applicable when an agency loses a formal challenge to an unadopted rule.²¹

Rulemaking Publication and Notification Requirements

Section 2 amends s. 120.55, F.S., to expand the list of information that must be published on the F.A.R. The bill requires DOS to publish in the F.A.R. a listing of rules filed for adoption in the previous seven days and a listing of all rules filed for adoption but pending legislative ratification.

The bill also requires those agencies with e-mail alert services that provide regulatory information to interested parties to use such services to notify recipients of each notice required under s. 120.54(2) and (3)(a), F.S., including, but not limited to, notice of rule development, notice of proposed rules, and notice of adoption of rules. The notices must provide Internet links to either the rule page on the Secretary of State's website or an agency website that contains the proposed rule or final rule.

The bill also provides that failure to follow these notice requirements does not give rise to a challenge to the validity of a rule.

¹⁹ 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."

²⁰ 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.

²¹ See, s. 120.56(4)(c) and (e), F.S.

Challenges to Rules

Section 3 amends ss. 120.56), F.S., relating to petitions challenging the validity of rules, proposed rules, and unadopted rules. The changes clarify the pleading requirements for the petitions. It also clarifies the parties' respective burdens of proof in challenges to proposed rules and unadopted rules.

Disputes

Section 4 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 rule challenge provisions of s. 120.56, F.S. The changes will treat a challenge to a rule in defending against or attacking an agency action similar to a challenge in an action initiated solely to challenge the rule.

The bill specifies that a petitioner may pursue a separate, collateral rule challenge under s. 120.56, F.S., even if an adequate remedy exists through a hearing involving disputed issues of material fact. The administrative law judge may consolidate the proceedings.

The bill also revises the procedures for raising challenges to the validity of rules and unadopted rules in many proceedings where there is no dispute of material fact, staying the agency's non-DOAH proceeding during a related DOAH challenge to a rule.

Appeals

Section 5 amends s. 120.68, F.S., to improve the structure and make conforming changes based on amendments to s. 120.57, F.S., in the previous section.

Minor Violations

Section 6 amends s. 120.695, F.S., to direct each agency to timely review its rules and certify to the President of the Senate, the Speaker of the House of Representatives, the Administrative Procedures Committee, and the rules ombudsman those rules that have been designated as rules the violation of which would be a minor violation no later than June 30, 2017.

Beginning July 1, 2017, each agency will be required to publish all rules of that agency designated as rules the violation of which would be a minor violation either as a complete list on the agency's Internet webpage or by incorporation of the designations in the agency's disciplinary guidelines adopted as a rule. Each agency must ensure that all investigative and enforcement personnel are knowledgeable of the agencies' designations of these rules. The agency head must certify for each rule filed for adoption whether any part of the rule is designated as one the violation of which would be a minor violation and update the listing on the webpage or disciplinary guidelines.

Effective Date

Section 7 provides an effective date of July 1, 2016.

B. SECTION DIRECTORY:

Section 1 amends s. 120.54(7)(c), F.S., and creates paragraph (7)(d) of that section.

Section 2 amends s. 120.55, F.S.

Section 3 amends s. 120.56, F.S.

Section 4 amends s. 120.57(1)(e) and (h), F.S. and subsection (2) of that section.

Section 5 amends s. 120.68(1) and (9), F.S.

Section 6 amends s. 120.695, F.S.

Section 7 provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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 bill has an indeterminate but likely insignificant negative impact to the state. There is some additional workload on state agencies and a minimal increase in expenditures related to state agencies filing more frequently in the F.A.R., but the impact is likely insignificant and can be absorbed within existing resources.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

B. RULE-MAKING AUTHORITY:

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 keep agency rulemaking accountable under the law. The bill also increases requirements relating to identifying rules the violation of which should be classified as minor violations.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

27 s. 120.68, F.S.; specifying legal authority to file a
 28 petition challenging an agency rule as an invalid
 29 exercise of delegated legislative authority; amending
 30 s. 120.695, F.S.; removing obsolete provisions with
 31 respect to required agency review and designation of
 32 minor violations; requiring agency review and
 33 certification of minor violation rules by a specified
 34 date; requiring minor violation certification for all
 35 rules adopted after a specified date; requiring public
 36 notice; providing applicability; providing an
 37 effective date.

38

39 Be It Enacted by the Legislature of the State of Florida:

40

41 Section 1. Paragraph (c) of subsection (7) of section
 42 120.54, Florida Statutes, is amended, and paragraph (d) is added
 43 to that subsection, to read:

44 120.54 Rulemaking.—

45 (7) PETITION TO INITIATE RULEMAKING.—

46 (c) If the agency does not initiate rulemaking or
 47 otherwise comply with the requested action within 30 days after
 48 ~~following~~ the public hearing provided for in ~~by~~ paragraph (b),
 49 ~~if the agency does not initiate rulemaking or otherwise comply~~
 50 ~~with the requested action,~~ the agency shall publish in the
 51 Florida Administrative Register a statement of its reasons for
 52 not initiating rulemaking or otherwise complying with the

53 requested action⁷ and of any changes it will make in the scope
 54 or application of the unadopted rule. The agency shall file the
 55 statement with the committee. The committee shall forward a copy
 56 of the statement to the substantive committee with primary
 57 oversight jurisdiction of the agency in each house of the
 58 Legislature. The committee or the committee with primary
 59 oversight jurisdiction may hold a hearing directed to the
 60 statement of the agency. The committee holding the hearing may
 61 recommend to the Legislature the introduction of legislation
 62 making the rule a statutory standard or limiting or otherwise
 63 modifying the authority of the agency.

64 (d) If the agency initiates rulemaking after the public
 65 hearing provided for in paragraph (b), the agency shall publish
 66 a notice of rule development within 30 days after the hearing
 67 and file a notice of proposed rule within 180 days after the
 68 notice of rule development unless, before the 180th day, the
 69 agency publishes in the Florida Administrative Register a
 70 statement explaining its reasons for not having filed the
 71 notice. If rulemaking is initiated under this paragraph, the
 72 agency may not rely on the unadopted rule unless the agency
 73 publishes in the Florida Administrative Register a statement
 74 explaining why rulemaking under paragraph (1)(a) was not
 75 previously feasible or practicable before the public hearing.

76 Section 2. Section 120.55, Florida Statutes, is amended to
 77 read:

78 120.55 Publication.—

79 (1) The Department of State shall:
 80 (a)1. Through a continuous revision and publication
 81 system, compile and publish electronically, on a ~~an~~ Internet
 82 website managed by the department, the "Florida Administrative
 83 Code." The Florida Administrative Code shall contain all rules
 84 adopted by each agency, citing the grant of rulemaking authority
 85 and the specific law implemented pursuant to which each rule was
 86 adopted, all history notes as authorized in s. 120.545(7),
 87 complete indexes to all rules contained in the code, and any
 88 other material required or authorized by law or deemed useful by
 89 the department. The electronic code shall display each rule
 90 chapter currently in effect in browse mode and allow full text
 91 search of the code and each rule chapter. The department may
 92 contract with a publishing firm for a printed publication;
 93 however, the department shall retain responsibility for the code
 94 as provided in this section. The electronic publication shall be
 95 the official compilation of the administrative rules of this
 96 state. The Department of State shall retain the copyright over
 97 the Florida Administrative Code.

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

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

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

127 5. The department shall allow adopted rules and material
 128 incorporated by reference to be filed in electronic form as
 129 prescribed by department rule. When a rule is filed for adoption
 130 with incorporated material in electronic form, the department's

131 publication of the Florida Administrative Code on its ~~Internet~~
 132 website must contain a hyperlink from the incorporating
 133 reference in the rule directly to that material. The department
 134 may not allow hyperlinks from rules in the Florida
 135 Administrative Code to any material other than that filed with
 136 and maintained by the department, but may allow hyperlinks to
 137 incorporated material maintained by the department from the
 138 adopting agency's website or other sites.

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

143 1. All notices required by s. 120.54(2) and (3)(a)
 144 ~~120.54(3)(a)~~, showing the text of all rules proposed for
 145 consideration.

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

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

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

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

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

157 | days.

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

162 | ~~8.6.~~ Any other material required or authorized by law or
 163 | deemed useful by the department.

164 |

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

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

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

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

175 | (2) The Florida Administrative Register ~~Internet~~ website
 176 | must allow users to:

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

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

181 | (c) Subscribe to an automated e-mail notification of
 182 | selected notices to be sent out before or concurrently with

183 publication of the electronic Florida Administrative Register.
 184 Such notification must include in the text of the e-mail a
 185 summary of the content of each notice.

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

189 (e) Comment on proposed rules.

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

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

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

204 ~~(6)(5)~~ Any publication of a proposed rule promulgated by
 205 an agency, whether published in the Florida Administrative
 206 Register or elsewhere, shall include, along with the rule, the
 207 name of the person or persons originating such rule, the name of
 208 the agency head who approved the rule, and the date upon which

209 | the rule was approved.

210 | ~~(7)(6)~~ Access to the Florida Administrative Register
 211 | ~~Internet~~ website and its contents, including the e-mail
 212 | notification service, shall be free for the public.

213 | ~~(8)(7)~~(a) All fees and moneys collected by the Department
 214 | of State under this chapter shall be deposited in the Records
 215 | Management Trust Fund for the purpose of paying for costs
 216 | incurred by the department in carrying out this chapter.

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

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

224 | Section 3. Subsection (1), paragraph (a) of subsection
 225 | (2), paragraph (a) of subsection (3), and subsection (4) of
 226 | section 120.56, Florida Statutes, are amended to read:

227 | 120.56 Challenges to rules.—

228 | (1) GENERAL PROCEDURES ~~FOR CHALLENGING THE VALIDITY OF A~~
 229 | ~~RULE OR A PROPOSED RULE.~~—

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

234 | (b) The petition challenging the validity of a proposed or

235 adopted rule under this section ~~seeking an administrative~~
 236 ~~determination~~ must state: with particularity

237 1. The particular provisions alleged to be invalid and a
 238 statement with sufficient explanation of the facts or grounds
 239 for the alleged invalidity. and

240 2. Facts sufficient to show that the petitioner ~~person~~
 241 ~~challenging a rule~~ is substantially affected by the challenged
 242 adopted rule it, or ~~that the person challenging a proposed rule~~
 243 would be substantially affected by the proposed rule it.

244 (c) The petition shall be filed by electronic means with
 245 the division which shall, immediately upon filing, forward by
 246 electronic means copies to the agency whose rule is challenged,
 247 the Department of State, and the committee. Within 10 days after
 248 receiving the petition, the division director shall, if the
 249 petition complies with ~~the requirements of~~ paragraph (b), assign
 250 an administrative law judge who shall conduct a hearing within
 251 30 days thereafter, unless the petition is withdrawn or a
 252 continuance is granted by agreement of the parties or for good
 253 cause shown. Evidence of good cause includes, but is not limited
 254 to, written notice of an agency's decision to modify or withdraw
 255 the proposed rule or a written notice from the chair of the
 256 committee stating that the committee will consider an objection
 257 to the rule at its next scheduled meeting. The failure of an
 258 agency to follow the applicable rulemaking procedures or
 259 requirements set forth in this chapter shall be presumed to be
 260 material; however, the agency may rebut this presumption by

261 showing that the substantial interests of the petitioner and the
 262 fairness of the proceedings have not been impaired.

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

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

280 (2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—

281 (a) A ~~substantially affected person may seek an~~
 282 ~~administrative determination of the invalidity of a proposed~~
 283 ~~rule by filing a petition~~ alleging the invalidity of a proposed
 284 rule shall be filed seeking such a determination with the
 285 ~~division~~ within 21 days after the date of publication of the
 286 notice required by s. 120.54(3)(a); within 10 days after the

287 final public hearing is held on the proposed rule as provided by
 288 s. 120.54(3)(e)2.; within 20 days after the statement of
 289 estimated regulatory costs or revised statement of estimated
 290 regulatory costs, if applicable, has been prepared and made
 291 available as provided in s. 120.541(1)(d); or within 20 days
 292 after the date of publication of the notice required by s.
 293 120.54(3)(d). ~~The petition must state with particularity the~~
 294 ~~objections to the proposed rule and the reasons that the~~
 295 ~~proposed rule is an invalid exercise of delegated legislative~~
 296 ~~authority.~~ The petitioner has the burden of going forward with
 297 evidence sufficient to support the petition. The agency then has
 298 the burden to prove by a preponderance of the evidence that the
 299 proposed rule is not an invalid exercise of delegated
 300 legislative authority as to the objections raised pursuant to
 301 paragraph (1)(b). ~~A person who is substantially affected by a~~
 302 ~~change in the proposed rule may seek a determination of the~~
 303 ~~validity of such change.~~ A person who is not substantially
 304 affected by the proposed rule as initially noticed, but who is
 305 substantially affected by the rule as a result of a change, may
 306 challenge any provision of the resulting proposed rule ~~and is~~
 307 ~~not limited to challenging the change to the proposed rule.~~

308 (3) CHALLENGING ~~EXISTING~~ RULES IN EFFECT; SPECIAL
 309 PROVISIONS.—

310 (a) A petition alleging ~~substantially affected person may~~
 311 ~~seek an administrative determination of the invalidity of an~~
 312 existing rule may be filed at any time during which the

313 | ~~existence of the rule~~ is in effect. The petitioner has the a
 314 | burden of proving by a preponderance of the evidence that the
 315 | existing rule is an invalid exercise of delegated legislative
 316 | authority as to the objections raised.

317 | (4) CHALLENGING AGENCY STATEMENTS DEFINED AS UNADOPTED
 318 | RULES; SPECIAL PROVISIONS.—

319 | (a) Any person substantially affected by an agency
 320 | statement that is an unadopted rule may seek an administrative
 321 | determination that the statement violates s. 120.54(1)(a). The
 322 | petition shall include the text of the statement or a
 323 | description of the statement and shall state ~~with particularity~~
 324 | facts sufficient to show that the statement constitutes an
 325 | unadopted a rule ~~under s. 120.52 and that the agency has not~~
 326 | ~~adopted the statement by the rulemaking procedure provided by s.~~
 327 | 120.54.

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

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

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

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

356 ~~(f)(e)~~ If proposed rules addressing the challenged
 357 unadopted rule ~~statement~~ are determined to be an invalid
 358 exercise of delegated legislative authority as defined in s.
 359 120.52(8)(b)-(f), the agency must immediately discontinue
 360 reliance upon ~~on~~ the unadopted rule ~~statement~~ and any
 361 substantially similar statement until rules addressing the
 362 subject are properly adopted, and the administrative law judge
 363 shall enter a final order to that effect.

364 (g)(f) All proceedings to determine a violation of s.

365 | 120.54(1)(a) shall be brought pursuant to this subsection. A
 366 | proceeding pursuant to this subsection may be consolidated with
 367 | a proceeding under subsection (3) or under any other section of
 368 | this chapter. This paragraph does not prevent a party whose
 369 | substantial interests have been determined by an agency action
 370 | from bringing a proceeding pursuant to s. 120.57(1)(e).

371 | Section 4. Paragraphs (e) and (h) of subsection (1) and
 372 | subsection (2) of section 120.57, Florida Statutes, are amended
 373 | to read:

374 | 120.57 Additional procedures for particular cases.—

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

377 | (e)1. An agency or an administrative law judge may not
 378 | base agency action that determines the substantial interests of
 379 | a party on an unadopted rule or a rule that is an invalid
 380 | exercise of delegated legislative authority. ~~The administrative~~
 381 | ~~law judge shall determine whether an agency statement~~
 382 | ~~constitutes an unadopted rule.~~ This subparagraph does not
 383 | preclude application of valid adopted rules and applicable
 384 | provisions of law to the facts.

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

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

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

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

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

401 3.2. Notwithstanding subparagraph 1., if an agency
 402 demonstrates that the statute being implemented directs it to
 403 adopt rules, that the agency has not had time to adopt those
 404 rules because the requirement was so recently enacted, and that
 405 the agency has initiated rulemaking and is proceeding
 406 expeditiously and in good faith to adopt the required rules,
 407 then the agency's action may be based upon those unadopted rules
 408 if, subject to de novo review by the administrative law judge
 409 determines that rulemaking is neither feasible nor practicable
 410 and the unadopted rules would not constitute an invalid exercise
 411 of delegated legislative authority if adopted as rules. An
 412 unadopted rule ~~The agency action~~ shall not be presumed valid ~~or~~
 413 ~~invalid~~. The agency must demonstrate that the unadopted rule:
 414 a. Is within the powers, functions, and duties delegated
 415 by the Legislature or, if the agency is operating pursuant to
 416 authority vested in the agency by ~~derived from~~ the State

417 Constitution, is within that authority;

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

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

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

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

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

430 4.3. The recommended and final orders in any proceeding
431 shall be governed by ~~the provisions of~~ paragraphs (k) and (l),
432 except that the administrative law judge's determination
433 regarding an unadopted rule under subparagraph 1. or
434 subparagraph 2. shall not be rejected by the agency unless the
435 agency first determines from a review of the complete record,
436 and states with particularity in the order, that such
437 determination is clearly erroneous or does not comply with
438 essential requirements of law. In any proceeding for review
439 under s. 120.68, if the court finds that the agency's rejection
440 of the determination regarding the unadopted rule does not
441 comport with ~~the provisions of~~ this subparagraph, the agency
442 action shall be set aside and the court shall award to the

443 prevailing party the reasonable costs and a reasonable attorney
 444 ~~attorney's~~ fee for the initial proceeding and the proceeding for
 445 review.

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

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

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

466 (a) The agency shall:

467 1. Give reasonable notice to affected persons of the
 468 action of the agency, whether proposed or already taken, or of

469 its decision to refuse action, together with a summary of the
 470 factual, legal, and policy grounds therefor.

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

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

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

483 (c) ~~(b)~~ The record shall only consist of:

- 484 1. The notice and summary of grounds.
- 485 2. Evidence received.
- 486 3. All written statements submitted.
- 487 4. Any decision overruling objections.
- 488 5. All matters placed on the record after an ex parte
 489 communication.
- 490 6. The official transcript.
- 491 7. Any decision, opinion, order, or report by the
 492 presiding officer.

493 Section 5. Subsections (1) and (9) of section 120.68,
 494 Florida Statutes, are amended to read:

495 120.68 Judicial review.—

496 (1) (a) A party who is adversely affected by final agency
 497 action is entitled to judicial review.

498 (b) A preliminary, procedural, or intermediate order of
 499 the agency or of an administrative law judge of the Division of
 500 Administrative Hearings is immediately reviewable if review of
 501 the final agency decision would not provide an adequate remedy.

502 (9) A ~~No~~ petition challenging an agency rule as an invalid
 503 exercise of delegated legislative authority shall not be
 504 instituted pursuant to this section, except to review an order
 505 entered pursuant to a proceeding under s. 120.56, s.
 506 120.57(1)(e)1., or s. 120.57(2)(b) or an agency's findings of
 507 immediate danger, necessity, and procedural fairness
 508 prerequisite to the adoption of an emergency rule pursuant to s.
 509 120.54(4), unless the sole issue presented by the petition is
 510 the constitutionality of a rule and there are no disputed issues
 511 of fact.

512 Section 6. Section 120.695, Florida Statutes, is amended
 513 to read:

514 120.695 Notice of noncompliance; designation of minor
 515 violation of rules.—

516 (1) It is the policy of the state that the purpose of
 517 regulation is to protect the public by attaining compliance with
 518 the policies established by the Legislature. Fines and other
 519 penalties may be provided in order to assure compliance;
 520 however, the collection of fines and the imposition of penalties

521 | are intended to be secondary to the primary goal of attaining
 522 | compliance with an agency's rules. It is the intent of the
 523 | Legislature that an agency charged with enforcing rules shall
 524 | issue a notice of noncompliance as its first response to a minor
 525 | violation of a rule in any instance in which it is reasonable to
 526 | assume that the violator was unaware of the rule or unclear as
 527 | to how to comply with it.

528 | (2) (a) Each agency shall issue a notice of noncompliance
 529 | as a first response to a minor violation of a rule. A "notice of
 530 | noncompliance" is a notification by the agency charged with
 531 | enforcing the rule issued to the person or business subject to
 532 | the rule. A notice of noncompliance may not be accompanied with
 533 | a fine or other disciplinary penalty. It must identify the
 534 | specific rule that is being violated, provide information on how
 535 | to comply with the rule, and specify a reasonable time for the
 536 | violator to comply with the rule. A rule is agency action that
 537 | regulates a business, occupation, or profession, or regulates a
 538 | person operating a business, occupation, or profession, and
 539 | that, if not complied with, may result in a disciplinary
 540 | penalty.

541 | (b) Each agency shall review all of its rules and
 542 | designate those for which a violation would be a minor violation
 543 | and for which a notice of noncompliance must be the first
 544 | enforcement action taken against a person or business subject to
 545 | regulation. A violation of a rule is a minor violation if it
 546 | does not result in economic or physical harm to a person or

547 adversely affect the public health, safety, or welfare or create
 548 a significant threat of such harm. ~~If an agency under the~~
 549 ~~direction of a cabinet officer mails to each licensee a notice~~
 550 ~~of the designated rules at the time of licensure and at least~~
 551 ~~annually thereafter, the provisions of paragraph (a) may be~~
 552 ~~exercised at the discretion of the agency. Such notice shall~~
 553 ~~include a subject-matter index of the rules and information on~~
 554 ~~how the rules may be obtained.~~

555 (c)1. No later than June 30, 2017, and after such date
 556 within 3 months after any request of the rules ombudsman in the
 557 Executive Office of the Governor, ~~The agency's review and~~
 558 ~~designation must be completed by December 1, 1995;~~ each agency
 559 shall review under the direction of the Governor shall make a
 560 report to the Governor, and each agency under the joint
 561 direction of the Governor and Cabinet shall report to the
 562 Governor and Cabinet by January 1, 1996, on which of its rules
 563 and certify to the President of the Senate, the Speaker of the
 564 House of Representatives, the committee, and the rules ombudsman
 565 those rules that have been designated as rules the violation of
 566 which would be a minor violation under paragraph (b), consistent
 567 with the legislative intent stated in subsection (1).

568 2. Beginning July 1, 2017, each agency shall:

569 a. Publish all rules that the agency has designated as
 570 rules the violation of which would be a minor violation, either
 571 as a complete list on the agency's website or by incorporation
 572 of the designations in the agency's disciplinary guidelines

573 adopted as a rule.

574 b. Ensure that all investigative and enforcement personnel
 575 are knowledgeable about the agency's designations under this
 576 section.

577 3. For each rule filed for adoption, the agency head shall
 578 certify whether any part of the rule is designated as a rule the
 579 violation of which would be a minor violation and shall update
 580 the listing required by sub-subparagraph 2.a.

581 (d) The Governor or the Governor and Cabinet, as
 582 appropriate ~~pursuant to paragraph (c)~~, may evaluate the review
 583 and designation effects of each agency subject to the direction
 584 and supervision of such authority and may direct ~~apply~~ a
 585 different designation than that applied by such ~~the~~ agency.

586 (e) Notwithstanding s. 120.52(1)(a), this section does not
 587 apply to:

- 588 1. The Department of Corrections;
- 589 2. Educational units;
- 590 3. The regulation of law enforcement personnel; or
- 591 4. The regulation of teachers.

592 (f) Designation pursuant to this section is not subject to
 593 challenge under this chapter.

594 Section 7. This act shall take effect July 1, 2016.