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An Overview of the 1996 Administrative Procedure Act

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AN OVERVIEW OF THE 1996 ADMINISTRATIVE PROCEDURE ACT

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The views expressed in this Article are those of the authors and are not intended to reflect the views of the Office of the Governor or the Florida House of Representatives.

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I. LEGISLATIVE HISTORY OF THE 1996 ADMINISTRATIVE PROCEDURE ACT

Since adopting the Administrative Procedure Act (APA) in 1974,¹ the Florida Legislature has not appeared to be satisfied with the methods of legislative oversight and control of agency rulemaking which are contained in the Act.² Furthermore, in an era of de-regulation, the

1. 1974 Fla. Laws ch. 74-310 (codified at FLA. STAT. §§ 120.50-71 (1975)).

2. See Dan R. Stengle & James P. Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 FLA. ST. U. L. REV. 415,

impact of increasing numbers of rules³ on government and private sector efficiency became a growing concern.⁴ Evidence of legislative dissatisfaction may be found in the creation of select committees charged with the responsibility to review the APA and to recommend revisions to it⁵ and in the numerous bills introduced as attempts to modify rulemaking procedures or to expand legislative oversight of agency rulemaking, including legislation intended to authorize a legislative veto of administrative rules.⁶ While bills to amend various aspects of the APA were filed every year since the 1974 revision,⁷

433 (1993) (referring to the history of the legislative veto in Florida as evidence of the Legislature's quest for more effective control of rulemaking by the executive branch).

3. Stephen T. Maher, *The Death of Rules: How Politics Is Suffocating Florida*, 8 ST. THOMAS L. REV. 313, 330 (1996). Maher notes that

[s]tatistics maintained by JAPC show that more published rules were adopted in 1992, 7,160, than in any other year between 1975 and 1994, and that more net rulemaking (new published rules and amendments minus repeals), 5,840, occurred that year than in any other year between 1975 and 1994. This increased level of rulemaking activity was significantly higher than in previous years (1991—4310/3858 net; 1990—4753/3823 net; 1989—4865/4244 net; 1988—3706/3359 net). This higher level of rulemaking activity continued (1993—5891/5153 net; 1994—6415/5583 net) until the Governor began calling for mass repeals of published rules early in 1995.

Id.

4. See Sally Bond Mann, *Reforming the APA: Legislative Adventures in the Labyrinth*, 22 FLA. ST. U. L. REV. 307, 308 (1994) (noting the interest in amending chapter 120 arising out of the growing impact of governmental regulation of Florida citizens).

5. In September 1992, incoming Senate President Pat Thomas, Dem., Quincy, established the Florida Senate Select Committee on Governmental Reform. Additionally, in November 1992, incoming Speaker of the Florida House of Representatives, Bolley L. "Bo" Johnson, Dem., Milton, 1978-1994, created the Florida House of Representatives Select Committee on Agency Rules and Administrative Procedures. Speaker Peter Rudy Wallace, Dem., St. Petersburg, established the Florida House of Representatives Select Committee on Streamlining Governmental Regulations in November 1994.

6. For an in-depth review of legislation which attempted to increase legislative oversight and authorize the legislative veto, see generally David Gluckman, *1994 APA Legislation: The History, the Reasons, the Results*, 22 FLA. ST. U. L. REV. 345 (1994) (describing the actions of the Florida Legislature during the 1994 Regular Session, and analyzing the recent history of that act and predicting its future); see also Stengle & Rhea, *supra* note 2 (examining methods available for overseeing agency rulemaking, evaluating issues raised by legislative control, and focusing on the legislative veto of administrative rules).

7. Since 1974, the following numbers of bills to amend Florida Statutes chapter 120 have been filed: 15 bills in 1975; 13 bills in 1976; 26 bills in 1977; 20 bills in 1978; 24 bills in 1979; 25 bills in 1980; 17 bills in 1981; 14 bills in 1982; 20 bills in 1983; 21 bills in 1984; 22 bills in 1985; 12 bills in 1986; 25 bills in 1987; 26 bills in 1988; 20 bills in 1989; 28 bills in 1990; 18 bills in 1991; 33 bills in 1992; 16 bills in 1993; 38 bills in 1994; 26 bills in 1995; and 38 bills in 1996.

foment for fundamental change was particularly strong during the early 1990s.⁸ Enactment of revisions to the APA, however, was hampered by the conflict between two ideals: regulatory certainty and regulatory flexibility.⁹

Regulatory certainty is enhanced by the promulgation of rules because the standards and requirements that an agency will apply are published and available to the public.¹⁰ When the procedures that an agency follows and the interpretation of statutes that it enforces are clearly stated, citizens are able to make business or professional decisions more efficiently and effectively.¹¹ For example, a developer with knowledge of the standards that the Department of Environmental Protection will apply in delineating a wetland has greater certainty about how to construct a project that will comply with the law and, as a result, will save development costs. Though this developer might prefer not to comply with the rules, he or she will at least find some comfort in the assurance that an agency cannot change its standards at the personal whim of a bureaucrat.¹²

The cost of greater regulatory certainty, however, is diminished regulatory flexibility.¹³ Agency personnel cannot possibly conceive of every circumstance that will be subject to regulation under the rule.¹⁴

8. For a review of the issues and legislation from the early 1990s, see generally Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U. L. REV. 437 (1991) (discussing 1991 legislation that dealt with the problems of "unchecked use of adjudication to develop policies and the lack of meaningful access to agency orders"); Stephen T. Maher, *Administrative Procedure Act Amendments: The 1991 and 1992 Amendments to the Florida Administrative Procedure Act*, 20 FLA. ST. U. L. REV. 367 (1992) (analyzing the impact of and forces behind the 1991 and 1992 amendments to the APA); see also Gluckman, *supra* note 6; Stengle & Rhea, *supra* note 2.

9. See Letter from Governor Lawton Chiles to Secretary of State Sandra Mortham (July 12, 1995) (announcing veto of Florida Committee Substitute for Committee Substitute for Senate Bill 536 (Reg. Sess. 1995) and stating that it did not "honor [his] request for legislative recognition for flexibility in decision-making") [hereinafter Governor's Veto Message].

10. See ARTHUR EARL BONFIELD, *STATE ADMINISTRATIVE RULEMAKING* 106-12 (1986).

11. See *id.*

12. As Rep. Kenneth Pruitt, Repub. Port St. Lucie, and Martha Edenfield noted in *Administrative Procedure Act Reform Bill*, EMPLOYER ADVOCATE, July-Aug. 1996, at 23, "Despite all the rhetoric over too many rules and too much regulation, the real conflict about the APA and rules centers on the flexibility and the ability of an agency employee to use discretion versus the certainty needed by the regulated community that if certain conditions are met, a specific result will follow." See also Maher, *supra* note 3, at 331 (stating that published rules "protect people from arbitrary agency action").

13. See F. Scott Boyd, *How the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida*, 7 ST. THOMAS L. REV. 287, 291 (1995).

14. See Donna E. Blanton & Robert M. Rhodes, *Loosening the Chains that Bind: The New*

As a result, agencies attempt to develop rules that are sufficient for the majority of circumstances considered during the rule development process.¹⁵ When agency discretion is limited by rules, however, there may be instances when rule standards and requirements can be inefficient or can lead to absurd results.¹⁶ As a result, there are instances when greater rule flexibility is desirable.¹⁷

Although the need for flexibility in administrative processes was recognized at the inception of the 1974 APA,¹⁸ the rulemaking processes that were instituted by the Act¹⁹ indicate that regulatory certainty was perceived to be a greater concern than regulatory flexibility. The Act did not contain provisions authorizing agency waiver or variance of rules.²⁰ The problem of “phantom government,”²¹ or government which operates by rules known only to a select few and which are inconsistently applied,²² was resolved by creating rule promulgation processes which authorized both public participation²³ and rule challenges,²⁴ and by making the resultant rules available to the public.²⁵

When the Legislature first created the rulemaking process, however, it did not specifically require²⁶ agencies to adopt their policies as rules

Variance and Waiver Provision in Florida's Administrative Procedure Act, 24 FLA. ST. U. L. REV. 353 (1997).

15. *Id.*

16. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 15 (1994) (“Solid, objective rules . . . satisfy lawmakers’ longing for certainty. Human activity, however, cannot be so neatly categorized. The more precise the rule, the less sensible law seems to be.”).

17. See *generally id.* (providing anecdotal accounts of offensive results that might have been avoided with more flexible rules).

18. REPORTER’S COMMENTS ON PROPOSED ADMINISTRATIVE PROCEDURE ACT FOR THE STATE OF FLORIDA, Mar. 9, 1974, at 3, *reprinted in* 3 FLA. ADMIN. PRACTICE app. C (1979) [hereinafter REPORTER’S COMMENTS].

19. Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U. L. REV. 965, 988-89 (1986).

20. 1974 Fla. Laws ch. 74-310, at 952 (codified at FLA. STAT. §§ 120.50-71 (1975)).

21. The term “phantom government” is believed to have been coined by Sen. Dempsey J. Barron, Dem., Panama City, 1957-1988. See Stephen T. Maher, *Getting Into the Act*, 22 FLA. ST. U. L. REV. 277, 280 & n.8 (1994).

22. GOVERNOR’S ADMIN. PROC. ACT REV. COMM’N, FINAL REPORT 18 (Feb. 20, 1996) [hereinafter APA COMM’N REPORT].

23. See FLA. STAT. § 120.54(2), (4) (1974).

24. See FLA. STAT. §§ 120.54(3), .56 (1974).

25. FLA. STAT. § 120.55 (1974); see also REPORTER’S COMMENTS, *supra* note 18, at 5-6.

26. Comments made at the 1995 Administrative Law Conference by Senator Curt Kiser, one of the sponsors of the 1974 Act, indicate that legislators thought that the 1974 Act required agencies to adopt their policies as rules.

prior to application of these policies in individual cases.²⁷ That requirement was determined by the courts.²⁸

The initial judicial reaction was to force rulemaking by permitting a person against whom unadopted policy was being applied to challenge the validity of the policy in a section 120.56 rule validity challenge proceeding. If the policy was found to be a rule within the meaning of the definition of that term in 120.52(16), and if it had not been adopted as a rule following 120.54 rulemaking procedures, then the policy was invalidated and could not be used as a basis for agency action until it was properly adopted.²⁹

An exception to this rulemaking requirement was created in *McDonald v. Department of Banking & Finance*.³⁰ In that case, the judiciary acknowledged that agencies develop policies through serial experiences until they have the requisite knowledge to formalize their policies as rules and permitted agencies to apply developing or incipient policies that had not been adopted as rules.³¹ Unadopted policies could be defended in a Florida Statutes section 120.57 proceeding by explicating and supporting them with competent, substantial evidence.³² This exception, however, provided agencies with the ability to avoid adopting some of their policies as rules.

Before long, however, the limited *McDonald* exception swallowed the rule. Instead of inquiring into the extent of an agency's knowledge and experience with its nonrule policy to determine whether the nonrule policy was truly incipient and emerging, the courts allowed the agencies themselves to decide whether and when they were ready to proceed to rulemaking. Because the courts were not inclined to police the exercise of agency discretion in this area and the agencies were not interested in losing their discretion, legislative action was necessary to restore some balance between adjudication and rulemaking in the process of policy development.³³

27. Dore, *supra* note 8, at 437.

28. Department of Admin. v. Stevens, 344 So. 2d 290 (Fla. 1st DCA 1977).

29. Dore, *supra* note 8, at 437 (footnotes omitted).

30. 346 So. 2d 569 (Fla. 1st DCA 1977).

31. *Id.* at 581.

32. St. Francis Hosp. v. Department of Health & Rehab. Servs., 553 So. 2d 1351 (Fla. 1st DCA 1989).

33. Dore, *supra* note 8, at 437-38 (footnote omitted).

In 1991, the Legislature disapproved the judicial notion that rulemaking is a matter of agency discretion by enacting Florida Statutes section 120.535.³⁴ The section required each agency statement that met the definition of a rule³⁵ to be adopted as a rule as soon as feasible and practicable.³⁶ This statutory standard inadvertently set in motion an avalanche of rulemaking.³⁷ The yearly average number of administrative rules adopted by state agencies throughout the 1980s was 4292. In 1992, the first year after agencies began complying with the new standard, the number of rules which were adopted that year was 7160, almost double the number of the year before.³⁸

A doubling in the number of rules in an era of de-regulation could not, and did not, escape notice.³⁹ Not surprisingly, at least by the 1993 regular legislative session, a backlash against a perceived excess in administrative regulation was developing.⁴⁰ Select committees were appointed in both the Florida Senate⁴¹ and the House of Representatives⁴² to consider revisions to the APA.⁴³ Much time was spent by these select committees discussing the impact of section 120.535 on the number of administrative rules and the impact of the growth of regulation on the efficiency of agencies and the private sector.⁴⁴

34. 1991 Fla. Laws ch. 91-30, § 3, at 241 (codified at FLA. STAT. § 120.535 (1991)).

35. Florida Statutes § 120.52(16) (1995) defined a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule."

36. 1991 Fla. Laws ch. 91-30, § 3, at 244 (codified at FLA. STAT. § 120.535 (1991)).

37. Maher, *supra* note 3, at 329-30.

38. *Id.* at 330. According to information compiled by the JAPC, in 1991, state agencies promulgated 4310 administrative rules. *Id.* By 1994, state agencies proposed or adopted 6415 administrative rules. *Id.* This was somewhat fewer than the years immediately following the adoption of § 120.535, but nevertheless still many more than in most previous years. *Id.*

39. *See, e.g.*, Phillip Longman, *New Ways to Cut Red Tape*, FLORIDA TREND, Aug. 1993, at 36.

40. *See id.*

41. The Florida Senate Select Committee on Governmental Reform.

42. The Florida House of Representatives Select Committee on Agency Rules and Administrative Procedures, 1992-1994, and the Florida House of Representatives Select Committee on Streamlining Governmental Regulations, 1994-1996.

43. For a complete discussion of the establishment of the first two committees and their work product, see Mann, *supra* note 4, at 309-26.

44. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., tape recording of proceedings (Oct. 9, 1995) (on file with the Comm.). The proceedings include presentations by Stephen T. Maher, Past Chair of the Administrative Law Section of The Florida Bar and former Associate Professor of Law at the University of Miami; G. Steven Pfeiffer, former General Counsel of the Department of Community Affairs, former Division of Administrative Hearings Hearing Officer, former Chair and Member of the Executive Council of the Administrative Law Section of the

Testimony at these committee meetings focused on the number of rules which were being adopted, the manner in which some agencies complied with rule promulgation requirements, the statutory authority for some rules.⁴⁵

As these issues were reviewed, however, concerns began to be expressed that repealing section 120.535 and providing increased discretion to agencies might increase agency efficiency at the expense of the private sector by bringing back the days of "phantom government" when only a few select bureaucrats knew what the rules really were.⁴⁶ Providing increased discretion to bureaucrats caused some discomfort, especially given some of the testimony at these meetings.⁴⁷ Given testimony that tended to undercut legislative faith in some agencies' willingness to comply with the spirit and intent of rulemaking, there was some reticence on the part of legislators to authorize agencies to operate without significant strictures on their procedures.⁴⁸ Consequently, the fundamental value of administrative rules and rulemaking processes remained secure from a legislative perspective. Not surprisingly, then, the select committees proposed methods to increase legislative oversight, to improve agency compliance with rulemaking procedures, and to insure correct agency interpretation of legislative intent.⁴⁹

With the advent of 1995, the executive branch began to assert that government reliance on administrative rules had become excessive and that rules had limited bureaucratic discretion to the point of irrationality.⁵⁰ During the January 3, 1995, Inaugural Address of Governor

Florida Bar, and William L. Hyde of Gunster, Yoakley, Valdes-Fauli & Stewart, P.A., former Chair and Member of the Executive Council of the Administrative Law Section of The Florida Bar. *Id.*

45. *Id.*

46. Stephen T. Maher, *Why Florida Needs Section 120.535*, *Florida Statutes*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Dec. 1995, at 7.

47. As is so often the case, colorful anecdotes exemplified some of the frustration over bureaucracies which were perceived as unresponsive to the public. One anecdote that was repeated numerous times was of an agency that had scheduled only one public hearing on a rule with statewide application. To make matters worse, the hearing had been scheduled to occur in Tallahassee on the Wednesday afternoon before the Thanksgiving holiday. Some legislators reacted quite strongly to this example, and vocalized the opinion that the agency had not provided the public with much of an opportunity to participate in a rulemaking process that they thought was designed to afford public participation.

48. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., tape recording of proceedings (Oct. 9, 1995) (on file with the Comm.) (discussion of impact of § 120.535 and the Governor's rule reduction effort).

49. For a complete discussion of the issues, see *A Symposium on the Florida Administrative Procedure Act*, 22 FLA. ST. U. L. REV. 243 (1994).

50. See Governor Lawton Chiles, Inaugural Address (Jan. 3, 1995), in *Government Don't Work—People Work*, TALLAHASSEE DEMOCRAT, Jan. 4, 1995, at A11 [hereinafter Inaugural

Lawton Chiles, which is now generally referred to as the “Cook Shack Speech,” the Governor advised that it was necessary to drastically change Florida’s bureaucracy:

To bring about fairness and equal treatment, we decided we needed to prohibit any official from acting in an arbitrary manner—so, through rules and regulations we deprived our officials of all decision-making authority.⁵¹

Now, there are thousands of rules and regulations that take away all discretion of an official to make a decision based on common sense and then be held responsible for it. We must set the goals—the public policy we wish to accomplish—but we must restore sanity to how we accomplish this. . . .⁵²

As an example of how over-regulation had affected him personally, the Governor referred to his attempt to build a “cook shack” on woodlands he owns:

I have 200 acres of woods north of Tallahassee where I have an old log cabin. I wanted to build a cook shack out back—wood poles, tin roof, screened sides, and an old stove.

I’ve been trying to get a permit for over a year. “You must have plans,” they say. But, a cook shack is unusual;

Address].

51. Whether the existence of administrative rules *per se* deprives an agency manager of the ability to exercise decisionmaking authority is questionable. Although poorly drafted or overly restrictive, administrative rules may preclude managers from exercising some decisionmaking authority, agencies are responsible for drafting these rules and have the ability to correct problems with them. Given the broad grants of authority to promulgate rules traditionally delegated by the Legislature, executive agencies could draft rules which permit the exercise of discretion and judgment. For example, the Department of Environmental Protection promulgated Rule 62-340.300, F.A.C., which provides,

[t]he landward extent (i.e., the boundary) of wetlands as identified in subsection 62-340.200(19), F.A.C., shall be determined by applying *reasonable scientific judgment* to evaluate the dominance of plant species, soils, and other hydrologic evidence of regular and periodic inundation and saturation as set forth below. In applying *reasonable scientific judgment*, all reliable information shall be evaluated in determining whether the area is a wetland as defined in subsection 62-340.200(19), F.A.C. [emphasis added].”

FLA. ADMIN. CODE ANN. r. 62-340.300 (1997).

52. See Inaugural Address, *supra* note 50, at A12.

there are no regulations for one. So they ask: "Does it have a stove?" Yes. "Does it have a toilet?" Yes.

"Well, the closest thing we have is a single-family residence; so it needs steel tie-downs; it must withstand Andrew-type winds, etc."

The cost went from \$15,000 to \$65,000. . . .

I've concluded the Lord gave me this problem so I could understand why people hate government so much.⁵³

In the "Cook Shack Speech," the Governor requested the assistance of the President of the Senate, the Speaker of the House of Representatives, and every member of the Cabinet, to reduce the number of administrative rules by fifty percent within two years.⁵⁴ He charged the Lt. Governor with the duty to complete the task.⁵⁵ Thereafter, in early February 1995, the Governor forwarded copies of the book, *The Death of Common Sense*⁵⁶ to every member of the Florida Legislature.

On March 7, 1995, the Governor addressed a joint session of the Legislature. In his State of the State Address, he reiterated the themes of his Inaugural Address.⁵⁷ The Governor reminded lawmakers that he had sent each of them a copy of *The Death of Common Sense* and noted that "[t]he book identifies 'Public Enemy Number One' and that is the rules and regulations and the way we are presently applying them."⁵⁸ In keeping with this philosophy, the Governor reported that, since his inauguration, about 3500 rules had been identified for elimination.⁵⁹ He also informed the joint houses of the Legislature that the secretaries of

53. *Id.* Administrative agencies often take the blame for statutory requirements. The *Jacksonville Florida Times-Union* reported on Monday, January 9, 1995, that Leon County building inspection officials stated, "[t]he man who sold Chiles the land had not gotten county approval for subdividing his property as required by the state's growth management laws (emphasis added)." Additionally, the *Tallahassee Democrat* reported on January 4, 1995, that "the main problem holding up further plans for the cabin, and any accompanying cook shack, is this: Chiles's property is part of an illegal subdivision."

54. Inaugural Address, *supra* note 50, at A12.

55. *Id.*

56. PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994). For a critical review of *The Death of Common Sense*, see Maher, *supra* note 3, at 318-21.

57. Governor Lawton Chiles, State of the State Address, in *FLA. H.R. JOUR.* 23-24 (Reg. Sess. Mar. 7, 1995) [hereinafter *State of the State Address*].

58. *Id.* at 24 (emphasis added).

59. *Id.* at 24. The Governor stated: "There are more than 10,000 rules and regulations just in agencies under control of the Governor—10,000 rules. In two months time, by making this 50 percent goal an imperative, an imperative to our agencies, we've identified some 3,500 rules that should be eliminated. That's nearly 34 percent just in those agencies. We're just getting started, but the easy part comes first." *Id.*

three executive agencies had proposed methods for reducing the number of administrative rules even more.⁶⁰ The most dramatic proposal that he identified was a request by the Secretary of Transportation to “*eliminate all the rules*” of the department.⁶¹ In keeping with this ideology, the Governor stated:

The cornerstone of our joint attack should be to pass a bill that would say that all of our department and agency rules now in effect would be repealed at the close of the 1995 session of the Legislature, except those rules that I say need to stay in effect or that you say needs [sic] to be in effect.⁶²

On March 27, 1995, the Governor called a press conference during which he distributed copies of a proposal which would have repealed most of the APA if it had been adopted by the Legislature.⁶³ The Governor’s proposal would have stricken all of the Administrative Procedure Act except for section 120.65, which creates the Division of Administrative Hearings within the Department of Management Services and that provides for hearing officers.⁶⁴ Additionally, the Governor’s proposal sought to repeal every agency rule, effective July 1, 1996, except for rules designated in a joint resolution adopted by the Legislature during the 1996 legislative session or in an executive order of the Governor rendered by the end of the 1996 legislative session.⁶⁵

In response to the perception that section 120.535 caused an unnecessary proliferation of administrative rules, the Governor specifi-

60. *Id.* at 25. The Secretary of the Department of Environmental Protection instituted a demonstration project in Duval County that stressed cooperation with businesses instead of confrontation and enforcement. In addition, the Secretary of the Department of Community Affairs proposed that state review of small amendments to local comprehensive plans—amendments involving 10 acres or less—be abolished. *Id.*

61. *Id.* The vehicles for this proposal during the 1995 Regular Session were Senate Bill 2276 by Senators Jack Latvala, Repub., Palm Harbor, and Malcolm E. Beard, Repub., Seffner, and House Bill 2289 by Representatives Alzo J. Reddick, Dem., Orlando and Durell Peaden, Jr., Dem., Crestview.

62. *Id.*

63. The deadline for filing bills for the 1995 regular legislative session in the House of Representatives was March 7, 1996, and March 10, 1996, in the Senate, though the provision could have been offered as an amendment to related legislation.

64. The Governor’s proposal would have renamed hearing officers as “administrative law judges.”

65. Under the proposal, the joint resolution or executive order could have conditioned the retention of any rule upon modification of the rule. In case of a conflict between the joint resolution and executive order, the rule would “remain adopted.”

cally reiterated in his proposal that it should be repealed.⁶⁶ Furthermore, to reduce the number of rules that exist because of legislative mandates, the Governor proposed that “[a]ny statute that *purports to require* the adoption of rules *shall be construed not to mandate* the adoption of rules, *but to authorize any agency, in the exercise of its discretion, to adopt rules.*”⁶⁷

The Governor’s proposal to repeal the APA did not receive a hearing in either house.⁶⁸ Nevertheless, the Governor was not alone in calling for a drastic reduction in the number of administrative rules.⁶⁹ The most important administrative procedures bill of the 1995 legislative session, Senate Bill 536⁷⁰ by the Florida Senate Select Committee on Governmental Reform and Oversight and Senator Charles Williams,⁷¹ would have resulted in a reduction in the number of administrative rules.

66. Section 120.535 requires that an agency statement meeting the definition of a rule in § 120.52(16) be adopted as a rule as soon as feasible and practicable. The provision would have been repealed under § 2 of the Governor’s proposal which repealed all of chapter 120 except for § 120.65.

67. *See supra* note 57 (emphasis added). Statutorily providing that legislative mandates could be followed by agencies *in their discretion* clearly would minimize the power of the Legislature and is a standard that, in all probability, would never receive support in either house.

68. The Governor’s legislative office contacted Rep. Durell Peaden, Dem., Crestview, to ask that he accept the Governor’s proposal as an amendment to CS/HB 1309 when the bill was heard by the Committee on Community Affairs on April 18, 1995. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF HOUSE BILLS at 291, CS/HB 1309.

69. *See, e.g., Longman, supra* note 39.

70. Senate Bill 536 had its genesis in the Florida Senate Select Committee on Governmental Reform which was created by the Senate President in late 1993. The Senate Presidency was split during 1993 and 1994 because the Senate was split evenly between Democrats and Republicans. As a result, the party in power alternated, with Senator Ander Crenshaw, Repub., Jacksonville, sitting as President in 1993 and Senator Pat Thomas, Dem., Quincy, sitting as President in 1994. The Select Committee on Governmental Reform, which was chaired by Senator Charles Williams, Dem., Tallahassee, during the 1994 regular session, was assigned the task of reviewing agency rulemaking and governmental accountability. The Select Committee’s work product resulted in the introduction of Senate Bill 1440 by Senator Williams. The bill passed the Senate and was certified to the House of Representatives, but was not taken up for a vote on the floor of the House. Nevertheless, many of the provisions of Senate Bill 1440 survived and reappeared in 1995 in Senate Bill 536 by Senator Williams.

71. Dem., Live Oak. Co-sponsors of the Committee Substitute for Committee Substitute for Senate Bill 536 were: Senators Robert T. Harden, Repub., Ft. Walton Beach; Jim Horne, Repub. Orange Park; George G. Kirkpatrick, Jr., Dem., Gainesville; Donald C. Sullivan, Repub., St. Petersburg; Tom Rossin, Dem., W. Palm Beach; Pat Thomas, Dem., Quincy; William G. Myers, Repub., Stuart; John A. Grant, Jr., Repub., Tampa; Charles H. Bronson, Jr., Satellite Beach; Karen Johnson, Dem., Inverness; John M. McKay, Repub., Bradenton; Jack Latvala, Repub., Palm Harbor; William G. Bankhead, Repub., Ponte Vedra Beach; Robert Wexler, Dem., Boca Raton; Katherine Harris, Repub., Sarasota; Fred R. Dudley, Repub. Cape Corral; Malcolm E. Beard, Repub., Seffner; Ronald A. Silver, Dem., N. Miami Beach; Daryl L. Jones, Dem., Miami; William H. Turner, Dem., Miami; and Howard C. Forman, Dem., Pembroke Pines.

As it ultimately passed the Legislature, the Committee Substitute for Committee Substitute for Senate Bill 536 (Reg. Sess. 1995) (CS/CS/SB 536) contained provisions of Senate Bill 2276 by Senator Latvala and of House Bill 2289 by Representative Reddick,⁷² which would permit the Department of Transportation, during a three-year period, to operate without rules and, instead, to perform its duties using “guidelines.”⁷³ CS/CS/SB 536 also would have (1) restricted agency rulemaking authority by authorizing only rules that implement a specific law, (2) increased legislative oversight of the rulemaking process,⁷⁴ (3) permitted a temporary suspension of rules by the Joint Administrative Procedures Committee (JAPC),⁷⁵ (4) modified rulemaking procedural requirements,⁷⁶ (5) affected the rule challenge process,⁷⁷ (6) shifted the

72. Dem., Orlando.

73. The provisions of HB 2289, also known as the “Common Sense in Government Act,” were amended onto the final version of the CS/CS/SB 536.

74. The CS/CS/SB 536 increased legislative oversight of rulemaking by requiring: (1) each house of the Legislature to consider before enacting a general or special law whether any rules implementing that law must be adopted; (2) the Legislature to review chapter 120, Florida Statutes, to consider changes; (3) the JAPC to report how many times in the previous year it had voted objections to rules, voted to suspend rules, filed administrative determination or petitions for judicial review on rules; (4) the JAPC to undertake a systematic and continuous review of statutes that authorize agencies to adopt rules; and (5) each agency to review its existing rules and file a written report with the Governor and Legislature which identifies ways to simplify and clarify existing rules and regulatory schemes by combining redundant or overlapping rules and by deleting obsolete rules.

75. The JAPC is created in § 11.60 as a legislative check on legislatively-created authority. The JAPC, which is a joint standing legislative committee composed of three members from each house, is assigned the duty of maintaining a continuous review of administrative rules and the statutory authority on which they are based.

76. The CS/CS/SB 536 required: (1) a notice of rule development; (2) publication of the full rule text; (3) consideration of the impact of the rule on small counties and cities; (4) preparation of a statement of estimated regulatory costs; (5) preparation of a rule development statement; (6) compilation of a rulemaking record in all rulemaking proceedings; (7) filing with the JAPC a notice stating that a proposed rule is unchanged from the rule as previously filed or containing any changes made; (8) adoption of the rule imposing the lowest cost; (9) postponement of the rule adoption process if the JAPC was considering an objection; and (10) agency certification that all statutory rulemaking requirements had been met.

77. The CS/CS/SB 536 affected rule challenges by: (1) giving the JAPC standing to challenge an agency’s implementation of a policy on the basis that the policy must be adopted as a rule; (2) requiring petitions challenging proposed rules to state the provisions of the rule or statement of estimated regulatory costs alleged to be invalid and to require filing within 21 days after the date of publication of a notice of intent to adopt, amend or repeal a rule, or within 20 days after filing with the Department of State; and (3) providing that in a challenge to an existing rule, the hearing officer must independently determine relevant questions of law and independently interpret statutory provisions and without giving deference to an agency’s interpretation.

burden of proof in rule challenges,⁷⁸ (7) provided mandatory attorneys' fees,⁷⁹ and (8) altered judicial review.⁸⁰

While there were areas of agreement between the legislative and executive branches, it became apparent during the course of the 1995 legislative session that there was a fundamental disagreement between the two branches of government with respect to both the level of discretion that should be accorded to agencies and the value of administrative rules in the performance of governmental duties.⁸¹ This conflict set the stage for the veto of CS/CS/SB 536 on July 12, 1995.⁸²

The content of CS/CS/SB 536 primarily reflected those problems that the Legislature had identified during two years of committee meetings on rulemaking.⁸³ As a result, the act that was presented to the Governor emphasized agency adherence to procedural requirements, sought to increase legislative oversight of agency rulemaking, required consideration of the economic impact of regulation, and provided penalties for failing to follow procedures or for adopting rules determined to be

78. The CS/CS/SB 536 provided that a proposed rule or existing rule would be presumed invalid, and the burden of proof would be on the agency, in any proceeding for judicial or administrative review to establish that the rule or portion of the rule is a valid exercise of delegated legislative authority.

79. The CS/CS/SB 536 changed attorneys' fee provisions by: (1) deleting the requirement in § 120.535(6), Florida Statutes, that a challenger must successfully demonstrate that an agency is not permitted to rely upon a statement as a basis for agency action in order to obtain reasonable costs and attorneys' fees; (2) deleting the provision in § 120.535(6) that provides that an agency is not required to pay costs and attorneys' fees if it publishes proposed rules and proceeds expeditiously and in good faith to adopt a statement as a rule when that statement has been found to be in violation of § 120.535(1); (3) providing that if the hearing officer determines that an agency failed to prove that rulemaking is not feasible or practicable under § 120.535, an order must be entered against the agency for costs and reasonable attorneys' fees; (4) requiring the entry of an order for reasonable attorneys' fees and costs against an agency that fails to overcome the presumption of invalidity of a proposed or existing rule; and (5) providing that in any proceeding pursuant to § 120.57(1), a prevailing party other than an agency must recover costs and reasonable attorneys' fees from the nonprevailing adverse party.

80. The CS/CS/SB 536 prohibited a court from substituting its judgment for that of a hearing officer as to the weight of the evidence on any disputed finding of fact in a rule challenge proceeding pursuant to § 120.54 or § 120.56. Under this version of the bill, if the court found that the final order depended on any finding of fact that was not supported by competent substantial evidence in the record of the proceeding, it would have to set aside the final order or remand the case.

81. Governor's Veto Message, *supra* note 9.

82. *Id.*

83. Hearings were held by the Florida Senate Select Committee on Governmental Reform, the Florida House of Representatives Select Committee on Agency Rules and Administrative Procedures, and the Florida House of Representatives Select Committee on Streamlining Governmental Regulations.

invalid.⁸⁴ While the CS/CS/SB 536 contained sections that reflected the Governor's concerns,⁸⁵ including authorization of a pilot project to permit one agency to operate under "guidelines" for three years,⁸⁶ and while it contained numerous provisions that would have reduced the number of rules,⁸⁷ the Legislature apparently did not agree with the Governor that administrative rules are "Public Enemy Number One."⁸⁸ Instead, CS/CS/SB 536 still retained provisions similar to section 120.535, thereby supporting the notion that administrative rules are a valuable instrument in executing statutes as well as limiting agency discretion.⁸⁹

Because the revisions to the APA made by the CS/CS/SB 536 did not significantly diminish the reliance of government on rules and, therefore, did not expand agency discretion or flexibility in the manner desired by the Governor, the Governor vetoed the Act.⁹⁰ While noting

84. Modifications were made to the presumption of invalidity of a proposed or existing rule, the burden of proof in a rule challenge proceeding, the assessment of attorneys' fees, and the ability of the JAPC to unilaterally suspend a proposed or existing rule. Section 120.535 was repealed in order to assuage the Governor, but § 120.547 was created to replace it. Additionally, sections from House Bill 2543, the work product of the Florida House of Representatives Select Committee on Streamlining Government and Rep. Kenneth P. Pruitt, Repub., Port St. Lucie, were added to the bill. Committee Substitute for House Bill 1453 by the House Committee on Business and Professional Regulation and Rep. Robert J. Starks, Repub., Casselberry, which authorized issuance of citations for initial violations of minor rules, also was added. Finally, House Bill 2289 by Rep. Reddick and Rep. Peaden, which exempted the Department of Transportation from the requirement that it operate with rules for a period of three years, was included in the final product.

85. The Act repealed § 120.535, included some language in § 120.547 regarding agency flexibility, and encouraged mediation.

86. See HB 2289 (also called "Common Sense in Government Act").

87. The methods by which the Legislature sought to decrease the number of administrative rules included: (1) requiring agencies to review their rules and report to the Legislature ways to simplify and clarify existing rules and regulatory schemes by combining redundant and overlapping rules and by deleting obsolete rules; (2) striking statutory requirements that agencies adopt rules describing their organization and methods of operation; (3) striking statutory requirements that agencies adopt rules of practice setting forth the nature and requirements of all formal and informal procedures; (4) striking statutory requirements that agencies adopt rules of procedure appropriate for the presentation of arguments concerning issues of law or policy and for the presentation of evidence; (5) requiring the Administration Commission to adopt model rules which all agencies must use unless they are specifically granted exceptions; and (6) limiting the statutory bases that an agency can use to support the promulgation of a rule. CS/CS/SB 536.

88. See *supra* text accompanying note 58.

89. CS/CS/SB 536 created a new § 120.547 which retained components of § 120.535 but added provisions for agency flexibility.

90. See Governor's Veto Message, *supra* note 9.

that the CS/CS/SB 536 had a “number of sound attributes,” the Governor stated in his Veto Message:

Its most significant effects, however, are in other amendments to Chapter 120—amendments pivotal to whether Florida will enjoy good government decisions in the future. These amendments constitute the basic thrust and overall stance the Legislature has taken with regard to decision-making in the executive branch of government. As I explain below, I object to them. They compel my veto.⁹¹

The Governor’s Veto Message explicated the fundamental differences between the two branches of government:

In the State of the State speech delivered at the commencement of this year’s legislative session, I called for two legislative steps in administrative law. Both are critical, in my view, to the achievement of prompt and meaningful regulatory reform. The first is the repeal of Section 120.535, which removes agency discretion in determining whether to adopt a regulation. Passage of this measure caused the number of regulations filed each year to nearly double. The second step I called for was a sunset of executive branch rules by the end of the 1996 session of the Legislature, with the exception of those found either by me or the Legislature to be essential to protection of human health and public safety.⁹²

Furthermore, the Governor elucidated his philosophy regarding regulatory reform:

It is time to reject the rules-dominated system of government created over the last 30 years. It is time, instead, to renew our commitment to the system envisioned by our state constitution throughout its history of revisions: a system in which the Legislature charts the direction our state should take through broad statements of policy and in which the executive branch makes decisions in individual cases which best accomplish the goals the Legislature has set. We must abandon the present system because it has banned thinking by human beings at the juncture most critical to outcomes: the moment of decision. We must

91. *Id.*

92. *Id.*

return to government which allows, within reason, human thought to have the last word in decision-making.⁹³

The Governor noted that, to reach this end, two reforms were necessary: (1) flexibility in decisionmaking and (2) a simplified Administrative Procedure Act.⁹⁴ The Veto Message stated that the Governor did not believe that CS/CS/SB 536 “honor[ed] [his] request for legislative recognition for flexibility in decision-making.”⁹⁵ Furthermore, the Governor thought that the bill did not simplify the APA, but instead “made it more complicated than ever.”⁹⁶ He noted that amendments to section 120.54, which governs rule adoption procedures, took up twenty-nine pages of the bill and that the amendments made “. . . the rule-making process more convoluted, involved and tangled than ever before.”⁹⁷

The Governor also objected to the increase in the number of “bases for striking rules as invalid exercises of legislative authority.”⁹⁸ The Veto Message noted that “[m]aterial failure to follow any of the new rulemaking [requirements was] a new basis for challenging a rule’s invalidity.”⁹⁹ In addition, he characterized the amendments as “triggers for administrative litigation devoted to procedure but devoid of substance.”¹⁰⁰ The Governor concluded his Veto Message with the following:

I see the battle in the domain of administrative law as one between the small businesses of this state and those with the resources to participate successfully in a complicated, rules-dominated, process-oriented, highly-specialized governmental system unfriendly to those without such resources. It is a battle between the citizens of this state and powerful special interests. By vetoing CS/CS for Senate Bill 536, I cast my lot with those who cry out for simpler government, government where common sense in decision-making prevails over complicated process.¹⁰¹

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

Although the 1995 regular legislative session did not bring about any changes in the APA, dramatic changes in the rulemaking arena were effected by legislative request¹⁰² and executive order.¹⁰³ On June 22, 1995, the Senate President sent a letter to all agency heads requesting that they develop and submit a recommendation regarding rules the agency could repeal because they are unnecessary, redundant, overlapping or obsolete.¹⁰⁴ Rules that require legislative action prior to repeal were also to be considered.¹⁰⁵ Furthermore, agencies were requested to review how their rules dictate the implementation of programs and the operation of the agency.¹⁰⁶ Agencies were requested to recommend how those rules could be modified or repealed in order to increase efficiency and effectiveness.¹⁰⁷

Subsequently, on July 12, 1995, the Governor issued Executive Order Number 95-256 which directed agencies to take immediate steps to repeal rules.¹⁰⁸ The order required agencies to

continue a page by page review of all rules now in force,
to eliminate or revise those that are unduly cumbersome,

102. See Letter from Senate President James A. Scott, Repub., Ft. Lauderdale to administrative agencies (June 22, 1995) (on file with Florida Senate Select Committee on Governmental Reform and Oversight) [hereinafter *Legislative Request*].

103. See Fla. Exec. Order No. 95-74 (Feb. 27, 1995); Fla. Exec. Order No. 95-256 (July 12, 1995). For a discussion of these two orders see Maher, *supra* note 3, at 321-28.

104. Legislative Request, *supra* note 102.

105. *Id.*

106. *Id.*

107. *Id.*

108. Executive Order 95-256 directed agencies to comply with Executive Order 95-74. Fla. Exec. Order No. 95-256, § 1. Executive Order 95-74 was issued February 27, 1995 and required each agency under the supervision of the Governor to "conduct a review of its rules to examine the purpose, intent, and necessity of each rule, and . . . to repeal obsolete rules." Fla. Exec. Order No. 95-74, § 1. Executive Order 95-74 also required agencies to submit to the Executive Office of the Governor the following for analysis:

- (a) Obsolete rules;
- (b) Organizational or procedural rules;
- (c) Rules that merely track statutory language;
- (d) Rules adopted because the statute required the agency to adopt a rule, when the agency believes the rule is unnecessary to implement the legislative direction;
- (e) Rules adopted because they were mandated by section 120.535, Florida Statutes; and
- (f) Any other rules the agency believes are unnecessary.

Id. Following analysis by the Executive Office of the Governor, the rules were to "be provided to the Legislature for an opportunity to review the rules and repeal and/or amend any statutes mandating the rules so that the repeal of the rules may be effectuated." *Id.*

restrictive, punitive or otherwise in need of revision. Reports of such review shall be provided every sixty days to the Executive Office of the Governor. The initial report shall be filed no later than September 1, 1995.¹⁰⁹

As a result of both the legislative request and executive orders, agencies began filing large numbers of rules for repeal.¹¹⁰ According to information compiled by the JAPC, roughly fifty-seven percent of the rules adopted in 1995 were rule repeals.¹¹¹ As noted by one commentator, the rule repeal process instituted by the legislative and executive branches in 1995 was of an historic magnitude:

In 1995, 5,777 published rules were noticed for repeal. To put that figure in perspective, again according to JAPC statistics, there were only 8,627 repeals of published rules for the entire twenty year period from 1975 to 1994. Not since 1975 have repeals accounted for more than twenty percent of rulemaking activity. In 1995, the majority of rulemaking activity involved repeals. That is unprecedented.¹¹²

On September 19, 1995, two months after the veto of CS/CS/SB 536, the Governor's Office announced the appointment of the Governor's Administrative Procedure Act Review Commission.¹¹³ The fifteen-member Commission concentrated its efforts in three broad areas: (1)

109. Fla. Exec. Order No. 95-74, § 1 (Feb. 27, 1995).

110. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., tape recording of proceedings (Oct. 9, 1996) (presentation by David Maloney, Office of the Governor) (on file with the Comm.); Chiles/Mackay Rules Reduction Initiative: A Report to the House Select Committee on Streamlining Govtl. Regs. (on file with the Comm.).

111. Information on file with Florida Senate Select Committee on Governmental Reform and Oversight.

112. Maher, *supra* note 3, at 328.

113. Fla. Exec. Order No. 95-256, § 7. The Commission was composed of the following members: Robert M. Rhodes, Chair, a partner in the law firm of Steel Hector & Davis; Rep. David Bitner, Repub., Port Charlotte; Rep. Irlo "Bud" Bronson, Dem., Kissimmee; Sen. Locke Burt, Repub., Ormond Beach; Sen. Rick Dantzler, Dem., Winter Haven; Martha Edenfield, of counsel to Akerman, Senterfitt & Eidson; Clay Henderson, President of the Florida Audubon Society; Wade L. Hopping, a partner in the law firm of Hopping, Green, Sams & Smith; Eleanor Hunter, a state hearing officer with the Division of Administrative Hearings; Jon Mills, Director of the Center for Governmental Responsibility at the University of Florida; Jon Moyle, Jr., of Moyle, Flanagan, Katz, Fitzgerald and Sheehan; Rep. Ken Pruitt, Repub., Port St. Lucie; Rep. Dean Saunders, Dem., Lakeland; Linda Loomis Shelley, Chief of Staff to Governor Lawton Chiles; and Alan Starling, president of Starling Chevrolet, Inc., in Kissimmee. The Commission's Executive Director was Donna E. Blanton of the law firm of Katz, Kutter, Haigler, Alderman, Marks, Bryant & Yon.

simplifying the APA; (2) increasing flexibility in the application of administrative rules and procedures; and (3) increasing agency accountability to the Legislature and the general public.¹¹⁴ The Final Report of the Governor's Administrative Procedure Act Review Commission was issued on February 20, 1996.¹¹⁵ Surprisingly, the Governor's Commission did not concur with the Governor's request to repeal section 120.535.¹¹⁶ Instead, the report specifically recommended retaining the requirement that agencies adopt rules as soon as feasible and practicable.¹¹⁷ It also recommended, however, that agencies be authorized to grant waivers and variances to these rules, a position to which the Legislature was very receptive.¹¹⁸ Thus, in many respects, the Commission's report was in agreement with most of the fundamental provisions of CS/CS/SB 536; therefore, the Commission helped to construct a compromise between the legislative and executive branches.¹¹⁹

Upon the Governor's veto of CS/CS/SB 536, it was widely expected that the Senate would attempt an override.¹²⁰ It was unclear, however, whether an override ultimately would be successful in the House of Representatives. As the interim progressed, and due to the broad areas

114. APA COMM'N REPORT, *supra* note 22, at 1.

115. *Id.* The report recommended: (1) "authorizing agencies to grant variances and waivers to their own rules;" (2) requiring "staff analyses of bills prepared by legislative committees [to] identify sections of proposed legislation that require agency rulemaking and [to] discuss whether the bill provides adequate and appropriate standards and guidelines to direct the agency's implementation of the proposal;" (3) retaining § 120.535, "which provides that rulemaking is not a matter of agency discretion and that rules should be adopted as soon as feasible and practicable;" (4) providing that "no presumption of validity attach to proposed agency rules;" (5) continuing a presumption of validity for rules which have been adopted; (6) providing no presumption of validity for unadopted agency policies; (7) awarding costs and attorney fees up to \$15,000 against state agencies in rule challenge proceedings pursuant to §§ 120.54(4) and 120.56 if "an agency [] does not prevail unless the agency's actions are 'substantially justified' as defined in the Equal Access to Justice Act;" (8) awarding costs and attorney fees with no monetary cap upon entry of a final order against an agency in § 120.535 proceedings; (9) replacing the Economic Impact Statement (EIS) with a Statement of Estimated Regulatory Costs (SERC); (10) establishing "ten informal dispute resolution pilot projects in the eight executive branch departments;" (11) modification of "the evidentiary standard and timeframes used in bid protest proceedings;" and (12) "chang[ing] the title of 'hearing officer' at DOAH to 'administrative law judge.'" *Id.* at 1-5.

116. APA COMM'N REPORT, *supra* note 22, at 19.

117. *Id.*

118. *Id.* at 10, 15 app. J.

119. *Id.* at 1-5.

120. Senator Charles Williams, Presentation at the Pat Dore 1996 Administrative Law Conference (Oct. 4-5, 1996).

of agreement that resulted after issuance of the Commission's report, it appeared less likely that the veto could be overridden.

On March 7, 1996, Senator Williams, a strong advocate of overriding the Governor's veto, filed Senate Bill 2290, which was identical to CS/CS/SB 536.¹²¹ In addition, Senators Locke Burt and Rick Dantzler, both members of the Governor's Administrative Procedure Act Review Commission, filed Senate Bill 2288, which contained many of the recommendations of the Commission's final report.¹²² Both bills were referred to the Florida Senate Select Committee on Governmental Reform and Oversight and the Committee on Ways and Means.¹²³ Additionally, Senate Bill 2290 was referred to the Committee on Rules and Calendar.¹²⁴

Senate Bills 2290 and 2288 were placed on the March 19, 1996 agenda of the Florida Senate Select Committee on Governmental Reform and Oversight.¹²⁵ Prior to that meeting, however, representatives of the Governor had met with Senator Williams as well as the leadership of both houses of the Legislature. Given that there were broad areas of agreement, legislative staff were directed to draft a committee substitute for Senate Bills 2290 and 2288 based upon the provisions of the Committee Substitute for House Bill 1179.¹²⁶ This bill contained most of the provisions of CS/CS/SB 536, with some modifications, as well as the primary recommendations of the Governor's Commission.¹²⁷ The Committee Substitute for Senate Bills 2290 and 2288 (CS/SBs 2290 & 2288) passed out of the committee unanimously.¹²⁸ The bill was placed on the Special Order Calendar on

121. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS, at 174, SB 2290.

122. *Id.* SB 2288.

123. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 174, SB 2288 & SB 2290.

124. *Id.*

125. *Id.*

126. Committee Substitute for House Bill 1179 by the Florida House of Representatives Select Committee on Streamlining Governmental Regulations and Representatives Pruitt, Bronson, Saunders, and Sembler actually was more complete than SB 2288.

127. See APA COMM'N REPORT, *supra* note 22, at 1-5; Wade L. Hopping & Kent Wetherell, *The Legislature Tweaks McDonald (Again): The New Restrictions on the Use of "Unadopted Rules" and "Incipient Policies" by Agencies in Florida's Administrative Procedure Act*, 48 FLA. L. REV. 135, 145-46 (1996).

128. The bill passed the Florida Senate Select Committee on Governmental Reform and Oversight on March 13, 1996. See *supra* note 123, at 174.

April 3, 1996,¹²⁹ and upon passage by the full Senate,¹³⁰ it was sent to the House of Representatives.¹³¹

Prior to the issuance of the Commission's final report, Representatives Bronson, Pruitt and Saunders, all members of the Governor's Administrative Procedure Review Commission, and Rep. Sembler¹³² filed House Bill 1179¹³³ as a short form bill.¹³⁴ The short form bill was referred to the Florida House of Representatives Select Committee on Streamlining Governmental Regulations, the Committee on Finance & Taxation, and the Committee on Appropriations.¹³⁵ The bill was considered by the Florida House of Representatives Select Committee on Streamlining Governmental Regulations, in workshop, on March 6, 1996.¹³⁶ The Select Committee reported the bill favorably as a committee substitute on March 14, 1996.¹³⁷ The bill was withdrawn from the Committee on Finance and Taxation¹³⁸ and heard by the full Appropriations Committee on April 15, 1996.¹³⁹ The Appropriations Committee reported Committee Substitute for House Bill 1179 favorably with no amendments,¹⁴⁰ and the bill was placed on the regular calendar of the House.¹⁴¹ On April 17, 1996, the bill was placed on the Special

129. *Id.*

130. The final vote on passage in the Senate was 38 Yeas and 0 Nays. *Id.* at 174.

131. *Id.* at 174, SB 2290.

132. Repub., Sebastian.

133. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 317, HB 1179.

134. Fla. H.R. Rule 7.18 (1994/1996), provides:

A Member may introduce a short form bill, which suggests the need for general legislation in a specific field, in lieu of introducing a bill in general form as required in Rule 7.2. . . . A short form bill reported favorably by a standing committee shall be put in final form and placed upon the Calendar only as a committee substitute. . . .

Id.

135. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 317, HB 1179; FLA. H.R. JOUR. 89 (Reg. Sess. 1996).

136. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 317, HB 1179.

137. *Id.*; FLA. H.R. JOUR. 316 (Reg. Sess. 1996); *see also* Fla. H.R. Rule 6.40 (1994/1996).

138. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 317, HB 1179; FLA. H.R. JOUR. 576 (Reg. Sess. 1996).

139. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 317, HB 1179.

140. *Id.*; FLA. H.R. JOUR. 704 (Reg. Sess. 1996).

141. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 317, HB 1179; FLA. H.R. JOUR. 705 (Reg. Sess. 1996).

Order Calendar,¹⁴² the Committee Substitute for Senate Bills 2290 & 2288 was substituted in lieu thereof,¹⁴³ and CS/SBs 2290 & 2288 was passed as amended with 118 Yeas and 0 Nays.¹⁴⁴

The Senate concurred in the House amendments,¹⁴⁵ passed the committee substitute as amended, with 39 Yeas and 0 Nays.¹⁴⁶ The Committee Substitute for Senate Bills 2290 and 2288 was signed by the officers and presented to the Governor on April 29, 1996,¹⁴⁷ and it was signed into law on May 1, 1996.¹⁴⁸

II. AN OVERVIEW OF THE 1996 APA

A. *The Simplified Act, Licensing and Definitional Changes*

1. The Simplified Act

The Lieutenant Governor Buddy MacKay's staff first proposed a "simplified version" of the Administrative Procedure Act in 1995.¹⁴⁹ While the Legislature did not act upon that proposal during the 1995 Regular Session, the executive branch continued to emphasize the necessity of a simplified and reorganized APA during the 1995 interim. Simplification of the Act was one of the three general areas that the Governor assigned his Administrative Procedure Act Review Commission to review.¹⁵⁰

In addition, a working group¹⁵¹ of government and nongovernment

142. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 317, HB 1179; FLA. H.R. JOUR. 713 (Reg. Sess. 1996).

143. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 317, HB 1179; FLA. H.R. JOUR. 713 (Reg. Sess. 1996); *see also* Fla. H.R. Rule 7.11 (1994/1996).

144. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 174, SB 2290; FLA. H.R. JOUR. 747 (Reg. Sess. 1996).

145. FLA. S. JOUR. 513 (Reg. Sess. 1996).

146. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 174, SB 2290; FLA. S. JOUR. 513 (Reg. Sess. 1996).

147. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 174, SB 2290; FLA. S. JOUR. 577 (Reg. Sess. 1996).

148. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 174, SB 2290.

149. The recommended simplification of the APA was extreme in that it struck the entire act except for § 120.65. *See* CS/HB 1309, § 4 (1995).

150. APA COMM'N REPORT, *supra* note 22, at 1.

151. Deborah K. Kearney, *An Open Letter to Steve Maher*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Dec. 1995, at 5 n.1. The working group was comprised of private practitioners Carol Forthman, David Gluckman, Steve Pfeiffer, and Dan Thompson, agency representatives Cathy Lannon, Li Nelson, and Dan Stengle, Hearing Officer Linda Rigot, and Phyllis Slater

lawyers was established by the Governor's office to clarify the Act and to rearrange it in a more logical fashion.¹⁵² The simplified draft that was prepared by the working group added more subsection and paragraph headings and purported to replace legal terminology with standard English and "reduce[] unnecessary verbiage in an effort to [make the act] more user-friendly for nonlawyers."¹⁵³

Support of the effort to streamline the Act was not uniform. One commentator, a former chair of the Administrative Law Section of The Florida Bar, expressed grave concerns about the project.¹⁵⁴ This commentator thought not only that simplification of the Act was unnecessary, but also that it would "put familiar things in unfamiliar places" and "promote confusion and create unnecessary costs."¹⁵⁵ In addition, he opined that ordinary people do not read the APA and, as a result, concluded that the Act did not need to be made more comprehensible to nonlawyers.¹⁵⁶

Another concern that was expressed regarding reorganization of the Act was that the renumbering of existing sections would unravel years of history and experience in dealing with the Act.¹⁵⁷ In particular, the timing of the simplification and reorganization was found to be inopportune because the APA was being rewritten on the eve of a major shift of power from the federal government to state government.¹⁵⁸ The commentator concluded that a simplified draft was another "APA solution in search of a problem."¹⁵⁹

The chair of the working group¹⁶⁰ answered the criticisms leveled against the simplification and reorganization of the Act in an open letter of response published in the December 1995 newsletter of the Administrative Law Section of The Florida Bar.¹⁶¹ The response maintained that ordinary people do read the APA, and that they work with it every day.¹⁶² In addition, the letter noted that "[m]ost state government rulemaking and procedure is administered by thousands of state workers

Hampton and Debby Kearney, of the Office of General Counsel, Executive Office of the Governor. *Id.* at 5 n.1.

152. APA COMM'N REPORT, *supra* note 22, at 6.

153. *Id.* app. G.

154. Stephen T. Maher, *The Governor's Proposed Technical APA Revision*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Dec. 1995, at 1-3.

155. *Id.* at 1-2.

156. *Id.* at 2.

157. *Id.*

158. *Id.*

159. *Id.*

160. Debbie Kearney, Deputy General Counsel, Executive Office of the Governor.

161. Kearney, *supra* note 151, at 4.

162. *Id.*

who do not have legal training and who would benefit from a more comprehensible APA.”¹⁶³ The response advised that it was not the intent of the working group to substantively change the Act or revise case law.¹⁶⁴ The letter of response concluded that the benefit of a more tractable APA outweighed “any added difficulty in researching.”¹⁶⁵

In its review of the simplification and reorganization of the Act, the Commission determined that the original APA was “not logically organized or easily understood.”¹⁶⁶ It found that the “simplified draft” prepared by the working group provided for a more logical arrangement of the Act,¹⁶⁷ noting that:

For example, sections 120.54 and 120.535, both of which relate to rulemaking, are combined into a single section 120.54 entitled “Rulemaking.” Additionally, the rule challenge provisions of sections 120.535, 120.54, and 120.56 are combined into a single section 120.56 entitled “Challenges to rules.” This new section 120.56 first addresses provisions common to all rule challenges, and then lists special provisions relating to particular types of challenges.¹⁶⁸

The Commission endorsed “the simplified draft with the express understanding that it [did not make any] substantive changes to the APA.”¹⁶⁹ Thereafter, the simplified draft served as the basic working document to which other changes recommended by the Commission were made¹⁷⁰ and many of the provisions of CS/CS/SB 536 were added.¹⁷¹

The common procedures for hearings are now included in a new section 120.569, which combines provisions from sections 120.57, 120.58, and 120.59 into a general hearing section.¹⁷² The hearing

163. *Id.*

164. *Id.* The working group draft was submitted to the Commission on November 16, 1995. APA COMM’N REPORT, *supra* note 22, app. B.

165. Kearney, *supra* note 151, at 4.

166. APA COMM’N REPORT, *supra* note 22, at 6.

167. *Id.*

168. *Id.* at 6-7.

169. *Id.* at 8.

170. *Id.*

171. *Id.*; Memorandum from Dan Stengle, Deputy Chief of Staff, Office of the Governor, to the Governor’s APA Review Commission (on file with the Commission). The draft also was the basis for the changes made in CS/HB 1179 introduced by Representatives Pruitt, Bronson, and Saunders and in SB 2288 introduced by Senators Burt and Dantzer.

172. Compare FLA. STAT. § 120.569 (Supp. 1996) with FLA. STAT. § 120.57 (Supp. 1996), amended by 1996 Fla. Laws ch. 96-159; FLA. STAT. § 120.58 (Supp. 1995), repealed by 1996

provisions for formal and informal hearings are retained in sections 120.57(1) and (2), respectively.¹⁷³ Almost all of the attorney fee provisions, which were formerly contained in sections 120.535, 120.56, 120.57, and 120.59, were consolidated into a new section 120.595.¹⁷⁴ There are, however, three attorney fee provisions that are not included in the new section.¹⁷⁵

Since its inception, many exceptions to the provisions of the APA were created and scattered throughout the Act.¹⁷⁶ This created a “trap for the unwary” because persons who were unfamiliar with the Act often were unaware that there were exceptions to the Act or, even if they were aware of them, they were unable to locate them. Sections 120.80 and 120.81 now provide single locations within the Act for specific and general exceptions to chapter 120, respectively.¹⁷⁷

2. Licensing

While the simplified draft of the APA was not intended to make any substantive changes to the Act,¹⁷⁸ one impact of the simplification and reorganization process was discovered late in the 1996 session: licensing time frames were affected during the simplification of the Act. The

Fla. Laws ch. 96-159; FLA. STAT. § 120.59 (Supp. 1996), *repealed by* 1996 Fla. Laws ch. 96-159.

173. FLA. STAT. §§ 120.57(1), (2) (Supp. 1996).

174. *Compare* FLA. STAT. § 120.595 (Supp. 1996) *with* FLA. STAT. § 120.535 (Supp. 1996), *repealed by* 1996 Fla. Laws ch. 96-159; FLA. STAT. § 120.56 (Supp. 1996), *amended by* 1996 Fla. Laws ch. 96-159; FLA. STAT. § 120.57 (Supp. 1996), *amended by* 1996 Fla. Laws ch. 96-159; FLA. STAT. § 120.59 (Supp. 1996), *repealed by* 1996 Fla. Laws ch. 96-159.

175. *Compare* FLA. STAT. § 120.595 (Supp. 1996) *with* FLA. STAT. § 120.535 (Supp. 1996), *repealed by* 1996 Fla. Laws ch. 96-159; FLA. STAT. § 120.56 (Supp. 1996), *amended by* 1996 Fla. Laws ch. 96-159; FLA. STAT. § 120.57 (Supp. 1996), *amended by* 1996 Fla. Laws ch. 96-159; FLA. STAT. § 120.59 (Supp. 1996), *repealed by* 1996 Fla. Laws ch. 96-159.

176. For example, § 120.52(16)(c)4. contains the exception that marketing orders issued by the Department of Agriculture and Consumer Services (DACS) are not to be considered rules. An exception providing that DACS hearings conducted pursuant to chapter 601 do not have to be conducted by a hearing officer assigned by the Division of Administrative Hearings located in § 120.57(1)(a)8.

177. FLA. STAT. §§ 120.80, .81 (Supp. 1996). Unfortunately, hundreds of exceptions to the provisions of chapter 120 still exist throughout other substantive laws. These exceptions have not been reviewed thoroughly and perhaps not even identified. For example, the Department of Citrus has a procedural exception from the rulemaking provisions of the APA pursuant to § 601.151. In addition, the Local Government Comprehensive Planning and Land Development Regulation Act, in §§ 163.3177(9) and (10), gives the Department of Community Affairs the authority to promulgate rules which are not subject to rule challenges or drawout proceedings under the APA.

178. APA COMM’N REPORT, *supra* note 22, at 8.

CS/SBs 2290 and 2288, as originally passed and signed into law,¹⁷⁹ retained the former statutory requirement that an application for a license must be approved or denied within 90 days after receipt of a completed application.¹⁸⁰ It also maintained the provision that tolled the 90-day time limit upon the initiation of a proceeding under sections 120.569 and 120.57.¹⁸¹ It also provided, however, that the time period would resume "10 days after the recommended order is submitted to the agency and the parties, 10 days after an informal hearing pursuant to s[ection] 120.57(2), or 45 days after either event if the agency head is a collegial body."¹⁸²

Executive agencies subsequently advised that the time frames in the simplified draft were insufficient to allow appropriate action by the licensing agencies. However, because CS/SBs 2290 and 2288 already had been signed into law, another bill related to the subject of administrative procedure was needed as a vehicle for the amendment to the Act. On the last day of the 1996 Regular Session, the House of Representatives considered the Committee Substitute for House Bill 751¹⁸³ by Rep. Peaden¹⁸⁴ to be the proper vehicle. The bill, a reviser's bill¹⁸⁵ which conformed the statutes to changes made to the APA by CS/SBs 2290 and 2288,¹⁸⁶ was further amended to reinstate the time-limits from section 120.60 of the prior Act.¹⁸⁷ Chapter 96-159, Laws of Florida, was amended to read:

[a]n application for a license must be approved or denied within the 90 day or shorter time period, within 15 days after the conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever is later. . . .¹⁸⁸

179. 1996 Fla. Laws ch. 96-159, § 26, at 196 (codified at FLA. STAT. § 120.60 (Supp. 1996)).

180. *Id.* (retaining the requirement of FLA. STAT. § 120.60(2) (1995)).

181. *Id.*; see also FLA. STAT. § 120.60(2) (1995) (referencing the provisions of § 120.57).

182. 1996 Fla. Laws ch. 96-159, § 26, at 196 (codified at FLA. STAT. § 120.60 (Supp. 1996)).

183. See 1996 Fla. Laws ch. 96-410.

184. Dem., Crestview.

185. A true reviser's bill is prepared by the Division of Statutory Revision, Joint Legislative Management Committee pursuant to § 11.242.

186. See amendments to CS/HB 751, FLA. H. R. JOUR. 1745 (Reg. Sess. 1996).

187. See 1996 Fla. Laws ch. 96-410, § 326.

188. *Id.*

3. Definitional Changes

The CS/SBs 2290 and 2288 substantially revised some of the definitions contained in the APA.¹⁸⁹ Of primary importance is the amendment of the term “invalid exercise of delegated legislative authority.”¹⁹⁰ The term is revised to provide that “[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute.”¹⁹¹ The definition specifically prohibits an agency from adopting rules that “implement statutory provisions setting forth general legislative intent or policy.”¹⁹² In addition, two new paragraphs are added. Paragraph (f) provides that a rule is invalid if it “is not supported by competent substantial evidence.”¹⁹³ Paragraph (g) provides that a rule is invalid if it “imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.”¹⁹⁴

The requirement that rules be based upon competent, substantial evidence is based upon principles heretofore established in caselaw dealing with the rulemaking process.¹⁹⁵ This provision puts the standard, which has been thought of as a judicial review standard,¹⁹⁶ into a rather new context. It appears to mitigate against haphazard regulation by codifying the requirement that agency rules must be based upon

189. 1996 Fla. Laws ch. 96-159, § 3, at 150 (codified at FLA. STAT. § 120.52 (Supp. 1996)).

190. FLA. STAT. § 120.52(8) (Supp. 1996).

191. 1996 Fla. Laws ch. 96-159, § 3, at 151 (codified at FLA. STAT. § 120.52(8) (Supp. 1996)). This definitional change corresponds to the provisions of § 120.536, as well. *See* FLA. STAT. § 120.536(1) (Supp. 1996).

192. 1996 Fla. Laws ch. 96-159, § 3, at 151 (codified at FLA. STAT. § 120.52(8) (Supp. 1996)).

193. 1996 Fla. Laws ch. 96-159, § 3, at 152 (codified at FLA. STAT. § 120.52(8)(f) (Supp. 1996)).

194. 1996 Fla. Laws ch. 96-159, § 3, at 152 (codified at FLA. STAT. § 120.52(8)(g) (Supp. 1996)). The provisions of CS/CS/SB 536 did not specifically refer to the regulated person, county, or city, and it also modified the term “regulatory costs” with the word “excessive.” CS/CS/SB 536, § 2.

195. *Agrico Chem. Co. v. Department of Env'tl. Reg.*, 365 So. 2d 759, 763 (1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979); *Adam Smith Enters. v. Department of Env'tl. Reg.*, 553 So. 2d 1260, 1274 (Fla. 1st DCA 1989); *Department of Revenue v. John's Island Club*, 680 So. 2d 475, 477 (Fla. 1st DCA 1996).

196. William E. Williams, Presentation at the Pat Dore 1996 Administrative Law Conference (Oct. 4, 1996). Mr. Williams stated that this standard is essentially a judicial standard of review. *Id.* *See also* the judicial standard enunciated in FLA. STAT. § 120.68(10) (Supp. 1996).

demonstrable evidence before the rule is imposed upon the regulated community.¹⁹⁷

The JAPC is responsible for reviewing each rule to determine whether, among other things, it is “an invalid exercise of delegated legislative authority.”¹⁹⁸ Unlike under the prior statutory list of items that the JAPC was required to consider in its review of rules, the JAPC now must look well beyond the rule and its enabling statute in its review.¹⁹⁹ Furthermore, the new standards also could prove difficult for administrative law judges in rule challenge proceedings.

The Act also modified the definition of “agency.”²⁰⁰ The revised definition is both more expansive and more restrictive in its inclusion of those entities that meet the definition of an “agency” subject to the Act. The Act includes the Commission on Ethics²⁰¹ and the Game and Fresh Water Fish Commission,²⁰² both of which are established in the Florida Constitution,²⁰³ within the definition of an agency “when acting pursuant to statutory authority derived from the Legislature.”²⁰⁴ The Legislature cannot affect, through statute, an agency in its execution of powers established by the Constitution.²⁰⁵ However, the Legislature can “enact laws in aid of the [C]ommission, not inconsistent with [the constitutional provisions].”²⁰⁶ The constitution provides that “[t]he [C]ommission shall exercise the regulatory and executive powers of the

197. 1996 Fla. Laws ch. 96-159, § 3, at 151 (codified at FLA. STAT. § 120.52(8) (Supp. 1996)).

198. FLA. STAT. § 120.545(1) (Supp. 1996). The JAPC is charged with reviewing agency rules “[a]s a legislative check on legislatively created authority.” *Id.* An agency must focus on the economic effects of a rule on the regulated community under the SERC provisions as well. *See* 1996 Fla. Laws ch. 96-159, § 10, at 160 (codified at FLA. STAT. § 120.54 (Supp. 1996)).

199. FLA. STAT. § 120.545(1) (Supp. 1996).

200. *See* FLA. STAT. § 120.52(1) (Supp. 1996).

201. *Id.* § 120.52(1)(b).

202. *Id.*

203. FLA. CONST. art. II, § 8(f), (h)(3) (1968) (establishing the Florida Commission on Ethics); FLA. CONST. art. IV, § 9 (1968) (establishing the Florida Game and Fresh Water Fish Commission).

204. FLA. STAT. § 120.52(1)(b) (Supp. 1996). When exercising its constitutional authority to regulate wildlife, the Florida Game and Fresh Water Fish Commission is not an agency within the meaning of the APA. *Airboat Ass’n of Florida, Inc. v. Florida Game & Fresh Water Fish Comm’n*, 498 So. 2d 629 (Fla. 3d DCA 1986). However, when the commission acts exclusively under statutory authority, then it is subject to the rule challenge procedures under the APA. *Id.* For example, regulation of off-road vehicles on public land and regulation of boating safety, the authority for which is delegated by statute, are functions not exercised under the Commission’s constitutional grant of authority. Any rulemaking on these subjects, therefore, would be subject to an administrative determination under the APA. *See id.*

205. *In re Administrative Procedure Act*, 334 So. 2d 561, 562 (Fla. 1976).

206. *See* FLA. CONST. art. IV, § 9 (1968).

state with respect to wild animal life and fresh water aquatic life. . . .²⁰⁷

In addition, the description of "district" within the definition of "agency" was amended to read, "multicounty special district with a majority of its governing board comprised of non-elected persons."²⁰⁸ This definition limits the application of the Act to fewer special districts.²⁰⁹

The definition of an "agency" under the Act also was amended to exclude expressway authorities created pursuant to chapter 348.²¹⁰ When SB 2288 and SB 2290 were combined as a committee substitute by the Florida Senate Select Committee on Governmental Reform and Oversight, the definition of agency was amended to exclude the expressway authorities.²¹¹ Upon further review, however, it was determined that the amendment had mistakenly included the authorities, rather than excluded them. When the bill reached the House, a corrective amendment was adopted on the House floor to clarify that the expressway authorities were excluded from the definition of agency.²¹² Due to a scrivener's error, however, the amendment was engrossed incorrectly, and the chapter law reflected the amendment adopted in the Senate committee as well as the House floor amendment.²¹³

Recently, the Fifth District Court of Appeals held that the Orlando-Orange County Expressway Authority is an agency as defined in section 120.52(1)(b).²¹⁴ The court noted the language dealing with expressway authorities in the 1996 amendments to the APA.²¹⁵ After quoting the provision in chapter 96-159, Laws of Florida, the court stated that it would "pass no judgment or opinion about the effect of that double-

207. *Id.* The Florida House of Representatives Select Committee on Streamlining Governmental Regulations received testimony from representatives of the agricultural community regarding the use of policy statements, which were issued by the Game and Fresh Water Fish Commission under its constitutional powers and therefore not subject to the rulemaking provisions of chapter 120 as the basis for action by another agency subject to chapter 120. In this way the agency subject to chapter 120 could enforce regulatory restrictions without adopting those restrictions as rules.

208. FLA. STAT. § 120.52(1)(b) (Supp. 1996).

209. *See id.*

210. *Id.*

211. *See* amendment record on file with committee.

212. *See* FLA. S. JOUR. 513 (Reg. Sess. 1996); FLA. H.R. JOUR. 746-47 (Reg. Sess. 1996).

213. 1996 Fla. Laws ch. 96-159, § 3(1)(b), at 150-51 (codified at FLA. STAT. § 120.52(1)(b) (Supp. 1996)).

214. *Orlando-Orange County Expressway Auth. v. Hubbard Constr. Co.*, 682 So. 2d 566, 568 (Fla. 5th DCA 1996).

215. *Id.* at 566-67.

exclusionary masterpiece of legislative drafting.”²¹⁶ This error has been corrected in the 1996 Supplement to the Florida Statutes.²¹⁷

The Act also amends section 120.65 to change the title “hearing officer” to “administrative law judge.”²¹⁸ This change was recommended by the Administrative Law Section of The Florida Bar and the Governor’s Commission.²¹⁹ The Commission noted that Florida was “the only state [that uses] independent central panels to adjudicate disputes between agencies and citizens” and that continued to call its adjudicatory personnel “hearing officers.”²²⁰ The Commission emphasized:

More importantly, some *pro se* litigants and attorneys with little experience in the formal hearing process available at DOAH appear at hearings expecting that they will be simply meeting with an employee of the agency to attempt to “work things out.” They are dismayed to learn at the formal hearing that the expected meeting is, in reality, an adjudication of important legal rights for which they are ill-prepared.²²¹

The Commission and the section believed that a change would clarify any confusion on the part of the public and *pro se* litigants regarding the role of the DOAH presiding officers in administrative cases.²²²

B. Increased Legislative Oversight

1. Legislative Consideration of Rulemaking Prior to Enacting Law

The Legislature is constitutionally responsible for the development of public policy, and it performs this duty through the enactment of laws.²²³ The legislative power may not be exercised by another governmental branch or agency.²²⁴ The executive branch, however,

216. *Id.* at 567.

217. *See* FLA. STAT. § 120.52(1)(b) (Supp. 1996).

218. 1996 Fla. Laws ch. 96-159, § 31, at 199 (codified at FLA. STAT. § 120.65 (Supp. 1996)).

219. APA COMM’N REPORT, *supra* note 22, at 45-46.

220. *Id.* at 45.

221. *Id.*

222. *Id.*

223. Stengle & Rhea, *supra* note 2, at 415 (citing *Carter v. City of Stuart*, 468 So. 2d 955, 957 (Fla. 1985)).

224. *Id.* (citing *Smith v. State of Florida*, 537 So. 2d 982, 985 (Fla. 1989); *Foley v. State ex rel. Gordon*, 50 So. 2d 179, 184-85 (Fla. 1951)).

performs an integral role "in the development of public policy through the adoption of administrative rules."²²⁵

While rule adoption is a standard activity of modern agencies, rulemaking authority is not an inherent power of executive agencies.²²⁶ The Florida Legislature delegates to agencies the authority to adopt rules that implement, enforce, and interpret a statute through the adoption of enabling statutes.²²⁷ It has long been the case in Florida that the Legislature may not, in an enabling statute, provide agencies with unbridled authority to determine what the law is.²²⁸ A statutory delegation of rulemaking authority must declare the legislative policy or standard,²²⁹ be complete in itself,²³⁰ and limit the power delegated.²³¹

While constitutional limitations on delegations of rulemaking authority appear to require a degree of specificity, the realities of the legislative process, for numerous reasons, often result in the adoption of statutes that are less specific than may be desirable.²³²

Enacting laws that are as specific as administrative rules may cause an over-burdened legislature to become bogged down in quibbling over details not particularly suited to resolution by those constitutionally charged with crafting broad policies. Although the Legislature could draft legislation that is more specific, the Legislature has only a limited ability to anticipate the practical aspects of a regulatory

225. *Id.*

226. *Id.* (citing *Grove Isle, Ltd. v. Department of Env'tl. Reg.*, 454 So. 2d 571, 573 (Fla. 1st DCA 1984)); *see also* FLA. STAT. § 120.54(15) (1995).

227. *Id.* (citing *State v. Atlantic Coast Line R.R.*, 47 So. 969, 976 (Fla. 1909)); *see also* *Askew v. Cross Key Waterways*, 372 So. 2d 913, 920 (Fla. 1979).

228. *Id.* (citing *State ex rel. Davis v. Fowler*, 114 So. 435, 437 (Fla. 1927)); *see also* *Askew*, 372 So. 2d at 920.

229. *Id.* at 415-16 (citing *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 268 (Fla. 1991) (stating that the Legislature "can delegate functions so long as there are sufficient guidelines to assure that the legislative intent is clearly established and can be directly followed. . . . What the legislature *cannot* do is delegate its policy-making responsibility."); *see also* *State ex rel. Palm Beach Jockey Club v. Florida State Racing Comm'n*, 28 So. 2d 330, 335 (Fla. 1946)).

230. *Id.* (citing *Spencer v. Hunt*, 147 So. 282, 286 (Fla. 1933); *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200, 202 (Fla. 1st DCA 1975); *Lewis v. Florida State Bd. of Health*, 143 So. 2d 867, 875 (1st DCA 1962), *cert. denied*, 149 So. 2d 41 (Fla. 1963)).

231. *Id.* (citing *Permenter v. Younan*, 31 So. 2d 387, 389 (Fla. 1947); *Palm Beach Jockey Club*, 28 So. 2d at 335; *City Council of N. Miami Beach v. Trebor Constr. Corp.*, 254 So. 2d 51, 53 (3d DCA 1971), *cert. denied*, 260 So. 2d 514 (Fla. 1972); *Amara v. Town of Daytona Beach Shores*, 181 So. 2d 722, 724 (Fla. 1st DCA 1966)).

232. *Stengle & Rhea*, *supra* note 2, at 416.

program. The range and complexity of governmental regulatory activities often require more specialized training and expertise than one justifiably could expect of lawmakers and legislative staff. . . .²³³

While there are practical reasons that explain why statutes are not as specific as may be desirable, the lack of specificity in enabling statutes may, at times, result in the adoption of rules that do not adequately implement “legislative intent.”²³⁴ As a result, the Legislature, in CS/SBs 2290 and 2288, attempted to forge a stronger link between statutes and the rules that implement them.²³⁵ One method that was considered to help ensure adequate and clear legislative standards was to require legislative consideration of these items prior to adopting legislation.²³⁶

Originally, CS/SBs 2290 and 2288 would have required the Legislature, “[p]rior to the enactment of any general or special law, . . . to consider any agency rulemaking required by the legislation and determine whether the legislation provides adequate and appropriate standards and guidelines to direct the agency[]” when adopting rules.²³⁷ Nevertheless, even under this stricter, original provision, no general or special law could have been declared invalid for failure to comply with the provisions of the section.²³⁸

Legislative analysis of legislation requiring rules was supported by the Governor’s APA Review Commission, as well.²³⁹ The Commission recommended that “[s]taff analyses of bills prepared by legislative committees should identify sections of proposed legislation that require agency rulemaking and discuss whether the bill provides adequate and appropriate standards and guidelines to direct the agency’s implementation of the proposal.”²⁴⁰ The report further recommended the inclusion of agency comments in staff analyses.²⁴¹

As signed into law, the Act provided only a statement of intent “to consider the impact of any agency rulemaking required by proposed legislation and to determine whether the proposed legislation provides

233. *Id.*

234. *See, e.g., John’s Island Club*, 680 So. 2d at 477.

235. F. Scott Boyd, *Legislative Checks on Rulemaking Under the New APA*, 24 FLA. ST. U. L. REV. 309, 317-18 (1997).

236. 1996 Fla. Laws ch. 96-159, § 1.

237. CS/SBs 2290 & 2288, § 1 (First Engrossed).

238. *See id.*

239. APA COMM’N REPORT, *supra* note 22, at 17.

240. *Id.*

241. *Id.*

adequate and appropriate standards and guidelines to direct the agency's implementation of the legislation."²⁴² Consideration by the Legislature of the impact of agency rulemaking and whether proposed legislation provides the necessary rulemaking standards should help provide a better record for agencies to follow.²⁴³ These considerations should also provide agencies with the opportunity to advise the Legislature on whether the standards are clear or whether revisions need to be made to clarify legislative intent. However, no penalty is provided for failure to consider either the impact of the proposed legislation or whether adequate standards are explicated.²⁴⁴

While language establishing a statutory duty upon the Legislature to determine the impact of legislation on rulemaking ultimately did not pass, substitution of a statement of intent for this duty should not be interpreted as minimizing the need for legislative consideration of rulemaking prior to adoption of statutes. Instead, the change in the language was a result of operational considerations. During the 1996 Regular Session, the Legislature also passed House Bill 2669 which created, revised, and repealed numerous provisions relating to the operation of the Legislature.²⁴⁵ Substitution of intent language for statutory language imposing a duty upon the Legislature was consistent with the purpose of this bill and kept with the constitutional tenet that the Legislature has exclusive control over its operations and that imposition of duties of this sort would be better placed in the rules of each house than in statutes.²⁴⁶ It might be noted, however, that as of the date of this Article, neither house of the Legislature has adopted a rule requiring such consideration, nor has either house amended its analyses forms to ensure rulemaking considerations.

2. Amendments to the Duties and Powers of the JAPC

In addition to strengthening the ties between statutes and rules by encouraging legislative consideration of the impact of proposed legislation upon rulemaking, the revised Act attempts to improve legislative oversight by amending the duties and powers of the JAPC.²⁴⁷ Since its creation in 1974,²⁴⁸ the JAPC has played an im-

242. 1996 Fla. Laws ch. 96-159, § 1.

243. *John's Island Club*, 680 So. 2d at 476-78 (affirming the hearing officer's determination that a Department of Revenue rule was invalid in the absence of clear legislative intent that would validate the rule).

244. 1996 Fla. Laws ch. 96-159, § 1.

245. Fla. HB 2669 (1996).

246. *See Moffit v. Willis*, 459 So. 2d 1018, 1020-21 (Fla. 1984); FLA. CONST. art. II, § 3 (1968).

247. FLA. STAT. § 11.60 (Supp. 1996) (listing the JAPC's duties and powers).

portant role in the process of legislative oversight of agency rulemaking. The JAPC is required to examine all proposed administrative rules and is authorized to examine any existing rule.²⁴⁹ While the review of rules by the JAPC results in the establishment of a “legislative check on legislatively created authority,”²⁵⁰ the JAPC does not directly control agency rulemaking because agencies are not required to acquiesce to or act on the JAPC’s objections.²⁵¹

The revised Act imposes additional duties on the JAPC by requiring it to “[m]aintain a continuous review of the administrative rulemaking process, including a review of agency procedure and of complaints based on such . . . procedure.”²⁵² In order to assist agencies in the rule adoption process, the Act requires the JAPC to “[e]stablish measurement criteria to evaluate whether agencies are complying with the delegation of legislative authority in adopting and implementing rules.”²⁵³

The Act also requires the JAPC to “undertake and maintain a systematic and continuous review of statutes that authorize agencies to adopt rules. . . .”²⁵⁴ As part of this systematic review process, the JAPC must “make recommendations to the appropriate standing committees of the [Legislature] as to the advisability of considering changes to the delegated legislative authority to adopt rules in specific circumstances,”²⁵⁵ thereby encouraging legislative consideration of rulemaking standards and guidelines.²⁵⁶

Prior to the 1996 Act, section 11.60(2)(f) required the JAPC to file an annual report with the Legislature.²⁵⁷ This report now must contain

248. 1974 Fla. Laws ch. 74-310, § 2.

249. FLA. STAT. § 120.545(1) (Supp. 1996).

250. *Id.*

251. *Id.* § 120.545(10)(b)2.

252. 1996 Fla. Laws ch. 96-159, § 2, at 150 (codified at FLA. STAT. § 11.60(2)(1) (Supp. 1996)). The 1996 revision also retained the requirements in § 11.60(2)(a) that the JAPC “[m]aintain a continuous review of the statutory authority on which each [] rule is based” and in § 11.60(2)(b) that the JAPC “[m]aintain a continuous review of administrative rules.” While the JAPC’s duties of continuous review were expanded, its budget and staff were not increased.

253. 1996 Fla. Laws ch. 96-159, § 2, at 150 (codified at FLA. STAT. § 11.60(2)(m) (Supp. 1996)). This provision is identical to CS/CS/SB 536 (First Engrossed).

254. 1996 Fla. Laws ch. 96-159, § 2, at 150 (codified at FLA. STAT. § 11.60(4) (Supp. 1996)).

255. *Id.*

256. The requirement that the JAPC advise standing committees of the Legislature regarding the advisability of considering changes to delegated legislative authority for *existing* rules is a counterpart to the provisions in § 1, which provides that “[i]t is the intent of the Legislature to consider the impact of any agency rulemaking” which will result from proposed legislation.

257. FLA. STAT. § 11.60(2)(f) (1995).

additional information.²⁵⁸ Specifically, the JAPC must report how many times in the previous year it: (a) voted objections to rules; (b) voted to suspend rules; (c) filed administrative determinations on the invalidity of a proposed or existing rule; and (d) filed petitions for judicial review on the invalidity of a proposed or existing rule.²⁵⁹ The report also must include the outcome of any actions taken.²⁶⁰ Additionally, the annual report must “include a schedule for the required systematic review of existing statutes, a summary of the status of the review, and any recommendations provided to the standing committees during the preceding year.”²⁶¹

Prior to the adoption of the 1996 amendments, the JAPC had “standing to seek administrative and judicial review on behalf of the Legislature or the citizens . . . regarding the validity or invalidity of any administrative rule to which the committee has voted an objection and which has not been withdrawn, modified, repealed, or amended to meet the objection.”²⁶² If the JAPC decided to seek judicial review, it was required to notify the head of the agency involved and the Governor in order to provide an opportunity for agency consultation with the JAPC to attempt to resolve the dispute.²⁶³ The statute placed no time limit on the consultation period but instead provided that the agency and the Governor be allowed a “reasonable opportunity” to consult.²⁶⁴ The revised Act limits this consultation period to 60 days.²⁶⁵

Since the enactment of the provision authorizing the JAPC to seek administrative and judicial review of an agency rule, the JAPC has not sought such review. One reason that the JAPC has not brought actions seeking review is that agencies tend to comply with the JAPC’s recommendations regarding their rules.²⁶⁶ Additionally, procedural and constitutional issues have inhibited the JAPC from seeking administrative or judicial review. First, as both administrative and judicial review were authorized by section 11.60(2)(k), it was unclear in what forum the JAPC should bring an original action. Second, there was some concern

258. See 1996 Fla. Laws ch. 96-159, § 2, at 150 (codified at FLA. STAT. § 11.60(2)(f) (Supp. 1996)).

259. *Id.*

260. *Id.*

261. 1996 Fla. Laws ch. 96-159, § 2, at 150 (codified at FLA. STAT. § 11.60(4)).

262. FLA. STAT. § 11.60(2)(k) (1995).

263. *Id.*

264. *Id.*

265. 1996 Fla. Laws ch. 96-159, § 2, at 150 (codified at FLA. STAT. § 11.60(2)(k) (Supp. 1996)).

266. According to staff of the JAPC, during the ten-year period from 1982 to 1992, after each JAPC objection the agency either amended its proposed rule, or the Legislature enacted legislation clearly authorizing the rule objected to by the JAPC.

about a legislative committee bringing a challenge to a rule in an administrative forum, which is part of the executive branch. As amended, the Act's reference to standing to seek administrative review is deleted, thereby resolving the question about the proper form.²⁶⁷ However, given that agencies have tended to comply with the rule recommendations of the JAPC, it is unclear whether the JAPC will have the opportunity to use the amended provision.²⁶⁸

Based upon the amendments to the duties and powers of the JAPC, it appears that the Legislature intends to be more reliant upon the JAPC to oversee the implementation of statutes through rulemaking and that the Legislature expects greater interaction between the JAPC and standing legislative committees of each house.

3. Temporary Suspension of Rules

Rule suspension, one of the more popular as well as more controversial methods of improving legislative oversight of agency rulemaking, received a great deal of attention during the 1995 Regular Session. There was, however, very little debate over the concept in 1996. Nevertheless, as passed, the CS/SBs 2290 & 2288 contain the same rule suspension provision that was contained in CS/CS/SB 536 which passed in 1995.²⁶⁹

As it originally passed the Senate during the 1995 session, the CS/CS/SB 536 authorized the JAPC to suspend rules unilaterally, even though the constitutionality of this process was questioned during meetings of both the Florida Senate Select Committee on Governmental Reform and Oversight and the Committee on Rules and Calendar.²⁷⁰ Concerns about the rule suspension process revolved around at least three issues. First, temporary suspension of a proposed rule by the JAPC pending a vote of the full Legislature to sustain or overrule the suspension could be an impingement on the power of the Governor to execute the laws.²⁷¹ Because the Legislature meets in regular session for only two months during the year,²⁷² a proposed rule could be

267. 1996 Fla. Laws ch. 96-159, § 2, at 150 (codified at FLA. STAT. § 11.60(2)(k) (Supp. 1996)).

268. *See supra* note 266.

269. *Compare* 1996 Fla. Laws ch. 96-159, § 14, at 177 (codified at FLA. STAT. § 120.545(10)(b) (Supp. 1996)) *with* CS/CS/SB 536, § 9 (1995).

270. *See* CS/CS/SB 536, § 9 (1995). The bill was heard in the Florida Senate Select Committee on Governmental Reform and Oversight on February 22, 1995 and in the Senate Committee on Rules and Calendar on March 9, 1995. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 68, SB 536.

271. *See* FLA. CONST. art. IV, § 1(a) (1968).

272. FLA. CONST. art. III, § 3(b), (d).

suspended for as much as a year, thereby effectively preventing an agency from performing regulatory duties.²⁷³

Second, permitting the JAPC to act unilaterally to suspend a proposed rule might be determined to deliver the entire legislative power into the hands of a few members of the Legislature, and as such, could be an invalid delegation of legislative power.²⁷⁴ Finally, giving the JAPC the authority to determine legislative intent and the power to temporarily suspend a rule based on its interpretation of that legislative intent could be an encroachment on the power of the judiciary to interpret the law.²⁷⁵ Ultimately, the provisions of CS/CS/SB 536, which were included in CS/SBs 2290 and 2288, avoided these three areas of concern by providing a “voluntary” rule suspension process.²⁷⁶

Under the voluntary rule suspension process now contained in the APA, if the JAPC votes an objection to a proposed or existing rule, and the “agency fails to initiate administrative action to modify, amend, withdraw, or repeal the rule consistent with the objection within 60 days after the objection, or thereafter fails to proceed in good faith to complete such action, the [JAPC] may submit to the President of the Senate and the Speaker of the House . . . a recommendation that legislation be introduced to modify or suspend the adoption of the proposed rule, or amend or repeal the rule. . . .”²⁷⁷ While the JAPC may request that an agency voluntarily suspend the operation of an existing rule or suspend the adoption of the proposed rule pending consideration of proposed legislation on the rule, the Act does not require an agency to suspend the adoption of a proposed rule or the

273. The Kentucky Supreme Court held a similar rule suspension process to be unconstitutional. *See* Legislative Research Comm’n v. Brown, 664 S.W.2d 907 (Ky. 1984) (stating, “The power to suspend a regulation’s effective date . . . is the power to effectively prevent a regulation from having the force of law”).

274. *Id.* at 915; Opinion of the Justices, 431 A.2d 783, 788 (N.H. 1981).

275. *See* FLA. CONST. art. II, § 3 (1968) (dividing the powers of state government into three branches and prohibiting one branch from exercising any power of another branch unless expressly provided for in the Florida Constitution). Section 20.02(1) (1995) elucidates the explicit separation of powers and declares the state policy regarding it. Unless otherwise constitutionally provided, only the Legislature can exercise the legislative power, only the Governor or executive agencies can exercise the executive power, and only the courts can exercise the judicial power. *Atlantic Coast*, 47 So. at 974.

276. 1996 Fla. Laws ch. 96-159, § 14, at 176-77 (codified at FLA. STAT. § 120.545(10) (Supp. 1996)).

277. 1996 Fla. Laws ch. 96-159, § 14, at 176-77 (codified at FLA. STAT. § 120.545(10)(a) (Supp. 1996)).

operation of an existing rule.²⁷⁸ No penalty for refusing to comply with a request to suspend is provided under the Act.

If the JAPC votes to recommend the introduction of legislation to modify or suspend a rule, the JAPC must certify this fact to the promulgating agency within five days of the determination.²⁷⁹ Two options are available to the agency after receipt of this certification. An agency may “[t]emporarily suspend the [existing] rule or suspend the adoption of the proposed rule,” or it may advise the JAPC “in writing that it refuses to temporarily suspend the [existing] rule or suspend the adoption of the proposed rule.”²⁸⁰ The statute provides timeframes by which the agency must respond depending upon the type of agency head. If the agency is headed by a single individual, the agency must respond within thirty days after receipt of the certification.²⁸¹ An agency headed by a collegial body has forty-five days after receipt of the certification to suspend or notify the JAPC of its refusal to suspend.²⁸² Failure of the agency to respond to agency certification within the timeframes provided constitutes a refusal to suspend.²⁸³

If the agency agrees to temporarily suspend, it must give notice of the suspension in the *Florida Administrative Weekly*.²⁸⁴ The suspension is effective upon publication of the notice.²⁸⁵ An agency is not permitted to “base any agency action on a suspended rule or suspended proposed rule prior to expiration of the suspension,” but “[a] suspended rule or suspended proposed rule continues to be subject to administrative determination and judicial review as provided by law.”²⁸⁶

The JAPC is required to “prepare bills to modify or suspend the adoption of the proposed rule or amend or repeal the rule . . . for prefilng and introduction in the next regular session of the Legislature.”²⁸⁷ Where rule promulgation begins during a regular legislative session, and the proposed rule is temporarily suspended, a proposed rule could remain “in limbo” for a year or more, depending upon when the suspension process begins and when the Legislature finally acts upon the

278. See 1996 Fla. Laws ch. 96-159, § 14, at 176-77 (codified at FLA. STAT. § 120.545(10)(b) (Supp. 1996)).

279. *Id.*

280. 1996 Fla. Laws ch. 96-159, § 14, at 177 (codified at FLA. STAT. § 120.545(10)(b)2. (Supp. 1996)).

281. *Id.*

282. *Id.*

283. *Id.* (codified at FLA. STAT. § 120.545(10)(b)4. (Supp. 1996)).

284. *Id.* (codified at FLA. STAT. § 120.545(10)(b)3. (Supp. 1996)).

285. *Id.*

286. *Id.*

287. *Id.* (codified at FLA. STAT. § 120.545(10)(c) (Supp. 1996)).

bill. Thus, the rule suspension process could substantially delay implementation of a rule.

The JAPC is not authorized to file the bill for introduction in either house of the Legislature. It is only authorized to present the bill to the Senate President and the Speaker of the House with the committee's recommendation.²⁸⁸ Neither the President nor the Speaker is specifically required by the text of the statute to file the bill for introduction.²⁸⁹ Furthermore, the statute is silent as to the person who is to file the bill for introduction.²⁹⁰ Though not made specific by statute, individual members of the JAPC, who are either Senators or Representatives, could file legislation that is reflective of the JAPC position on the rule.²⁹¹ Other interested members of the Legislature who do not sit on the JAPC also could decide that they wish to sponsor such legislation.²⁹²

The length and impact of a temporary rule suspension are contingent upon legislative and executive action. If a bill to suspend a proposed rule passes both houses of the Legislature and is signed into law by the Governor, "the proposed rule is suspended until specific delegated legislative authority for [it] has been enacted."²⁹³ If a bill to suspend a proposed rule does not become law, either because it does not pass one or both houses of the Legislature or due to gubernatorial veto, "any temporary agency suspension of the rule [will] expire."²⁹⁴ However, "[i]f a bill to modify a proposed rule or amend a rule is enacted into law, the suspension shall expire upon publication of notice of modification or amendment in the *Florida Administrative Weekly*."²⁹⁵ "If a bill to repeal a rule is enacted into law, the suspension [will] remain in effect until notification of repeal of the rule is published in the *Florida Administrative Weekly*."²⁹⁶ The Act does not specifically state who is responsible for providing this notice or impose time limits for providing notice.²⁹⁷

The Department of State is required to publish final legislative action in the next issue of the *Florida Administrative Weekly*, which presum-

288. *Id.*

289. *See id.*

290. *See id.*

291. *See* Fla. S. Rule 3.12 (1994-1996) (providing that Senators or committees may file bills for introduction); Fla. H.R. Rule 7.14 (1994/1996) (providing that Representatives or committees may file bills for introduction).

292. *See supra* note 291.

293. 1996 Fla. Laws ch. 96-159, § 14, at 177 (codified at FLA. STAT. § 120.545(10)(d) (Supp. 1996)).

294. *Id.*

295. *Id.*

296. *Id.*

297. *See id.*

ably includes information on whether the Governor signs or vetoes the rule suspension or modification bill.²⁹⁸ If a bill to modify or suspend the adoption of a proposed rule or amend or repeal a rule is enacted into law, the department must make the rule conform “to the provisions of the law in the Florida Administrative Code and publish a reference to the law as a history note to the rule.”²⁹⁹

The impact of suspending a rule that already has been adopted is obviously different from the impact of suspending a proposed rule. In the former case, longstanding interpretations of a statute used by an agency for enforcement purposes would be affected, and procedures through which an agency performs its other duties would be disrupted. Conversely, with suspension of the adoption of a proposed rule, there is less likelihood of disruption of agency processes, as well as less confusion about what standards apply. From a process orientation, therefore, limiting rule suspension to proposed rules would be preferable.

The JAPC, however, may come under some pressure to review existing rules and to request their suspension. As the JAPC is required to review promulgated rules continuously,³⁰⁰ individuals who are dissatisfied with existing agency rules may be able to challenge them under the new rule suspension process by obtaining JAPC review and suspension. Because agencies can refuse a JAPC suspension request, suspension under this scenario may be unlikely, though the politically astute possibly could use the process to their advantage.

It is unlikely that the JAPC will need to use the rule suspension process very often. A review of the objections to rules made by JAPC shows that agencies consistently amend their rules to comply with JAPC objections, thereby obviating the need for suspending rules or proposed rules in most instances.³⁰¹ Nevertheless, the potential threat of rule suspension could provide the JAPC with increased leverage to coerce an agency to modify its rules, thereby improving legislative oversight.³⁰² The JAPC’s power to coerce by rule suspension, however, is limited because the Act provides no penalty for failure to agree to a JAPC request to suspend.³⁰³ Even so, specific statutory penalties may not be

298. 1996 Fla. Laws ch. 96-159, § 14, at 178 (codified at FLA. STAT. § 120.545(10)(e) (Supp. 1996)).

299. *Id.*

300. 1996 Fla. Laws ch. 96-159, § 2, at 150 (codified at FLA. STAT. § 11.60(2)(b) (Supp. 1996)).

301. *See supra* note 266.

302. Stengle & Rhea, *supra* note 2, at 425.

303. *See* 1996 Fla. Laws ch. 96-159, § 14, at 176-77 (codified at FLA. STAT. § 120.545(10) (Supp. 1996)).

required to influence an agency's position on a rule. The request for rule suspension by the JAPC, in and of itself, could result in the exertion of additional pressure upon an agency head by the Legislature, its individual members, or the Governor, to comply with the JAPC objection. This is particularly true if requests for rule suspension are rare. If the process is reserved for special cases, the power will appear more significant and is likely to be more visible as a result. Thus, it is in the judicious use of the rule suspension process that the JAPC's greatest power lies.

4. Rule Uniformity and Simplification

In order to reduce the number of rules, the Legislature required the use of uniform rules of procedure.³⁰⁴ It also required the use of other types of uniform rules.³⁰⁵ In addition, the Legislature encouraged agencies to adopt rules that are in "readable language."³⁰⁶

a. Uniform Rules of Procedure

One method of reducing the absolute number of rules is by requiring the use of uniform rules.³⁰⁷ Under the previous provisions of the APA, the Administration Commission was required to promulgate one or more sets of model rules of procedure.³⁰⁸ The model rules of procedure were the rules of procedure for agencies to the extent that each agency did "not adopt a specific rule of procedure covering the subject matter contained in the model rules applicable to that agency."³⁰⁹ As agencies

304. See 1996 Fla. Laws ch. 96-159, § 10, at 167-69 (codified at FLA. STAT. § 120.54(5) (Supp. 1996)).

305. See *id.*

306. 1996 Fla. Laws ch. 96-159, § 10, at 162 (codified at FLA. STAT. § 120.54(2)(b) (Supp. 1996)).

307. The Administrative Law Section of The Florida Bar worked on revisions to the model rules of procedure for a number of years prior to the changes required by CS/SBs 2290 and 2288. In 1992, the Section created a work group for the purpose of completely revising the model rules. The Section submitted a draft to the Governor's Office of Planning and Budgeting (OPB), which serves as staff to the Administration Commission, in 1993. The OPB worked with agency attorneys, revised the proposed draft, and conducted a public workshop on the draft rules. Because there was a legislative proposal to change the model rules to uniform rules, the revision effort was abandoned pending passage of this legislation. Steve Pfeiffer, *Uniform Rules of Procedure*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Oct. 1996, at 3.

308. FLA. STAT. § 120.54(10) (1995). The Administrative Commission adopted one set of model rules of procedure which were codified in the Florida Administrative Code Chapter 28.

309. *Id.* § 120.54(10). The model rules were "not designed to preempt individual agency rules of description, practice, and procedure. Essentially the model rules perform two functions. They establish standards against which agency rules are measured for substantial compliance. In addition, the model rules serve as gap fillers. If an agency has no rule at all or if the model

were permitted to adopt their own rules of procedure, many did.³¹⁰ With the numerous agency procedural rules came a variety of standards and possibility of confusion and error because of a lack of uniformity.³¹¹

Under the revised Act, the language authorizing agencies to adopt their own specific rules of procedure has been eliminated.³¹² Instead, the Administration Commission is required to adopt uniform rules of procedure³¹³ by July 1, 1997.³¹⁴ Agencies are required to comply with

rules address an area not covered by the agency's rules, the model rules prevail." Florida Administrative Practice, 2-26, Feb. 1995.

310. For example, the Department of Environmental Protection (formerly the Department of Environmental Regulation) devoted an entire chapter to procedural rules. See FLA. ADMIN. CODE ANN. ch. 62-103 (1996). Many of these rules have been repealed subsequently, but rule 62-103.010, still provides:

Proceedings determining the substantial interests of a person, except rulemaking proceedings, under statutes which the Department is required to implement, shall be pursuant to Section 120.57, Florida Statutes, Chapter 62-103 and Chapter 28-5, F.A.C., as amended, except for proceedings for which another specific rule has been promulgated.

In addition, rule 62-103.510 provides a good example of how agency procedural rules differ from the model rules. The Department's rule on Declaratory Statements provides additional requirements for the filing of a petition that the model rules do not require. See FLA. ADMIN. CODE ANN. r. 62-103.510(2)(d), (e), (f) (1996).

311. See Pfeiffer, *supra* note 307. Pfeiffer notes:

The failure of the model rules to establish uniformity created opportunities for small groups of lawyers and other practitioners to specialize in representing clients before single agencies. This opportunity has in many respects been based not on substantive expertise, but rather on knowledge of unique procedures. Even the most mundane aspects of practice could be buried in long paragraphs. For example, learning an agency's peculiar notion of the appropriate time limit for filing exceptions to recommended orders could be tricky, and dangerous if missed. It was becoming too hopelessly complicated for an attorney who had not developed expertise in the way individual agencies did business to represent clients before them. It was too easy to make a devastating mistake. Once adopted, the uniform rules will help change that. . . .

Id. at 3-4.

312. Compare 1996 Fla. Laws ch. 96-159, § 10, at 167 (codified at FLA. STAT. § 120.54(5) (Supp. 1996)) with FLA. STAT. § 120.54(10) (1995).

313. The Administrative Law Section of The Florida Bar established a uniform rules committee for the purpose of drafting proposed uniform rules of procedure for submission to the Administration Commission. See Pfeiffer, *supra* note 307, at 1.

314. 1996 Fla. Laws ch. 96-159, § 10, at 167 (codified at FLA. STAT. § 120.54(5)(a)1. (Supp. 1996)).

the uniform rules by July 1, 1998.³¹⁵ The uniform rules, like the model rules, must provide “procedures for conducting public meetings, hearings, and workshops, and for taking evidence, testimony, and argument”³¹⁶ the rules must provide procedures for these items whether occurring in person or by means of “communication media technology.”³¹⁷ In addition, the uniform rules must provide a procedure for granting or denying a waiver or variance to a rule.³¹⁸

On filing with the Department of State, “the uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency. . . .”³¹⁹ In order to obtain an exception, an agency must file a petition with the Administration Commission.³²⁰ Such exceptions must be approved “to the extent necessary to implement other statutes, . . . to conform to any requirement imposed as a condition precedent to receipt of federal funds or to permit persons . . . to receive tax benefits under federal law, or as required for the most efficient operation of the agency as determined by the Administration Commission.”³²¹ An agency may not file with the Department of State a rule that provides an exception to the uniform rules of procedure prior to approval by the Administration Commission.³²² Furthermore, in order to assist the public and attorneys in locating exceptions to the uniform rules of procedure, exceptions must be published in a separate chapter in the FAC “that delineates clearly the provisions of the agency’s rules that provide exceptions to the

315. *Id.*

316. 1996 Fla. Laws ch. 96-159, § 10, at 168 (codified at FLA. STAT. § 120.54(5)(b) (Supp. 1996)).

317. FLA. STAT. § 120.54(5)(b)2. (Supp. 1996). “ [C]ommunication media technology’ is defined to mean ‘the electronic transmission of printed matter, audio, full-motion video, freeze-frame video, compressed video, and digital video by any method available.’ ” *Id.* “If a public meeting, hearing, or workshop is to be conducted by means of communications media technology, or if attendance may be provided by such means, the notice [must] so state.” *Id.* Where communications media technology is used, the notice must “state how persons interested in attending may do so and [must] name locations, if any, where communications media technology will be available.” *Id.*

318. 1996 Fla. Laws ch. 96-159, § 10, at 169 (codified at FLA. STAT. § 120.54(5)(b)6. (Supp. 1996)).

319. 1996 Fla. Laws ch. 96-159, § 10, at 167 (codified at FLA. STAT. § 120.54(5)(a)1. (Supp. 1996)).

320. 1996 Fla. Laws ch. 96-159, § 10, at 168 (codified at FLA. STAT. § 120.54(5)(a)2. (Supp. 1996)).

321. *Id.*

322. 1996 Fla. Laws ch. 96-159, § 10, at 168 (codified at FLA. STAT. § 120.54(5)(a)3. (Supp. 1996)).

uniform rules and specifies each alternative chosen from among those authorized by the uniform rules.”³²³

b. Other Uniform Rules

While uniform rules of procedure are now required by the Act,³²⁴ the Legislature also required the adoption of other uniform rules in the 1996 Regular Legislative Session. The CS/SBs 1626 and 1654³²⁵ attempts to reduce the number of administrative rules by providing for the creation, where practical, of uniform rules that each agency must follow, while authorizing exceptions where necessary.³²⁶ Uniform personnel rules,³²⁷ uniform selective service system registration administration rules,³²⁸ uniform rules regarding appointments and promotions³²⁹ and use of volunteers,³³⁰ uniform sexual harassment rules,³³¹ uniform design-build contracts,³³² and uniform leasing procedures³³³ are now required. Exceptions are authorized, but approval must be obtained prior to rule adoption.³³⁴

323. *Id.*

324. 1996 Fla. Laws ch. 96-159, § 10, at 167 (codified at FLA. STAT. § 120.54(5) (Supp. 1996)).

325. CS/SBs 1626 & 1654 by the Florida Senate Select Committee on Governmental Reform and Oversight. 1996 Fla. Laws ch. 96-399, at 2565 (codified at FLA. STAT. § 110 (Supp. 1996)).

326. *Id.* The bill analysis for CS/SBs 1626 and 1654 states that “[t]he committee substitute seeks to resolve problems which were identified during the rule review initiative instituted by the Senate President during the interim. The problems that were identified were: (A) a lack of regular review of rules by agencies; (B) inefficient rules; (C) lack of rule coordination; (D) excess numbers of rules; and (E) rule inflexibility.” Fla. S. Select Comm. on Govtl. Reform & Oversight, CS/SBs 1626 & 1654 (1996) Staff Analysis 5 (Mar. 21, 1996). The bill analysis also indicates that the bill was intended “to improve agency rules by requiring agencies to perform an annual review of rules and by . . . [reporting to] the Legislature. Additionally, intent for the annual review was to improve agency efficiency by requiring agencies to coordinate their rules . . . [and] to decrease costs and reduce paperwork for . . . [agencies] and the private sector.” *Id.*

327. 1996 Fla. Laws ch. 96-399, § 39, at 2585 (amending FLA. STAT. § 110.201).

328. 1996 Fla. Laws ch. 96-399, § 38, at 2585 (amending FLA. STAT. § 110.1128).

329. 1996 Fla. Laws ch. 96-399, § 41, at 2587 (amending FLA. STAT. § 110.217).

330. 1996 Fla. Laws ch. 96-399, § 42, at 2588 (amending FLA. STAT. § 110.503).

331. 1996 Fla. Laws ch. 96-399, § 40, at 2587 (amending FLA. STAT. § 110.1221).

332. 1996 Fla. Laws ch. 96-399, § 45, at 2589 (amending FLA. STAT. § 287.055).

333. 1996 Fla. Laws ch. 96-399, § 44, at 2588 (amending FLA. STAT. § 255.25).

334. *See, e.g.*, 1996 Fla. Laws ch. 96-399, § 39, at 2586 (creating FLA. STAT. § 110.201(1)(b) (Supp. 1996)).

c. Simplified Rules

The concept of a simplified APA is extended by the Act to the rules themselves. The Act encourages agencies to draft rules in “readable language.”³³⁵ A rule is drafted in “readable language” if it avoids the use of: (1) “obscure words and unnecessarily long or complicated constructions; and [(2)] unnecessary technical or specialized language that is understood only by members of particular trades or professions.”³³⁶ As the section is not mandatory, no penalty is provided for failure to comply with its provisions.³³⁷

In some instances, it will be impossible to draft rules that meet the standard. Technical language is likely to remain, especially when the rules regulate complex, specialized areas. Nevertheless, the issue of “readable” rules was of importance to legislators. Many rules could be improved by adhering to the standard. Compliance with the standard is not mandatory and no penalty is provided,³³⁸ however, the provision only will be effective if the agencies police themselves to comply with the standard.

5. Section 120.535

As outlined in the introduction, one of the major concerns of the Legislature has been the extent of agency use of nonrule policy; the Legislature desires that statutory directives be implemented by policies that are adopted as rules as soon as feasible and practicable.³³⁹ Conversely, a primary concern of the executive has been the need for agency flexibility in the execution of laws.³⁴⁰ The clash of these two needs resulted in the veto of the CS/CS/SB 536.³⁴¹

The Governor’s Administrative Procedure Act Review Commission helped to resolve the impasse between these two positions. The Commission concluded that, “rules in and of themselves are not the problem; rather, problems surround the overly rigid rules adopted by some agencies.”³⁴² The Commission determined that published rules help to inform the public of agency policies, as well as to provide

335. 1996 Fla. Laws ch. 96-159, § 10, at 162 (codified at FLA. STAT. § 120.54(2)(b) (Supp. 1996)).

336. *Id.*

337. *Id.*

338. *Id.*

339. 1991 Fla. Laws ch. 91-30.

340. See Inaugural Address, *supra* note 50, at A11.

341. Letter from Gov. Lawton Chiles to Secretary of State Sandra Mortham (July 12, 1995) announcing the veto of CS/CS/SB 536.

342. APA COMM’N REPORT, *supra* note 22, at 19.

certainty to the regulated community.³⁴³ The Commission thereafter recommended that the rulemaking requirements of section 120.535 be retained,³⁴⁴ but that agencies be authorized to grant waivers and variances to the rules.³⁴⁵

Section 120.535 is repealed by the Act, but its requirements have been retained and incorporated in sections 120.54, 120.56, and 120.595. "Rulemaking still is not a matter of agency discretion."³⁴⁶ Each agency statement that is defined as a rule under the APA must be adopted as soon as feasible³⁴⁷ and practicable.³⁴⁸

While the provisions of section 120.535 essentially remain the same, there are a few differences. First, if an agency statement is challenged as a violation of section 120.54(1)(a),³⁴⁹ Florida Statutes,³⁵⁰ an agen-

343. *Id.* at 2.

344. *Id.* at 6-7.

345. *Id.* at 9-15.

346. 1996 Fla. Laws ch. 96-159, § 10, at 160 (codified at FLA. STAT. § 120.54(1)(a) (Supp. 1996)).

347. Under current statute, as well as the committee substitute, rulemaking is presumed feasible unless the agency proves that: (a) the "agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; [(b)] [r]elated matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or [(c)] [t]he agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement." *Id.*

348. *Id.* Currently, as well as under the bill, rulemaking is presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that: (a) "detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or . . . [(b)] [t]he particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances." *Id.*

349. FLA. STAT. § 120.54(1)(a) (Supp. 1996) provides:

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

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

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

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

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

c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable

cy may continue to rely on that statement if, *prior to the entry of a final order*, the agency publishes a notice of rulemaking which “address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement.”³⁵¹

Second, if an administrative law judge enters a final order that all or part of an agency statement violates section 120.54(1)(a), the administrative law judge *is required* to award petitioner reasonable costs and attorney fees.³⁵² This change was enacted to meet the criticism that the attorney fee provisions in former section 120.535, were too weak to be meaningful.³⁵³ It should be emphasized, however, that an agency can avoid the award of attorney fees and costs if it proceeds in good faith to adopt the statement as a rule before the entry of an adverse final order by the administrative law judge.³⁵⁴

6. Section 120.536

Though the Legislature reaffirmed the standard that agency policies must be adopted as rules by retaining the requirements of section 120.535,³⁵⁵ it nevertheless enacted rulemaking restrictions which limit the bases of rulemaking authority.³⁵⁶ These rulemaking restrictions are provided in the definition of “ ‘[i]nvalid exercise of delegated statutory

principles, criteria, or standards for agency decisions unless the agency proves that:

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

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

Id.

350. Formerly FLA. STAT. § 120.535(1) (1995).

351. FLA. STAT. § 120.56(4)(e) (Supp. 1996).

352. FLA. STAT. § 120.595(4)(a) (Supp. 1996).

353. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., tape recording of proceedings (Oct. 9, 1995) (on file with the Comm.) (testimony of Stephen T. Maher, G. Steven Pfeiffer, and William L. Hyde concerning the ramifications of § 120.535).

354. FLA. STAT. § 120.54(1)(a)1.c. (Supp. 1996).

355. These provisions are now codified in FLA. STAT. §§ 120.54(1), .56(4) & .595(4) (Supp. 1996).

356. The adopted restrictions had been in various Senate Bills since 1994. *See* CS/SB 1440 by the Committee on Rules & Calendar and Senator Williams (1994 Regular Session) and CS/CS/SB 536 by the Committee on Rules & Calendar, the Florida Senate Select Committee on Governmental Reform and Oversight, and Senator Williams (1995 Regular Session).

authority'³⁵⁷ and reiterated in subsection (1) of section 9.³⁵⁸ The restrictions provide that

[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.³⁵⁹

When the Legislature adopted the APA in 1974, it permitted challenges to a proposed or existing rule on the basis that a rule was an invalid exercise of delegated legislative authority.³⁶⁰ The Legislature

357. 1996 Fla. Laws ch. 96-159, § 3, at 151 (codified at FLA. STAT. § 120.52(8) (Supp. 1996)).

358. 1996 Fla. Laws ch. 96-159, § 9, at 159 (codified at FLA. STAT. §120.536) (Supp. 1996)).

359. *Id.*

360. 1974 Fla. Laws ch. 74, at 310 (codified at FLA. STAT. § 120.54 (Supp. 1974)). FLA. STAT. § 120.54(3) (Supp. 1974), provided that:

If the proposed rule contains any provision not relating exclusively to organization, practice or procedure, then any substantially affected person may seek an administrative determination of the validity of the proposed rule on the following grounds: that the proposed rule is an invalid exercise of validly delegated legislative authority; or, that the proposed rule is an exercise of invalidly delegated legislative authority.

Id.; FLA. STAT. § 120.56(2) (Supp. 1974), also provided:

Any person substantially affected by a rule may seek an administrative determination of the [invalidity] of the rule on the ground:

- (a) That the rule is an invalid exercise of validly delegated legislative authority.
- (b) That the rule is an exercise of invalidly delegated legislative authority.

Id.; 1975 Fla. Laws ch. 191 reorganized these provisions and 1976 Fla. Laws ch. 131, sec. 3, amended subsection FLA. STAT. § 120.54(3) as follows:

did not specifically define an “[i]nvalid exercise of delegated legislative authority” until 1987,³⁶¹ thereby giving the courts much leeway to interpret the term.³⁶² The courts used a variety of standards to determine rule invalidity,³⁶³ but agencies were determined to have “wide discretion in the exercise of their lawful rulemaking authority, clearly conferred or fairly implied and consistent with the agencies’ general statutory duties.”³⁶⁴ The authority of an agency to adopt rules could be “fairly implied” from several statutory sections when coupled with the authority to adopt such rules as the agency deems necessary to effectively administer and enforce the law, consistent with the legislative intent.³⁶⁵

While the judiciary utilized numerous standards to determine rule validity, two judicial standards were dominant.³⁶⁶ The first, that a rule cannot enlarge, modify, or contravene the provisions of statute,³⁶⁷ was a more restrictive standard.³⁶⁸ The second standard, that a rule would be upheld if it was reasonably related to the purposes of the enabling legislation and was not arbitrary and capricious, was less restrictive.³⁶⁹

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- (3)(a) Any substantially affected person may seek an administrative determination of the validity ~~[invalidity]~~ of any proposed rule ~~which contains any provision not relating exclusively to organization, practice, or procedure~~ on the ground:
1. that the proposed rule is an invalid exercise of ~~validly~~ delegated legislative authority.
 2. ~~That the proposed rule is an exercise of invalidly delegated legislative authority.~~

Id. (emphasis added); and 1976 Fla. Laws ch. 131, § 6, amended FLA. STAT. § 120.56(1), as follows:

- (1) Any person substantially affected by a rule may seek an administrative determination of the validity ~~invalidity~~ of the rule on the ground:
- (a) that the rule is an invalid exercise of ~~validly~~ delegated legislative authority.
 - (b) ~~That the rule is an exercise of invalidly delegated legislative authority.~~

Id.

361. See *infra* note 372 and accompanying text.

362. See *infra* note 366 and accompanying text.

363. Boyd, *supra* note 13, at 313-14 nn.25-35 and accompanying text.

364. Department of Prof. Reg., Bd. of Med. Exam'rs v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984).

365. General Motors Corp. v. Florida Dep't of Highway Safety & Motor Vehicles, 625 So. 2d 76 (Fla. 1st DCA 1993).

366. Boyd, *supra* note 13, at 320.

367. Department of Bus. Reg. v. Salvation Ltd., 452 So. 2d 65, 66 (Fla. 1st DCA 1984).

368. Boyd, *supra* note 13, at 320.

369. *Id.*

In 1987, after a review of the caselaw, the Legislature enacted Committee Substitute for Senate Bill 608,³⁷⁰ which defined the term “invalid exercise of delegated legislative authority”³⁷¹ as agency action that “goes beyond the powers, functions, and duties delegated by the Legislature.”³⁷² The criteria set forth in the definition of an invalid exercise of delegated legislative authority codified standards enunciated in various cases,³⁷³ including the standard that a rule could not enlarge, modify, or contravene the enabling statute.³⁷⁴ The Legislature included in the criteria of the definition a portion of the second standard by prohibiting rules that were arbitrary and capricious.³⁷⁵ The Legislature, however, did not codify in the criteria of the definition the first portion of that standard which authorized rules if they were “reasonably related to the purpose of the enabling statute.”³⁷⁶

Codification of the definition of “invalid exercise of delegated legislative authority” was recognized in *Adam Smith v. State Department of Environmental Regulation*.³⁷⁷ Nevertheless, use of the standard continued. The First District Court of Appeal thereafter held that if a rule has been adopted through the rulemaking proceedings, it would “be upheld if it was reasonably related to the legislative purpose and is not arbitrary or capricious.”³⁷⁸

370. CS/SB 608. By the Senate Committee on Governmental Operations and Senator W.D. Childers, Dem., Pensacola. 1987 Fla. Laws ch. 87-385. See House Committee on Governmental Operations, Staff Analysis of Proposed Amendments to FLA. STAT. ch. 120, for HB 710 & SB 608 (1987).

371. FLA. STAT. § 120.52(8) (Supp. 1996).

372. *Id.*

373. Other criteria in the definition of an invalid exercise of delegated legislative authority to be used to determine if a rule was invalid were if the agency: (a) materially failed to follow the applicable rulemaking procedures; see *Florida State Univ. v. Dann*, 400 So. 2d 1304, 1305 (Fla. 1st DCA 1981); (b) exceeded its grant of rulemaking authority; see *4245 Corp. v. Division of Beverage*, 371 So. 2d 1032, 1033 (Fla. 1st DCA 1978); and (c) adopted a rule that was impermissibly vague, failed to establish adequate standards for agency decisions, or vested unbridled discretion in the agency; see *Barrow v. Holland*, 125 So. 2d 749, 752 (Fla. 1960).

374. FLA. STAT. § 120.52(8)(c) (Supp. 1996); cf. *Grove Isle, Ltd. v. State Dep’t of Env’tl. Reg.*, 454 So. 2d 571, 573 (Fla. 1st DCA 1984).

375. *Agrico*, 365 So. 2d at 759.

376. *Id.*

377. *Adam Smith*, 553 So. 2d at 1266. The phrase “invalid exercise of delegated legislative authority,” as used in chapter 120, is now statutorily defined. 1987 Fla. Laws ch. 87-385, § 2, at 2318, amended § 120.52 by adding a subsection defining “invalid exercise of delegated legislative authority.” *Adam Smith*, 553 So. 2d at 1266.

378. *Pershing Indus. Inc. v. Department of Banking & Fin.*, 591 So. 2d 991, 993 (Fla. 1st DCA 1991) (citing *Durrani*, 455 So. 2d at 517); *Department of Labor & Employment Sec. v. Bradley*, 636 So. 2d 802, 807 (Fla. 1st DCA 1994).

The restrictive statutory standard of section 120.536(1) seems to be a clear legislative rejection of broad judicial rule review criteria for determining whether a rule is valid.³⁷⁹ The first sentence clarifies that not only must agencies have the general authority to adopt rules,³⁸⁰ but the rules that they adopt must relate to a specific law that is being implemented.³⁸¹ The second sentence authorizes “only rules that implement, interpret, or make specific the particular powers and duties,”³⁸² reiterates a requirement that has been in the APA since 1975.³⁸³ The third sentence further restricts agency rulemaking by prohibiting rules that implement statutory provisions which set forth general legislative intent or policy.³⁸⁴

The third sentence of the section also bolsters changes to the statutory definition of “invalid exercise of delegated legislative authority” which were enacted in 1987³⁸⁵ and overrules the line of cases that uphold agency rules if they are “reasonably related to the purpose of the enabling legislation and the rule is not arbitrary or capri-

379. FLA. STAT. § 120.536(1) (Supp. 1996).

380. *Id.* (providing that agencies do not have inherent rulemaking authority); *see also* Department of Bus. Reg. v. Salvation Ltd., 452 So. 2d 65, 66 (Fla. 1st DCA 1984) (for discussion that a rule cannot enlarge, modify or contravene provisions of statute).

381. 1996 Fla. Laws ch. 96-159, § 9, at 159 (codified at FLA. STAT. § 120.536(1) (Supp. 1996)); *see also* Board of Trustees v. Board of Prof'l Land Surveyors, 566 So. 2d 1358, 1360 (Fla. 1st DCA 1990), where the court held:

All rulemaking authority delegated to administrative agencies is of course limited by the statute conferring the power. *Department of Professional Regulation v. Florida Society of Professional Land Surveyors*, 475 So. 2d 939, 942 (Fla. 1st DCA 1985). According to section 120.52, Florida Statutes, a proposed rule is an invalid exercise of delegated legislative authority if it “goes beyond the powers, functions, and duties delegated by the Legislature.” If the agency has exceeded its grant of rulemaking authority, or if the rule enlarges, modifies, or contravenes the specific provisions of law implemented, such infractions are among those requiring a conclusion that the proposed rule is an invalid exercise of delegated legislative authority. s. 120.52, F.S.

Id.

382. FLA. STAT. § 120.536(1) (Supp. 1996).

383. *See id.*

384. *Id.* This provision may cause some agencies problems. They may need to come to the Legislature for additional grants of rulemaking authority. As David Gluckman noted in his materials supplied to participants at the Pat Dore 1996 Administrative Law Conference held in Tallahassee, Florida on October 4-5, 1996: “Though few agencies base their rules solely on general authority, there are some like the Department of Insurance who could have a lot of problems with this.”

385. Boyd, *supra* note 13, at 331 and accompanying text.

cious.”³⁸⁶ The Act specifically maintains the “arbitrary and capricious” portion of the standard, while rejecting the “reasonably related to the purpose of the statute” provisions as one of the elements of an “invalid exercise of delegated legislative authority.”³⁸⁷ The language is a clear direction to the administrative law judges whose responsibility it is to determine if a rule is an invalid exercise of delegated legislative authority and the court that the standard of review is whether the administrative law judge’s determination is based on competent substantial evidence.

Finally, the last sentence reiterates a longstanding concept that “[g]eneral language describing the powers and functions of an administrative body may be construed to extend no further than the specific duties and powers conferred by the same statute.”³⁸⁸

While the bases for agency rulemaking authority have been restricted by the Act, it remains to be seen how the standard will be applied by

386. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., CS/SBs 2290 & 2288 (1996), Bill Analysis 23 and 25. *General Tel. Co. v. Florida Pub. Serv. Comm’n*, 446 So. 2d 1053, 1067 (Fla. 1984); *Department of Labor & Employment Sec. v. Bradley*, 636 So. 2d 802, 805 (Fla. 1st DCA 1994); *Florida Waterworks Ass’n v. Florida Pub. Serv. Comm’n*, 473 So. 2d 237, 240 (Fla. 1st DCA 1985); *Department of Prof. Reg., Bd. of Med. Exam’rs v. Durrani*, 455 So. 2d 515, 517 (Fla. 1st DCA 1984); *Agrico*, 365 So. 2d at 763; *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200, 202 (Fla. 1st DCA 1975).

387. 1996 Fla. Laws ch. 96-159, § 9, at 159 (codified at FLA. STAT. § 120.536(1) (Supp. 1996)).

388. *General Motors Corp. v. Florida Dep’t of Highway Safety & Motor Vehicles*, 625 So. 2d 76, 80 (Fla. 1st DCA 1993) (quoting 1 Am. Jur. 2d 42). As Judge Booth noted in her dissent in *General Motors*:

The universally understood rule, stated in 1 Am.Jur.2d § 42 is as follows: “General [statutory] language describing the powers and functions of an administrative body may be construed to extend no further than the specific duties and powers conferred by the same statute.” . . . This court [has] held that the general statutory grant of rulemaking authority was nothing more than a restatement of the agency’s common-law powers, and granted no authority to adopt the specific rule . . . [which was not based on an implementing statute]. Indeed, it has been clear until now that a general grant of rulemaking authority does not permit an agency to legislate by adopting provisions omitted from enabling statutes. *State Department of Insurance v. Insurance Service Office*, 434 So.2d 908, 910 (Fla. 1st DCA 1983); *State Department of Health and Rehabilitative Services v. McTigue*, 387 So.2d 454 (Fla. 1st DCA (1980); *Department of Health and Rehabilitative Services v. Florida Psychiatric Society*, 382 So.2d 1280 (Fla. 1st DCA 1980).

The majority seems to confuse the issue of whether . . . [adopting a specific rule] was within the Department’s delegated rulemaking authority, with the issue raised by the Department that the rule is “a good idea.” The latter is an issue to be addressed by the Legislature, not by the Department or a panel of this court.

Id. (Booth, J., dissenting).

the courts. It is likely that the section will generate a new body of caselaw addressing the new rulemaking provisions.

7. Systematic Review of and Report on Rules by Agencies

As discussed in the introduction *supra*, both the executive and legislative branches were concerned about the growth in number of administrative rules that occurred after the adoption of section 120.535. During the 1995 Regular Session, the executive sought to reduce the number of rules by eliminating the requirement that agencies adopt rules as soon as feasible and practicable.³⁸⁹ The Legislature, while desirous of fewer rules, was not willing to eliminate the requirement.³⁹⁰ As a result, the Governor vetoed CS/CS/SB 536 and APA reform failed in 1995.³⁹¹

Nevertheless, both branches worked during the 1995 legislative interim to improve rules and rulemaking. The Governor required administrative agencies under him to reduce their rules by fifty percent.³⁹² The Senate President requested that agencies conduct a two-stage review and repeal unnecessary rules.³⁹³ In the first stage, agencies were requested to repeal rules that were obsolete, redundant, or unnecessary.³⁹⁴ In the second stage, agencies were requested to review their rules for efficiency, which included financial impact of rules.³⁹⁵

As a result of these rule reduction exercises, it was determined that more regular review of rules by agencies was desirable.³⁹⁶ The Legisla-

389. State of the State Address, FLA. H.R. JOUR. 23, 24 (Reg. Sess. Mar. 7, 1995) (Governor Chiles outlines progress made in reducing agency rules and goals of further reducing agency rules).

390. CS/CS/SB 536 repealed § 120.535 and included some language in § 120.547 regarding agency flexibility, and encouraged mediation.

391. Letter from Governor Lawton Chiles to Secretary of State Sandra Mortham (July 12, 1995) (on file with the *Florida Law Review*) (announcing the veto of CS/CS/SB 536).

392. Fla. Exec. Order Nos. 95-74 and 95-256.

393. Letter from James A. Scott, Repub., Ft. Lauderdale to state agencies (June 22, 1995) (on file with the *Florida Law Review*).

394. *Id.*

395. *Id.*

396. Fla. S. Select Comm. on Govtl. Reform & Oversight, CS/SBs 1626 & 1653 (1996) Staff Analysis 1 (Mar. 21, 1996). The bill analysis for CS/SBs 1626 & 1654 states:

The committee substitute seeks to resolve problems which were identified during the rule review initiative instituted by the Senate President during the interim. The problems that were identified were: (A) a lack of regular review of rules by agencies; (B) inefficient rules; (C) lack of rule coordination; (D) excess numbers of rules; and (E) rule inflexibility.

ture, therefore, institutionalized the rule review process in the CS/SB 1626 and 1654.³⁹⁷ As a result, a process of regular agency review of rules was instituted.³⁹⁸ In order to guarantee agency compliance and to improve legislative oversight, agency reporting to the Legislature was required.³⁹⁹

a. Review of Rules for Compliance with New Standard

Rules adopted after July 1, 1996, must meet the new standard of section 120.536(1), that requires a grant of rulemaking authority, as well as a specific law to be implemented, before an agency may adopt a rule. Under the section, agencies may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute.⁴⁰⁰ There are, however, thousands of administrative rules that were adopted prior to the enunciation of the new standard. In order to conform these rules to the new standard, the Legislature instituted a rule review and reporting requirement.⁴⁰¹

By October 1, 1997, each agency must provide to the JAPC a list of rules or rule portions which were adopted before October 1, 1996, that exceeds the rulemaking authority permitted by the new standard.⁴⁰² The JAPC must combine the lists and provide a cumulative listing to the President of the Senate and the Speaker of the House of Representatives.⁴⁰³ Thereafter, the Legislature will consider whether specific

The committee substitute seeks to improve agency rules by requiring agencies to perform an annual review of rules and by requiring the filing of annual rule reports with the Legislature. Additionally, the annual review is intended to improve efficiency by requiring agencies to coordinate their rules with agencies with concurrent or overlapping jurisdiction to decrease costs and reduce paperwork for government and the private sector.

The committee substitute attempts to reduce the number of administrative rules through standardization of rules, where possible. . . .

Id.

397. *Id.* By the Florida Senate Select Committee on Governmental Reform and Oversight. The bill passed the Senate and the House of Representatives on May 3, 1996, and became law without the Governor's signature on June 2, 1996. 1996 Fla. Laws ch. 96-399 (codified at FLA. STAT. § 120.74 (Supp. 1996)).

398. Fla. S. Select Comm. on Govtl. Reform & Oversight, CS/SBs 1626 & 1653 (1996) Staff Analysis 1 (Mar. 21, 1996).

399. *Id.*

400. 1996 Fla. Laws ch. 96-159, § 9, at 159 (codified at FLA. STAT. § 120.536 (Supp. 1996)).

401. *Id.*

402. *Id.*

403. *Id.*

legislation authorizing the identified rules or rule sections should be enacted during the 1998 regular session.⁴⁰⁴

Agencies must begin the rule repeal process, not later than January 1, 1999, for each rule or portion of a rule which has been identified as exceeding the rulemaking authority permitted by section 120.536 and for which the Legislature has not adopted authorizing legislation.⁴⁰⁵ By February 1, 1999, the JAPC must submit to the Legislature a report identifying those rules that had been identified as exceeding legislative authority for which proceedings to repeal the rule has not been initiated.⁴⁰⁶

A rule that is adopted before July 1, 1996, may not be challenged prior to July 1, 1999, on the grounds that it exceeds the rulemaking authority or law implemented⁴⁰⁷ as described by section 120.536(1). As of July 1, 1999, however, the JAPC or any substantially affected person may petition an agency to repeal any rule or rule section because it exceeds the rulemaking authority permitted.⁴⁰⁸ Nothing in section 120.536 may be construed to change the legal status of a rule that otherwise has been judicially or administratively determined to be invalid.⁴⁰⁹

b. Section 120.74 Review and Report

As a result of the rule review instituted by the Senate President,⁴¹⁰ the Florida Senate Select Committee on Governmental Reform and Oversight introduced Senate Bill 1626 and 1654 to remedy identified problems of lack of regular rule review, rule inefficiency, lack of coordination, excess rules, and rule inflexibility.⁴¹¹ The Committee Substitute for Senate Bills 1626 and 1654 passed both houses of the Legislature and was signed into law by the Governor.⁴¹² The provisions of the bill, which were incorporated into the APA, require agencies to perform a formal review and revision of their rules every

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. Letter from James A. Scott, Repub., Ft. Lauderdale, President of the Senate, to state agencies (on file with the *Florida Law Review*).

411. Fla. S. Comm. on Govtl. Reform & Oversight, CS/SBs 1626 & 1654 (1996) Staff Analysis 1 (Mar. 21, 1996).

412. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 140, CS/SBs 1626 & 1654.

two years and, if appropriate, to revise their rules.⁴¹³ In the review, agencies must: “[(1)] identify and correct rule deficiencies;”⁴¹⁴ “[2)] clarify and simplify rules;”⁴¹⁵ “[3)] [d]elete obsolete or unnecessary rules;”⁴¹⁶ (4) “[d]elete rules that are redundant of statutes;”⁴¹⁷ (5) “[s]eek to improve efficiency, reduce paperwork or decrease costs to the government and the private sector;”⁴¹⁸ and (6) “[c]ontact agencies that have concurrent or overlapping jurisdiction to determine whether their rules can be coordinated to promote efficiency, reduce paperwork, or decrease costs to government and the private sector.”⁴¹⁹

“Beginning October 1, 1997, and by October 1 of every other year thereafter, the head of each agency . . . [must] file a report with: (1) the President of the Senate; . . . [(2)] the Speaker of the House of Representatives . . . [; and (3)] each appropriate standing committee of the Legislature.”⁴²⁰ The agency head must certify in the report that the agency has complied with the requirements of the Act.⁴²¹ The report must specify any changes to rules made by the agency “as a result of the review and, when appropriate, recommend statutory changes that will promote efficiency, reduce paperwork, or decrease costs to government and the private sector.”⁴²²

The requirement that agencies must review their rules regularly should improve the quality of agency rules if agencies perform the undertaking seriously. Requiring agencies to report their rule review findings and amendments to the Legislature should ensure the rule review process is adequately performed. Serious review of these reports by legislative staff and committees, however, will be necessary to maintain the desirable level of legislative involvement expressed in the Act.

8. Variance and Waiver

The fundamental dispute between the legislative and executive branches regarding revision to the APA during the 1995 legislative session involved the tension between the ideals of regulatory certainty

413. FLA. STAT. § 120.74 (Supp. 1996).

414. *Id.* § 120.74(1)(a).

415. *Id.* § 120.74(1)(b).

416. *Id.* § 120.74(1)(c).

417. *Id.* § 120.74(1)(d).

418. *Id.* § 120.74(1)(e).

419. *Id.* § 120.74(1)(f).

420. *Id.* § 120.74(2).

421. *Id.*

422. *Id.*

and “common sense” flexibility.⁴²³ The Governor’s APA Commission developed a compromise that attempts to balance the two concerns.⁴²⁴ The Commission recommendation,⁴²⁵ which ultimately was approved by the Legislature, addressed the legislative concern of “phantom government” by continuing to provide that rulemaking is not a matter of agency discretion and by retaining the feasibility and practicability provisions of section 120.535, albeit in a different section.⁴²⁶ The Commission recommended that the desire for agency flexibility be addressed by delegating to agencies the authority to grant a waiver or variance of rules.⁴²⁷ Section 120.542(1), states:

Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. This section does not authorize agencies to grant variances or waivers to statutes. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.⁴²⁸

Section 120.542(2) now *requires* agencies to grant a waiver or variance: (1) “when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means . . . [; and (2)] when application of a rule would create a substantial hardship⁴²⁹ or would violate principles of fairness.”⁴³⁰

In keeping with the legislative and executive goal to limit the number of administrative rules, the Legislature modified the Commission’s

423. For a complete discussion of the new variance and waiver requirement, see Blanton & Rhodes, *supra* note 14, at 353.

424. APA COMM’N REPORT, *supra* note 22, at 19.

425. *Id.*

426. FLA. STAT. § 120.54(1) (Supp. 1996).

427. APA COMM’N REPORT, *supra* note 22, at 18.

428. 1996 Fla. Laws ch. 96-159, § 12, at 172 (codified at FLA. STAT. § 120.542(1) (Supp. 1996)).

429. 1996 Fla. Laws ch. 96-159, § 12, at 172-73 (codified at FLA. STAT. § 120.542(2) (Supp. 1996)). The term “ ‘substantial hardship’ means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.” *Id.*

430. *Id.* “ ‘Principles of fairness’ are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.” *Id.*

recommendation that model waiver and variance rules be adopted and, instead, required the Administration Commission to adopt uniform rules of procedure for granting or denying petitions for variances and waivers which apply to all agencies.⁴³¹ The uniform rules are expected to include procedures for granting or denying emergency and temporary variances and waivers, as well as to include expedited time frames.⁴³²

To ensure that the public is aware that agencies may grant waivers or variances to their rules, agencies are required to advise persons of the availability of variances and waivers.⁴³³ Agencies must provide copies of the statutory section authorizing waiver or variance of agency rules, the uniform rules on variance and waiver and, if requested, the underlying statute authorizing the rule, to persons who inquire about the possibility of relief from rule requirements.⁴³⁴

An agency may not waive a rule or provide a variance to a rule on its own initiative. The person who is subject to regulation must file a petition for relief from the rule.⁴³⁵ A request for rule waiver or variance must be by petition which specifies: (a) “[t]he rule from which a variance or waiver is requested[; (b)] [t]he type of action requested[; (c)] [t]he specific facts that would justify a waiver or variance . . . [; and (d)] [t]he reason why the variance or the waiver requested would serve the purposes of the . . . statute.”⁴³⁶ An agency must provide notice to the Department of State, for publication in the *Florida Administrative Weekly*, that it has received a petition for a waiver or variance within fifteen days after receipt.⁴³⁷ Interested persons are authorized to comment on the petition, though the means for comment are to be provided by the uniform rules.⁴³⁸

A petition for waiver or variance must be granted or denied within ninety days of receipt.⁴³⁹ The petition is deemed approved if the agency fails to grant or deny the petition within this time period.⁴⁴⁰ The order granting or denying the petition must contain a statement of relevant facts and reasons supporting the agency’s action, and must be

431. 1996 Fla. Laws ch. 96-159, § 10, at 167 (codified at FLA. STAT. § 120.54(5) (Supp. 1996)).

432. *Id.*

433. 1996 Fla. Laws ch. 96-159, § 12, at 173 (codified at FLA. STAT. § 120.542(4) (Supp. 1996)).

434. *Id.*

435. *Id.* (codified at FLA. STAT. § 120.542(5) (Supp. 1996)).

436. *Id.* (codified at FLA. STAT. § 120.542(5)(a)-(d) (Supp. 1996)).

437. *Id.* (codified at FLA. STAT. § 120.542(6) (Supp. 1996)).

438. *Id.*

439. 1996 Fla. Laws ch. 96-159, § 12, at 173 (codified at FLA. STAT. § 120.542(7) (Supp. 1996)).

440. *Id.*

based upon competent, substantial evidence.⁴⁴¹ An order granting or denying a waiver or variance is subject to challenge under sections 120.569 and 120.57.⁴⁴²

One of the concerns about giving agencies the power to grant waivers or variance to rules is the possibility that they will apply the power inconsistently.⁴⁴³ To ensure consistent application, agencies are required to maintain a record of the type and disposition of each filed petition for waiver or variance.⁴⁴⁴ Each agency must file a report with the Governor, the President of the Senate, and the Speaker of the House of Representatives listing the number of petitions filed, and the disposition of each.⁴⁴⁵ The availability of a record of rule waiver and variance may assist agencies in determining that certain rules should be modified because of regular petitions for waiver or variance of the rule or its requirements. In addition, a record of waiver and variance may inform the Legislature that a specific statute needs to be amended.

C. Rulemaking Procedural Requirement Changes

Substantial changes to the rulemaking provisions of the APA were made by the CS/SBs 2290 and 2288.⁴⁴⁶ Additionally, the provisions of sections 120.535 and 120.543 were incorporated into a revised section 120.54.⁴⁴⁷

1. Petition to Initiate Rulemaking

“Any person regulated by an agency or having substantial interest in an agency . . . [rule is authorized to] petition an agency to adopt, amend, or repeal a rule or to provide the minimum public information required. . . . The petition . . . [is required] to specify the proposed rule and action requested.”⁴⁴⁸ The agency must initiate rulemaking proceed-

441. *Id.*

442. *Id.*

443. Another concern addressed in the proposed draft of the Uniform Rules involves rules that are adopted by one agency and enforced by another. The proposed draft of the Uniform Rules provides that an agency that receives a petition for variance or waiver must furnish a copy of the petition to any other agency responsible for implementing the rule. Proposed Draft of Uniform Rules, Rule 28-104.002(4).

444. 1996 Fla. Laws ch. 96-159, § 10, at 170-71 (codified at FLA. STAT. § 120.54(8) (Supp. 1996)).

445. 1996 Fla. Laws ch. 96-159, § 10, at 160 (codified at FLA. STAT. § 120.54 (Supp. 1996)).

446. CS/SBs 2290 & 2288.

447. Provision § 120.535(1) is included in § 120.54(1)(a). Section 120.543 is included in the new § 120.54(6).

448. 1996 Fla. Laws ch. 96-159, § 10, at 170 (codified at FLA. STAT. § 120.54(7) (Supp.

ings, comply with the requested action, or deny the petition with a written statement of its reasons for the denial within thirty calendar days following the date of filing.⁴⁴⁹

If the petition is directed to an agency statement which meets the definition of a rule but which has not been adopted by the agency, the agency must, not later than thirty days following the date of filing, initiate rulemaking, comply with the requested action, or provide notice in the *Florida Administrative Weekly* that it will hold a public hearing on the petition.⁴⁵⁰ The purpose of the public hearing is to consider the comments of the public directed to the agency statement, its scope and application, and to consider whether the public interest is served adequately by the application of the rule on a case-by-case basis, as contrasted with its adoption.

Within thirty days following the public hearing, if the agency does not initiate rulemaking or otherwise comply with the requested action, the agency must publish in the *Florida Administrative Weekly* a statement of its reasons for not initiating rulemaking or complying with the requested action.⁴⁵¹ In addition, the agency must state any changes it will make in the scope or application of the unadopted rule.⁴⁵² This statement also must be filed with the JAPC,⁴⁵³ which shall forward a copy to substantive committees of jurisdiction in each house of the Legislature for review.⁴⁵⁴

2. Notice of Development of Proposed Rule and Workshop

Under the prior act, an agency could, but was not required to, provide a notice of development of a proposed rule.⁴⁵⁵ However, agencies often provided notice of development on a complicated or controversial rule to avoid contentious adversarial proceedings.⁴⁵⁶ The Act now requires an agency to provide a notice of rule development in the *Florida Administrative Weekly* prior to giving notice of a proposed

1996)).

449. *Id.*

450. *Id.* (codified at FLA. STAT. § 120.54(7)(b) (Supp. 1996)). This public hearing must be conducted within 30 days after publication of the notice. *Id.*

451. *Id.* (codified at FLA. STAT. § 120.54(7)(c) (Supp. 1996)).

452. *Id.*

453. *Id.* This requirement, and the requirement that the JAPC file the statement with substantive legislative committees of jurisdiction, also will bolster legislative oversight.

454. *Id.*

455. FLA. STAT. § 120.54(1)(c) (1995).

456. See, e.g., 22 Fla. Admin. Weekly 5457, 5457-61 for notices of rule development filed by the Department of Community Affairs, the Agency for Health Care Administration, the Department of Environment Protection, and the Department of Professional Regulation.

rule.⁴⁵⁷ This provision should assist agencies in bringing the interested parties together early in the rulemaking process to resolve any problems with the rule.⁴⁵⁸

For noncontroversial rules, providing a notice of rule development will add another week to the rulemaking process.⁴⁵⁹ For controversial rules, it may result in a meeting similar to a case management conference⁴⁶⁰ and allow the interested parties to identify issues, pursue the possibility of settlement, and provide each party with additional information or alternatives.

The notice of development of a proposed rule must: (1) indicate the subject area to be addressed;⁴⁶¹ (2) "provide a short, plain explanation of the purpose and effect of the rule development; [(3)] cite the specific legal authority for rule development; and [(4)] include the preliminary text of proposed rules, if available."⁴⁶²

"An agency may hold a public workshop for purposes of rule development,"⁴⁶³ but is not required to hold a workshop unless one is requested by an affected person.⁴⁶⁴ Even if requested, the agency does not have to hold a workshop if the agency head explains in writing why a workshop is unnecessary.⁴⁶⁵ "The explanation is not final agency action [and is not] subject to review pursuant ss. 120.569 or 120.57."⁴⁶⁶ Nevertheless, "[t]he failure to provide an explanation . . . may be a material error in procedure pursuant to s. 120.56(1)(c),"⁴⁶⁷

457. 1996 Fla. Laws ch. 96-159, § 10, at 162 (codified at FLA. STAT. § 120.54(2)(a) (Supp. 1996)).

458. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., CS/SBs 2290 & 2288 (1996) Bill Analysis 26 (June 14, 1996).

459. The *Florida Administrative Weekly* is published weekly. This section does not have a time period attached to it. CS/CS/SB 536, at 14, provided that the notice of rule development for all rules had to be published 21 days prior to the notice of rule adoption.

460. FLA. R. CIV. P. 1.200.

461. 1996 Fla. Laws ch. 96-159, § 10, at 162 (codified at FLA. STAT. § 120.54(2)(a) (Supp. 1996)). CS/CS/SB 536 also required the notice to state the policy consideration underlying the proposed rule, the major legal issues involved in the rule, and the methodology proposed or used to obtain and analyze data. CS/CS/SB 536, at 36.

462. 1996 Fla. Laws ch. 96-159, § 10, at 162 (codified at FLA. STAT. § 120.54(2)(a) (Supp. 1996)). This provision also was contained in CS/CS/SB 536.

463. *Id.* (codified at FLA. STAT. § 120.54(2)(c) (Supp. 1996) (this provision is the same as former § 120.54(1)(d)).

464. *Id.*

465. *Id.* However, allowing the agency head the ability to not conduct a workshop and explain the reasons is a new provisions.

466. *Id.*

467. *Id.*

if the agency cannot show that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.⁴⁶⁸

One criticism voiced to the Florida House of Representatives Select Committee on Streamlining Governmental Regulations concerning the rule development process centered on the efficacy and good faith used in conducting workshops. Representatives from the Chamber of Commerce Regulatory Reform Committee⁴⁶⁹ complained that, while agencies often conducted rule workshops, very often agencies did not have staff members available to answer questions. Under the new provisions of section 120.54(2)(c), a workshop or public hearing is held, the agency must ensure that the person or persons responsible for preparing the rule are available to explain or discuss the proposals or to answer questions on the proposals.⁴⁷⁰

New provisions in the Act allow and encourage the use of neutral third persons to facilitate or mediate the workshops.⁴⁷¹ The facilitators or mediators may be compensated or uncompensated and they do not have to be “certified.”⁴⁷² These provisions are also “intended to give the citizens early notification of proposed rules and an opportunity to get involved [in the rulemaking process] and work with the agency [to solve any problems with the rules] prior to the notice of rule adoption.”⁴⁷³

3. Negotiated Rulemaking

Negotiated rulemaking is authorized by the Act for the development or adoption of rules.⁴⁷⁴ The use of negotiated rulemaking at the federal

468. *Id.* While under § 120.56(1)(c), failure to follow rulemaking procedures is presumed to be material, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings were not impaired.

469. Discussion with Wade L. Hopping and Lawrence E. Sellers, Jr., representing the Chamber of Commerce, in Tallahassee, Fla.

470. 1996 Fla. Laws ch. 96-159, § 10, at 162 (codified at FLA. STAT. § 120.54(2)(c) (Supp. 1996)). Public hearings on a rule must be held upon request of any affected person received within 21 days after the date of publication of the notice of rule adoption filed by the agency pursuant to § 120.54(3)(a). *See* FLA. STAT. § 120.54(3)(c)1. (Supp. 1996). This provision was included in the former § 120.54(3)(a), and is the type of quasi-legislative rule hearing noted by the court in *Agrico, General Telephone*, and *Adam Smith. General Tel. Co. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063 (Fla. 1984); *Adam Smith v. Department of Env'tl. Reg.*, 553 So. 2d 1260 (Fla. 1st DCA 1989); *Agrico Chem. Co. v. Department of Env'tl. Reg.*, 365 So. 2d 759 (Fla. 1st DCA 1978).

471. 1996 Fla. Laws ch. 96-159, § 10, at 162 (codified at FLA. STAT. § 120.54(2)(c) (Supp. 1996)).

472. FLA. R. MEDIATION 10.010.

473. Fla. H.R. Select Comm. on Streamlining Gov'tl. Regs., CS/SBs 2290 & 2288 (1996) Bill Analysis 26 (June 14, 1996).

474. 1996 Fla. Laws ch. 96-159, § 10, at 162 (codified at FLA. STAT. § 120.54(2)(d) (Supp.

level has been endorsed by the Administrative Conference of the United States. In the forward to the conference's sourcebook, the chairman of the conference noted:

The cost of the rulemaking process, in terms of dollars spent, conflict, and delay, is widely recognized as a major impediment to efficient and effective regulation. . . . Several years ago, the Administrative Conference recognized that . . . public participation in rulemaking is essential. . . . Specifically, the Conference suggested that by bringing interested parties together in a cooperative setting at the front end of the rulemaking process, much of the litigation that presently occurs at the conclusion of a rulemaking would be obviated. This concept of *negotiated rulemaking* (sometimes called "regulatory negotiation" or "reg-neg") gives the people who have real interests at stake in a particular rule the opportunity to work toward finding solutions to shared problems. [Negotiated rulemaking] has the capacity to reduce the likelihood of litigation, to produce faster and less costly rulemaking—and to create objectively better rules.⁴⁷⁵

Negotiated rulemaking is used at the federal level when complex rules are being drafted or when strong opposition to the rules is anticipated.⁴⁷⁶ Agencies in Florida are now encouraged to use the procedure in these instances,⁴⁷⁷ but the determination to use the process is entirely in the agencies' discretion.⁴⁷⁸

When evaluating whether to use negotiated rulemaking, an agency is encouraged to consider: (1) "whether a balanced committee of interested persons can be assembled to negotiate in good faith, [(2)] whether the agency is willing to support the work of the negotiating committee, and [(3)] whether the agency can use the group consensus as the basis for its proposed rule."⁴⁷⁹

"If an agency chooses to use negotiated rulemaking, it is required to publish a notice of the rulemaking in the Florida Administrative Weekly

1996)).

475. DAVID M. PRITZKER & DEBORAH S. DALTON, OFFICE OF THE CHAIRMAN, ADMIN. CONF. OF THE UNITED STATES, *NEGOTIATED RULEMAKING SOURCEBOOK* (Jan. 1990).

476. See Lee M. Thomas, *The Successful Use of Regulatory Negotiation by EPA*, A.B.A. 13 A.B.A. ADMIN. LAW NEWS 20 (1987).

477. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., CS/SBs 2290 & 2288 (1996), Bill Analysis 26 (June 14, 1996).

478. *Id.*

479. *Id.*

which includes a listing of the representative groups invited to participate in the process. . . . The makeup of the negotiating committee is within the discretion of the agency. . . .⁴⁸⁰ “Any person who believes that [his or her] interests would not be adequately represented could apply to participate in the group within 30 days of the notice.”⁴⁸¹ The Act, however, is silent as to whether or not the agency’s denial is final agency action. Since the Legislature was explicit that the explanation denying a request for a workshop is not appealable as a final agency action, it might be justifiable to presume that the denial of the application to participate in the negotiation is an appealable final agency action.

“The meetings of the negotiating committee are open to the public and a neutral facilitator or mediator is required to chair the meetings. There is no requirement that this person must be a paid facilitator or mediator, a volunteer could be used.”⁴⁸² If the negotiators are able to “achieve a consensus, then the resulting rule is likely to be easier to implement and the likelihood of subsequent litigation is diminished.”⁴⁸³

An agency may combine the use of negotiated rulemaking with the public workshops held for rule development. These provisions appear to complement each other and are not mutually exclusive.⁴⁸⁴ Even though the Florida act, unlike the federal act, does provide for public participation in the drafting stages of rulemaking, the negotiation process can be used at any stage of the proceedings.⁴⁸⁵

The negotiated rulemaking provisions not only may assist the agency in gathering needed expertise, but also may work to co-opt the participants insofar as rule challenges go.⁴⁸⁶ As a matter of law, however, nothing precludes the negotiating group, or any other nonparticipant with standing, to challenge the proposed rule resulting from the negotiated rulemaking.

4. Requiring Full Rule Text, Summary, and SERC in Notice

The Act now requires an agency to include additional items in a notice of intent to adopt, amend, or repeal a rule.⁴⁸⁷ Prior to the 1996

480. *Id.* at 27.

481. *Id.*

482. *Id.*

483. PRITZKER & DALTON, *supra* note 475, at 1.

484. Section 120.54(2)(c) provides that an “agency may employ other types of dispute resolution alternatives for . . . [a rule development] workshop that are appropriate for rule development.” FLA. STAT. § 120.54(2)(c) (Supp. 1996). Clearly, negotiated rulemaking would be a type of dispute resolution that is specifically authorized by statute.

485. *See* PRITZKER & DALTON, *supra* note 475, at 2.

486. *Id.* at 38.

487. 1996 Fla. Laws ch. 96-159, § 10, at 163 (codified at FLA. STAT. § 120.54(3)(a) (Supp.

revision, a notice of intent was required to contain a short and plain explanation of the purpose and effect of the proposed rule, and the specific legal authority of the rule.⁴⁸⁸ Under the new requirements an agency still must set forth a short, plain explanation of the purpose and effect of the proposed rule, but now must also include: (1) the full text of the proposed rule or amendment; (2) a summary; (3) “a reference to the specific rulemaking authority pursuant to which the rule is adopted; and [(4)] a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific.”⁴⁸⁹ In addition, the notice of intent must include a summary of the agency’s statement of estimated regulatory costs (SERC) if one has been prepared, as well as state the procedure for requesting a public hearing on the proposed rule.⁴⁹⁰

5. Special Matters for Consideration

Previously, the APA required an agency to consider the impact of a rule on small businesses before adopting, amending or repealing a rule.⁴⁹¹ Section 120.54(3)(b) now requires an agency to consider the impact of a rule on small counties⁴⁹² and cities.⁴⁹³ Definitions of “small county” and “small city” are now provided in the definitional section of the Act.⁴⁹⁴ Section 120.54(3)(b)2.a. specifically permits agencies to include counties and cities with greater populations than those contained in the definition, if such a definition is necessary to adapt a rule to the needs and problems of small businesses, small counties, or small cities.⁴⁹⁵

The bill utilizes the same format for taking into consideration the impact of a rule on small cities and counties as for small businesses.⁴⁹⁶ “Whenever practicable, an agency [must] tier its rules to reduce

1996)).

488. FLA. STAT. § 120.54(1) (1995).

489. 1996 Fla. Laws ch. 96-159, § 10, at 163 (codified at FLA. STAT. § 120.54(3)(a) (Supp. 1996)).

490. *Id.*

491. FLA. STAT. § 120.54(2)(a) (1995).

492. 1996 Fla. Laws ch. 96-159, § 3, at 155 (codified at FLA. STAT. § 120.52(17) (Supp. 1996)) (defining small county as “any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census”).

493. 1996 Fla. Laws ch. 96-159, § 3, at 155 (codified at FLA. STAT. § 120.52(16) (Supp. 1996)) (defining small city as “any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census”).

494. *Id.*

495. 1996 Fla. Laws ch. 96-159, § 10, at 163 (codified at FLA. STAT. § 120.54(3)(b) (Supp. 1996)).

496. *Id.*

disproportionate impacts on [these entities] and to avoid regulating [these entities] if they do not contribute significantly to the problem a rule is designed to address.”⁴⁹⁷ Five specific methods for reducing the impact of a proposed rule on small cities and counties are provided, including “establishing less stringent compliance or reporting requirements, . . . [e]stablishing less stringent schedules or deadlines, . . . [c]onsolidating or simplifying the rule’s compliance or reporting requirements, [e]stablishing performance standards . . . to replace design or operational standards, . . . [and] exempting [these entities] from any or all requirements of the rule.”⁴⁹⁸

6. Statement of Estimated Regulatory Costs

One of the most important rulemaking requirements of the 1996 Act is the new Statement of Estimated Regulatory Costs (SERC).⁴⁹⁹ Prior to 1992 amendments to the APA, preparation of an economic impact statement (EIS) was required before adopting, amending, or repealing a rule.⁵⁰⁰ A rule for which an EIS was not prepared could be determined to be invalid for lack of the required economic statement,⁵⁰¹ but the courts did not uniformly enforce the requirement for an EIS.⁵⁰²

As the courts eroded the legislatively-mandated requirement, agencies began to pay less attention to the quality of the EIS as a rulemaking tool.⁵⁰³ Challengers, of necessity, began to rely less on the failure of an adequate EIS to invalidate rules.⁵⁰⁴ From the agency perspective, however, the requirement for preparation of the EIS was criticized as being unduly burdensome and unnecessary in most cases.⁵⁰⁵ Others

497. *Id.*

498. *Id.* at 164.

499. 1996 Fla. Laws ch. 96-159, § 10, at 163 (codified at FLA. STAT. § 120.54(2)(b)1. (Supp. 1996)).

500. FLA. STAT. § 120.54(2)(b) (1991).

501. *Id.* § 120.54(2)(d).

502. *Florida-Texas Freight, Inc. v. Hawkins*, 379 So. 2d 944 (Fla. 1979); *Plantation Residents’ Ass’n, Inc. v. School Bd. of Broward County*, 424 So. 2d 879 (Fla. 1st DCA 1982); *School Bd. of Broward County v. Gramith*, 375 So. 2d 340 (Fla. 1st DCA 1979); *Polk v. School Bd. of Polk County*, 373 So. 2d 960 (Fla. 2d DCA 1979). Holding that deficiencies in an economic impact statement that are not incorrect or render the proceedings unfair are not a material error in procedure and as such will be deemed to be “harmless error” and not sufficient to invalidate a rule.

503. Patricia A. Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 FLA. ST. U. L. REV. 703, 706 nn.10-11 (1991) (citing cases that show variety of outcomes); *see also* Maher, *supra* note 8, at 413-14 (stating that agencies assigned the preparation of EIS to unqualified individuals).

504. *Id.* (describing lack of compliance with statute).

505. *Id.* at 704, 723-24 (describing dissatisfaction with economic impact statement).

criticized the requirement as being essentially meaningless because agencies generally did not have the requisite expertise to prepare adequate analyses of the economic impact of their rules.⁵⁰⁶

As a result of amendments to the APA in 1992, agencies no longer were required to prepare an EIS in every circumstance.⁵⁰⁷ The amendments authorized agencies to prepare an EIS, but only required them to prepare an EIS if: "(1) [t]he agency determine[d] that the proposed action would result in a substantial increase in costs or prices paid by consumers, individual industries, or state or local government agencies, or would result in significant adverse effects on competition, employment, investment, productivity, innovation, or [international trade,] and alternative approaches to the regulatory objective exist . . . ; or . . . (2) a written request for preparation of an economic impact statement is filed with the appropriate agency by the Governor, a body corporate and politic, at least 100 people signing a request, or an organization representing at least 100 persons, or any domestic nonprofit corporation or association."⁵⁰⁸

The 1992 amendments, while eliminating the requirement for needless preparation of the EIS, perhaps went too far in limiting the circumstances in which an agency was required to prepare one. There were few requests for preparation of the EIS. Further, agencies, which generally disfavored preparation of the EIS, were reluctant to prepare them on their own initiatives.

The 1996 revision attempts to remedy these deficiencies. First, it does not return the requirement to the standard where an economic analysis is required of every rule.⁵⁰⁹ Second, the new law makes the request for preparation more meaningful by tying it to a showing of specific alternatives that will lower the cost of regulation.⁵¹⁰

Under the provisions of the section 120.541, a substantially affected person, within twenty-one days of notice of intent to adopt a rule, is authorized to submit to an agency a good faith written proposal for a

506. David W. Nam, *1992 Amendments to the Florida Administrative Procedure Act*, FLA. B.J., July/Aug. 1992, at 55.

507. 1992 Fla. Laws ch. 92-166, § 4, at 1673-74 (codified at FLA. STAT. § 120.54(2)(b)-(d) (Supp. 1992)); Maher, *supra* note 8, at 423; Nam, *supra* note 506, at 55.

508. 1992 Fla. Laws ch. 92-166, § 4, at 1673-74 (codified at FLA. STAT. § 120.54(2)(b)-(d) (Supp. 1992)).

509. See FLA. STAT. § 120.54(3)(b) (Supp. 1996) ("an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule").

510. See FLA. STAT. § 120.541(1)(a) (Supp. 1996) (stating that a substantially affected person "may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented").

lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented.⁵¹¹ “The proposal may include the alternative of not adopting any rule, so long as the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule.”⁵¹²

Upon submission of the lower cost regulatory alternative, an agency must prepare SERC⁵¹³ or revise any SERC that it had previously prepared.⁵¹⁴ The agency either must adopt the lower cost alternative or “give a statement of the reasons for rejecting the alternative in favor of the proposed rule.”⁵¹⁵ Failure of an agency to prepare or revise the SERC is a material failure to follow applicable rulemaking procedures or requirements.⁵¹⁶

A SERC must include a good faith estimate of: (1) “the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule;”⁵¹⁷ (2) “the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenue;”⁵¹⁸ and (3) “the transactional costs⁵¹⁹ likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule.”⁵²⁰

In addition, a SERC must include: (1) an analysis of the impact on small businesses, counties or cities;⁵²¹ (2) any additional information

511. 1996 Fla. Laws ch. 96-159, § 11, at 171 (codified at FLA. STAT. § 120.541(1)(a) (Supp. 1996)).

512. *Id.*

513. The CS/CS/SB 536 required an agency to prepare a SERC prior to adopting, amending, or repealing any nonemergency rule.

514. 1996 Fla. Laws ch. 96-159, § 11, at 171-72 (codified at FLA. STAT. § 120.541(1)(b) (Supp. 1996)).

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.*

519. The term “transactional costs” is defined as “direct costs that are readily ascertainable based [on] standard business practice[.]” and would include, “filing fees, the cost of obtaining licenses,” installing equipment or following procedures required to comply with the rule. *Id.*

520. 1996 Fla. Laws ch. 96-159, § 11, at 172 (codified at FLA. STAT. § 120.541(2) (Supp. 1996)).

521. *Id.* Previously, the APA required an agency to consider the impact of a rule on small businesses before adopting, amending, or repealing a rule. Section 120.54 now requires an agency to consider the impact of a rule on small counties and cities. FLA. STAT. § 120.54(3)(b) (Supp. 1996). While definitions of “small county” and “small city” are provided in the Act, the section specifically permits agencies to include counties and cities with greater populations than those contained in the definition if such a definition is necessary to adapt a rule to the needs and

that the agency determines may be useful in informing the regulated public of the costs of rule compliance;⁵²² (3) a good-faith determination of whether less costly or less intrusive methods exist;⁵²³ and (4) a good-faith description of any reasonable alternative methods, including any proposals submitted by an affected person.⁵²⁴ The SERC must also state whether the alternative proposals are adopted or state the reasons for rejecting the alternative in favor of the proposed rule.⁵²⁵

No rule can "be declared invalid because it imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternative[s] that substantially accomplish the statutory objectives."⁵²⁶ Furthermore, no rule can be

declared invalid based upon a challenge to the . . . [SERC] unless:

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

2. the substantial interests of the person challenging the agency's rejection of, or failure to consider, the lower cost regulatory alternative are materially affected by the rejection; and

3.a. the agency has failed to prepare or revise the statement of estimated regulatory costs as required by paragraph (b); or

b. the challenge is to the agency's rejection under paragraph (b) of a lower cost regulatory alternative submitted under paragraph (a).⁵²⁷

problems of small counties or small cities. *Id.* The new law uses the same format for evaluating impacts of a rule on small cities and counties as it does for small businesses. *Id.* Whenever practicable, an agency must tier its rules to reduce disproportionate impacts on these entities and to avoid regulating these entities if they do not contribute significantly to the problem a rule is designed to address. *Id.* The same five methods for reducing the impact of a proposed rule on a small business now apply to small cities and counties. *Id.*

522. *Id.*

523. *Id.*

524. *Id.*

525. *Id.*

526. 1996 Fla. Laws ch. 96-159, § 11, at 171-72 (codified at FLA. STAT. § 120.541(1)(c) (Supp. 1996)).

527. *Id.* The CS/CS/SB 536 required a challenge to be brought within one year of the effective date of the rule to which the SERC applies and required the person challenging the SERC to have provided the agency with information sufficient to make the agency aware of the specific concerns. In addition, the challenged statements were required to be material to the person's substantial interests.

Before the 1996 amendments, the APA required that agencies choose the alternative that imposes the lowest net cost to society based upon factors required in preparation of the EIS, or to provide a statement as to why that lowest net cost alternative was rejected.⁵²⁸ This requirement explicitly did not provide a basis for challenging a rule.⁵²⁹

In the 1996 amendments, the agencies are required similarly to choose the alternative that does not impose regulatory costs which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.⁵³⁰ But, this is no longer a free-floating requirement. Although perhaps not displaying a full mouthful, it at least has some teeth.

The definition of an “invalid exercise of delegated legislative authority” now includes rules which impose “regulatory costs . . . which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives[,]”⁵³¹ and the JAPC is given authority to determine that the rule imposes these regulatory costs which could be reduced by these alternatives⁵³² There is a question as to how the JAPC will make its determinations in this regard. It should prove challenging to the JAPC.

In some instances, one tool that may be available to JAPC is the agency itself, which is “encouraged” by the new law to prepare a SERC prior to the adoption, amendment, or repeal of a rule.⁵³³

Perhaps a more effective tool will come from the regulated community itself. For even if the agency has itself elected not to prepare the SERC, it must do so under the circumstances outlined in the new section 120.541.⁵³⁴ Under this new section, a substantially affected person

may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. The proposal may include the alternative of

528. FLA. STAT. § 120.54(12)(b) (1995).

529. *Id.*

530. 1996 Fla. Laws ch. 96-159, § 10, at 161 (codified at FLA. STAT. § 120.54(1)(d) (Supp. 1996)).

531. 1996 Fla. Laws ch. 96-159, § 3, at 152 (codified at FLA. STAT. § 120.52(8)(g) (Supp. 1996)).

532. 1996 Fla. Laws ch. 96-159, § 14, at 174 (codified at FLA. STAT. § 120.545(1)(j) (Supp. 1996)).

533. 1996 Fla. Laws ch. 96-159, § 10, at 163 (codified at FLA. STAT. § 120.54(3)(b)1. (Supp. 1996)).

534. Larry E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform*, 48 FLA. L. REV. 94, 106-21 (1996).

not adopting any rule, so long as the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule.⁵³⁵

Arguably, this places the initial burden on the informed regulated community to tell the agencies what costs the regulated community will absorb in the adoption of the proposed rule.

Upon submission of the lower cost regulatory alternative, an agency must prepare the SERC or revise any SERC that it had previously prepared.⁵³⁶ The agency either must adopt the lower cost alternative or give a statement of the reasons for rejecting the alternative in favor of the proposed rule.⁵³⁷ Perhaps the courts will take greater notice of the requirements for the SERC than they did for the EIS, for the Legislature has enunciated a “per se” rule: that failure of an agency to prepare or revise the SERC is a material failure to follow applicable rulemaking procedures.⁵³⁸

The submission of a good faith written proposal for a lower cost regulatory alternative is a prerequisite to a declaration of invalidity, although the person challenging the validity is not required to be the person who submitted the lower cost regulatory alternative. It is important to note, however, that both the proposer of the alternative, and the challenger of the rule based on the invalidity of the SERC, are both required to be substantially affected. The challenge may be directed to the failure of the agency to prepare the SERC, or to the agency’s rejection of the lower cost regulatory alternative. Finally, like the challenge to the validity of the rule based upon the former EIS, the issue must be raised in an administrative proceeding within one year of the effective date of the rule.⁵³⁹

7. Additional Rulemaking Record Requirements

The Act now requires an agency to compile a rulemaking record in all rulemaking proceedings.⁵⁴⁰ The record must include:

- (a) all notices given for the proposed rule[;] (b) any statement of estimated regulatory costs for the rule; (c) [a]

535. 1996 Fla. Laws ch. 95-159, § 11, at 171 (codified at FLA. STAT. § 120.541(1)(a) (Supp. 1996)).

536. *Id.* (codified at FLA. STAT. § 120.541(1)(b) (Supp. 1996)).

537. *Id.*

538. *Id.*

539. *Id.*

540. 1996 Fla. Laws ch. 96-159, § 10, at 170-71 (codified at FLA. STAT. § 120.54(8) (Supp. 1996)).

written summary of hearings on the proposed rule[;] (d) [t]he written comments and responses to written comments . . . ; (e) [a]ll notices and findings [for emergency rules;] (f) [a]ll materials filed by the agency with the . . . [JAPC]; (g) [a]ll materials filed with the Department of State . . . ; and (h) [a]ll written inquiries from standing committees of the Legislature concerning the rule.”⁵⁴¹

An agency is required to retain the record of rulemaking as long as the rule remains in effect.⁵⁴²

8. Notice of Change or No Change to a Rule Required

Agencies also must now file with the JAPC a notice which states that a proposed rule is unchanged from the rule as previously filed with the JAPC or that the proposed rule contains only technical changes.⁵⁴³ This notice must be filed with the JAPC after the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, but at least seven days prior to filing the rule for adoption.⁵⁴⁴

When any change is made in a proposed rule,

other than a technical change that does not affect the substance of the rule, [the change] must be supported by the record of public hearings held on the rule, must be in response to written material received on or before the date of the public hearing, or must be in response to a proposed objection by the [JAPC.]⁵⁴⁵

The agency must “provide a copy of the notice of change by certified mail or actual delivery to any person who requests it in writing.”⁵⁴⁶ The agency [also must] file the notice with [JAPC and] . . . to persons requesting it, at least 21 days prior to filing the rule for adoption.”⁵⁴⁷ In addition, the agency would be required to publish the notice in the *Florida Administrative Weekly* at least twenty-one days prior to filing the rule for adoption.⁵⁴⁸

541. *Id.*

542. *Id.* When a rule is no longer in effect, the record may be destroyed pursuant to the records-retention schedule developed under § 257.36(6).

543. 1996 Fla. Laws ch. 96-159, § 10, at 165 (codified at FLA. STAT. § 120.54(3)(d)1. (Supp. 1996)).

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.* The previous time frame was seven days. *See* FLA. STAT. § 120.54(11)(a) (1995).

548. 1996 Fla. Laws ch. 96-159, § 10, at 165 (codified at FLA. STAT. § 120.54(3)(d)1.

An agency may, after giving notice of intent to adopt under section 120.54(3)(a), withdraw the rule in whole or in part.⁵⁴⁹

After adoption and before the effective date, a rule may be modified or withdrawn only in response to an objection by the [JAPC] or may be modified to extend the effective date by no more than 60 days when the [JAPC] has notified the agency that an objection to the rule is being considered.⁵⁵⁰

Under the prior system, an adversarial relationship resulted from the technicalities of the process, and limited cooperation between the agency and the regulated community, once the agency noticed a proposed rule. The law required the challenger to file its challenge within twenty-one days of the notice.⁵⁵¹ The APA also provided that the agency was required to hold a public hearing on the proposed rule if a request for a public hearing was received within twenty-one days from the notice.⁵⁵² Thus, before the agency could get together with the regulated community to hammer out an agreeable new rule, the regulated community was required to challenge the initially-noticed proposed rule in order to preserve its rights.⁵⁵³

Further, agencies were not required to publish a notice of substantive changes to the proposed rule as initially noticed in the *Florida Administrative Weekly*. The more attentive agencies did so, as a matter of courtesy, rather than as a matter of law. In fact, the law only required

(Supp. 1996)).

549. *Id.* (codified at FLA. STAT. § 120.54(3)(d)2. (Supp. 1996)).

550. *Id.* (codified at FLA. STAT. § 120.54(3)(d)3. (Supp. 1996)).

551. FLA. STAT. § 120.54(4)(b) (1995).

552. *Id.* § 120.54(3)(a).

553. For example, the rules proposed by the Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund (Rules 62B-49, 62-312, 62-343, and 18-21, FLA. ADMIN. CODE ANN.) were challenged by the Florida Electric Power Coordinating Group, Inc. on July 28, 1995. The notice of rulemaking was made on July 7, 1995, but the rulemaking hearing was not scheduled until August 11, 1995, 35 days after the notice (21 FLA. ADMIN. WEEKLY 4481). A rule must be challenged within 21 days after the notice. *See* FLA. STAT. § 120.54(4) (1995). According to the petition, the petitioner had been "actively involved in the Department's development of the Proposed Rules. The Petitioner's involvement includes appearance and comment at a rulemaking workshop, discussions with Department staff on the draft rules, and the submittal of written comments on drafts of the Proposed Rules." *Petition for Administrative Determination of Invalidity of Proposed Rules Chapters 62B-49, 62-312, 62-343, and 18-21, at 3, Florida Elec. Power Coordinating Group v. Florida Dep't of Env'tl. Protection, No. 95-384ORP, Fla. Div. of Admin. Hearings (July 28, 1995)*. Even though the petitioners had been actively working with the agency, the petitioner was required to file a rule challenge because the hearing on the rule was scheduled after the 21 day time limit provided for rule challenges. This provision causes a great waste of resources when there is a possibility of settling the controversy without a rule challenge.

that the agency file its change with the JAPC and with those persons requesting notice of the changes in writing at the public hearing.⁵⁵⁴

Under the new, more “cooperative” scheme, the agency first gives notice of rule development, and then proceeds to notice of proposed rulemaking. The agency schedules its public hearing, at which it ideally engages in a give-and-take with the interested public, and the agency makes its changes to the proposed rule based upon the comments made at the public hearing. Under the new Act, an agency must file with the JAPC a notice which states that a proposed rule remains unchanged from its original form, or contains only technical changes.

When any change is made in a proposed rule—other than a technical change that does not affect the substance of the rule—the agency must provide a copy of the notice of change by certified mail or actual delivery to any person who requests it in writing.⁵⁵⁵ The agency also must file the notice with JAPC and to persons requesting it, at least twenty-one days prior to filing the rule for adoption.⁵⁵⁶ As well, the agency is required to publish the notice in the *Florida Administrative Weekly* at least twenty-one days prior to filing the rule for adoption.⁵⁵⁷ After this notice, a still-dissatisfied person is given twenty days in which to file the rule challenge.⁵⁵⁸ Thus, it is only at the end of the proposed rulemaking process—rather than at the beginning—that a dissatisfied person must file a challenge to the proposed rule and engage in an adversarial relationship with the agency.

Any person who is substantially affected by a change in the proposed rule would be authorized to challenge the change.⁵⁵⁹ If a person were not substantially affected by the rule as originally proposed, but was thereafter substantially affected by the rule as a result of a change to the proposed rule, that person still could challenge any provision of the rule.⁵⁶⁰ Unlike the prior practice, then, a person who is satisfied with or unsure of a particular rule will not be required to challenge the rule at its initiation in order to preserve the right to later challenge the rule when it is changed in ways the person finds to be objectionable.⁵⁶¹

554. FLA. STAT. § 120.54(11)(a) (1995).

555. 1996 Fla. Laws ch. 96-159, § 10, at 165 (codified at FLA. STAT. § 120.54(3)(d)1. (Supp. 1996)).

556. *Id.*

557. *Id.*

558. 1996 Fla. Laws ch. 96-159, § 16, at 181 (codified at FLA. STAT. § 120.56(2)(a) (Supp. 1996)).

559. *Id.*

560. *Id.*

561. *Id.* at 182.

9. Postponement of Rule Adoption Process

Under the revised APA, an agency may postpone the adoption of a rule to accommodate review of the rule by the JAPC, if the JAPC “notifies an agency that an objection to a rule is being considered.”⁵⁶² “When an agency postpones adoption of a rule to accommodate review by the [JAPC], the ninety-day period for filing a rule is tolled until the [JAPC] notifies the agency that it has completed its review of the rule.”⁵⁶³

10. Agency and JAPC Certification

The Act requires that, in addition to what an agency currently certifies when it files a rule with the Department of State, the agency also must certify that all statutory requirements have been satisfied.⁵⁶⁴ In addition, the Act requires JAPC to certify, at the time a rule is filed, that the agency has responded to all material and timely written comments or written inquiries made on behalf of JAPC.⁵⁶⁵ The Department of State would have to reject any rule: (1) “that does not satisfy all statutory rulemaking requirements; [(2)] which an agency has not responded in writing to all material and timely written inquiries or written comments; . . . or [(3)] which does not include a [SERC], if required.”⁵⁶⁶

D. Rule Challenges and Attorneys’ Fees

During meetings of the Florida House of Representatives Select Committee on Streamlining Governmental Regulations,⁵⁶⁷ in early 1995, testimony was received that the “presumption of correctness and deference due to the acts of the [agency]”⁵⁶⁸ and the burden which is placed on the challenger to prove the invalidity of a proposed⁵⁶⁹ or

562. 1996 Fla. Laws ch. 96-159, § 10, at 166-67 (codified at FLA. STAT. § 120.54(3)(e)6. (Supp. 1996)).

563. *Id.*

564. 1996 Fla. Laws ch. 96-159, § 10, at 166 (codified at FLA. STAT. § 120.54(3)(e)3. (Supp. 1996)).

565. *Id.* (codified at FLA. STAT. § 120.54(3)(e)4. (Supp. 1996)).

566. *Id.*

567. The Florida House of Representatives Select Committee on Streamlining Governmental Regulations was established in November 1994. The committee was chaired by Representative Irlo Bronson, Dem., Kissimmee.

568. Board of Trustees of Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1363 (Fla. 1st DCA 1995).

569. *Agrico*, 365 So. 2d at 763.

existing⁵⁷⁰ rule by a preponderance of the evidence resulted in an “uneven playing field” that made it too difficult to challenge agency rules.⁵⁷¹ Thereafter, the CS/CS/SB 536 shifted the burden of proof to the agency to prove the validity of the proposed or existing rule in a proceeding challenging a proposed or existing rule.⁵⁷² That bill also provided that both proposed rules and existing rules were not presumed to be valid or invalid.⁵⁷³ In addition, during the 1995 interim, the Governor’s Commission determined that modifying the burden of proof would help to restore balance to the rule challenge process.⁵⁷⁴

Additionally, some members of the Governor’s staff⁵⁷⁵ expressed the opinion that, if there was to be a shift in the burden of proof, a distinction should be made between adopted rules and rules that are only proposed.⁵⁷⁶ The reasoning for this distinction was that the new APA would likely contain many new procedural processes which protected the public and that an agency rule that was adopted in compliance with these processes should be cloaked with some type of validity.

Under the new APA, general procedures for challenging the validity of a rule or a proposed rule are provided in section 120.56(1).⁵⁷⁷ Special provisions for challenges to proposed or existing rules are located in section (2) and (3), respectively. As well, special provisions for challenges to agency statements defined as rules are located in section (4) and emergency rule challenge provisions are provided in section (5).⁵⁷⁸

Most attorneys’ fees and cost provisions are consolidated in a new section 120.595.⁵⁷⁹ The primary distinction in attorneys’ fees and costs

570. *Florida Waterworks Ass’n v. Florida Pub. Serv. Comm’n*, 473 So. 2d 237, 246 (Fla. 1st DCA 1985).

571. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., tape recording of proceedings (Jan. 9, 1995) (presentation by Jon L. Shebel, President and CEO, Associated Industries of Florida) (on file with the Comm.).

572. *See* CS/CS/SB 536, §§ 6 & 12.

573. *Id.*

574. APA COMM’N REPORT, *supra* note 22, app. B, at 3.

575. Dan R. Stengle, Deputy Chief of Staff, Executive Office of the Governor.

576. This position was adopted by the commission and included in the final version of CS/SBs 2290 & 2288. *See* APA COMM’N REPORT, *supra* note 22, at 23-24; 1996 Fla. Laws ch. 96-159, § 16, at 181-82 (codified at FLA. STAT. § 120.56 (Supp. 1996)).

577. 1996 Fla. Laws ch. 96-159, § 16, at 180-81 (codified at FLA. STAT. § 120.56(1) (Supp. 1996)).

578. 1996 Fla. Laws ch. 96-159, § 16, at 180-83 (codified at FLA. STAT. § 120.56(1)-(5) (Supp. 1996)).

579. 1996 Fla. Laws ch. 96-159, § 25, at 194-95 (codified at FLA. STAT. § 120.595(1)-(5) (Supp. 1996)). There are three attorney fee provisions not included in this section. Section 120.569(2)(c) provides for the award of “reasonable expenses” incurred because of the filing of any pleading, motion, or other paper for an “improper purpose,” including the award of a

is determined by the status of a rule. For adopted rules and for proposed rules, agencies face less onerous attorneys' fee and costs provisions.⁵⁸⁰ Where an agency has relied upon an unpromulgated statement that should have been adopted as a rule, greater fees and costs will be applied.⁵⁸¹

1. Challenges to Proposed and Existing Rules

Special provisions for challenges to proposed rules are provided in section 120.56(2).⁵⁸² That section requires a petitioner to file a petition challenging the validity of a proposed rule within: (1) twenty-one days after the date of publication of a notice of intent to adopt, amend or repeal a rule; (2) ten days after the final public hearing is held;⁵⁸³ (3) twenty days after the preparation of the SERC; or (4) twenty days after filing with the Department of State.⁵⁸⁴

The burden of proof has been shifted to the agency in challenges to proposed rules.⁵⁸⁵ The presumption of validity is also eliminated in the case of proposed rules.⁵⁸⁶ The Act requires the petitioner to state his or her objections to a proposed rule in the petition, as well as state the reasons that it is an invalid exercise of delegated legislative authority.⁵⁸⁷ Thereafter, the agency must prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections

reasonable attorneys' fee. FLA. STAT. § 120.569(2)(c). Section 120.569(2)(i)2. provides that a court may award to a prevailing party all or part of the costs and attorney fees that were incurred in obtaining a court order to enforce an subpoena, discovery order, or order imposing sanctions. *Id.* § 120.569(2)(i)2. The award is granted under the *Florida Rules of Civil Procedure*. *Id.* Section 120.57(1)(e)3. provides the award of reasonable costs and attorney fees upon appeal of an agency rejection of an administrative law judge's determination concerning an unadopted rule pursuant to § 120.57(1)(e), if the agency did not review the complete record and state with particularity in the order that the administrative law judge's determination was clearly erroneous or did not comply with the essential requirements of law. *Id.* § 120.57(1)(e)3.

580. *See infra* notes 593-94 and accompanying text.

581. *See infra* note 631 and accompanying text.

582. 1996 Fla. Laws ch. 96-159, § 16, at 181-82 (codified at FLA. STAT. § 120.56(2) (Supp. 1996)).

583. 1996 Fla. Laws ch. 96-159, § 16, at 181 (codified at FLA. STAT. § 120.56(2)(a) (Supp. 1996)). Additional time was added for a rule challenge after the public hearing. This provision is intended to save administrative resources by allowing a challenger additional time to challenge and not require them to file a rule challenge "up front" even when there may be a possibility of a settlement.

584. *Id.*

585. *Id.*

586. *Id.* at 182 (codified at FLA. STAT. § 120.56(2)(c) (Supp. 1996)).

587. *Id.* at 181; see FLA. STAT. § 120.52(8) for the definition of invalid exercise of delegated legislative authority.

raised.⁵⁸⁸ Where a proposed rule is modified, any person who is substantially affected by a change, is authorized to challenge any provision of the rule.⁵⁸⁹

The proposed rule may be declared wholly or partly invalid. The adopting agency is required to withdraw the invalid proposed rule or portion thereof.⁵⁹⁰

Challenges to adopted rules are regulated under section 120.56(3). A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule.⁵⁹¹ However, the presumption of validity is maintained for existing rules.⁵⁹²

Section 120.595(2)⁵⁹³ provides the standard for attorneys' fees in cases challenging proposed rules and section 120.595(3)⁵⁹⁴ provides the standard for attorneys' fees in cases challenging existing rules. Where a proposed rule or existing rule is found to be invalid, a judgment or order must be rendered against the agency for reasonable costs and reasonable attorneys' fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust.⁵⁹⁵ An agency's action is defined to be "substantially justified" if there was a reasonable basis in law and fact for the action at the time the action was taken by the agency.⁵⁹⁶ The "substantially justified" standard is taken from the Equal Access to Justice Act, which provides for costs and attorney fee awards in civil

588. 1996 Fla. Laws ch. 96-159, § 16, at 181-82 (codified at FLA. STAT. § 120.56(2) (Supp. 1996)).

589. *Id.* at 182.

590. Fees and costs in proposed and existing rule challenges also were affected by CS/CS/SB 536. In cases pursuant to §§ 120.54(4) or 120.56, where an agency fails to prove the validity of the rule as to the objections raised, the court or hearing officer was required to enter a judgment or order against the agency for costs and reasonable attorneys' fees, unless the agency could demonstrate that its actions were substantially justified.

591. FLA. STAT. § 120.56(3)(a) (Supp. 1996). Fees and costs in proposed and existing rule challenges also were affected by CS/CS/SB 536. In cases pursuant to §§ 120.54(4) or 120.56, where an agency fails to prove the validity of the rule as to the objections raised, the court or hearing officer was required to enter a judgment or order against the agency for costs and reasonable attorneys' fees, unless the agency could demonstrate that its actions were substantially justified. CS/CS/SB 536, at 58-59.

592. APA COMM'N REPORT, *supra* note 22, at 24, app. N, at 2.

593. 1996 Fla. Laws ch. 96-159, § 25, at 195 (codified at FLA. STAT. § 120.595(2) (Supp. 1996)).

594. *Id.* at 196 (codified at FLA. STAT. § 120.595(3) (Supp. 1996)).

595. *Id.* at 195-96.

596. *Id.* The CS/CS/SB 536 did not define this term.

and administrative proceedings for small business parties.⁵⁹⁷ Attorney fees, however, are limited to \$15,000.⁵⁹⁸

The limitation on the award also is patterned after the Equal Access to Justice Act, except that under that Act the total award of \$15,000 includes both costs and attorney fees.⁵⁹⁹ The new APA segregates attorney fees from the monetary limitation, so that the only limit on costs is that they be reasonable.⁶⁰⁰

If an agency prevails in the proceedings, the court or administrative law judge is authorized to "award reasonable costs and reasonable attorney's fees against a party if . . . [it is determined that a party participated] in the proceedings for an improper purpose."⁶⁰¹

2. Challenges to Unadopted Agency Statements

As previously discussed, the requirement of section 120.535 that each agency statement that meets the definition of a rule must be adopted as soon as feasible and practicable, is now embodied in section 120.54(1).⁶⁰² Proceedings to determine a violation of this requirement must be brought pursuant to section 120.56(4).⁶⁰³ The pleading requirements⁶⁰⁴ and burden of proof requirements,⁶⁰⁵ which essentially are those of the old section 120.535 are strengthened by the 1996 amendments.⁶⁰⁶ Prior to the new APA, an agency could rely upon an unadopted statement and avoid the sanction of attorney fees and costs,

597. FLA. STAT. § 57.111(4) (1995).

598. 1996 Fla. Laws ch. 96-159, § 25, at 195-96 (codified at FLA. STAT. § 120.595(2)-(3) (Supp. 1996)).

599. FLA. STAT. § 57.111(4)(d)2. (1995).

600. 1996 Fla. Laws ch. 96-159, § 25, at 195-96 (codified at FLA. STAT. § 120.595(2)-(3) (Supp. 1996)).

601. *Id.*

602. 1996 Fla. Laws ch. 96-159, § 10, at 160-61 (codified at FLA. STAT. § 120.54(1) (Supp. 1996)).

603. 1996 Fla. Laws ch. 96-159, § 16, at 182 (codified at FLA. STAT. § 120.56(4) (Supp. 1996)).

604. *Id.* at 182-83.

605. *Id.* at 182.

606. Section 120.56(4) provides that any person substantially affected by an agency statement may file a challenge to that statement. "The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under § 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by § 120.54." *Id.* at 182. "If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable[.]" *Id.*

if the agency initiated rulemaking subsequent to a determination by a hearing officer that the agency statement violated section 120.535.⁶⁰⁷

Under the new APA, the agency must initiate rulemaking prior to the entry of the order that the statement violates the rulemaking requirements in order to avoid the attorney fee sanctions.⁶⁰⁸ Like the previous attorney fee sanctions, the Legislature has continued to mandate that the award of attorney fees based upon an unpromulgated rule determination be paid from the budget of the secretary or other agency head, and the agency is not entitled to reimbursement for the award under any other provision of law.⁶⁰⁹

Further, the agency only may continue to rely upon the statement if it demonstrates that the unadopted rule meets the functionally equivalent tests for the validity of an adopted rule.⁶¹⁰ The burden of proof in this instance is on the agency, as it was under the old section 120.535.⁶¹¹ The Legislature has further provided, however, that the agency action is not presumed valid or invalid.⁶¹² In this instance, the agency must demonstrate that the unadopted rule is within the delegated authority granted by the Legislature, and that the unadopted rule does not enlarge or contravene the law implemented.⁶¹³ In addition, the agency must show that the rule is not vague or “vests unbridled discretion in the agency; is not arbitrary or capricious; [and] [i]s not being applied to the substantially affected party without due notice.”⁶¹⁴ Finally, the unadopted rule must be supported by competent, substantial evidence, and must “not impose excessive regulatory costs.”⁶¹⁵

A proceeding pursuant to section 120.56(4) may be brought in conjunction with a proceeding under any other section of the APA, or consolidated with such a proceeding.⁶¹⁶ When the substantial interests of a party have been determined by an agency action that is based upon an unpromulgated rule, however, the party may bring a challenge under

607. FLA. STAT. § 120.535(1) (1995).

608. 1996 Fla. Laws ch. 96-159, § 16, at 183 (codified at FLA. STAT. § 120.56(4)(e) (Supp. 1996)).

609. FLA. STAT. § 120.535(6) (1995).

610. 1996 Fla. Laws ch. 96-159, § 19, at 187 (codified at FLA. STAT. § 120.57(1)(e) (Supp. 1996)).

611. 1996 Fla. Laws ch. 96-159, § 16, at 182 (codified at FLA. STAT. § 120.56 (Supp. 1996)).

612. 1996 Fla. Laws ch. 96-159, § 19, at 187 (codified at FLA. STAT. § 120.57(1)(e)2. (Supp. 1996)).

613. *Id.*

614. *Id.*

615. *Id.* at 187-88.

616. 1996 Fla. Laws ch. 96-159, § 16, at 183 (codified at FLA. STAT. § 120.56(4)(f) (Supp. 1996)).

section 120.57(1)(e), in which the administrative law judge will issue a recommended order subject to the final order authority in the agency.⁶¹⁷

In that case, the agency must demonstrate that the unadopted rule is within its scope of delegated authority.⁶¹⁸ In the recommended order, the administrative law judge's interpretation as to the validity of the unadopted rule is cloaked with a status similar to the findings of fact of a recommended order.⁶¹⁹ In other words, the agency, in its final order, only may reject the administrative law judge's determination regarding the unadopted rule if the agency determines from a review of the complete record, and states with particularity in the order, that the determination is clearly erroneous or does not comply with the essential requirements of law.⁶²⁰ If the agency does not restrict its actions to the limitations provided in the law on this point, the agency action must be set aside by the reviewing court and the court is directed by law to award to the prevailing party the costs and attorney fees for the initial proceeding and the review proceeding.⁶²¹

If a final order is entered which provides that all or part of an agency statement violates section 120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.⁶²²

If, however, prior to the entry of a final order, the agency publishes proposed rules which address the statement and if the agency proceeds expeditiously and in good faith to adopt rules which address the statement, the agency may rely upon the statement or a substantially similar statement as a basis for agency action if it meets the requirements of section 120.57(1)(e).⁶²³ "If an agency fails to adopt rules which address the statement within 180 days after publishing proposed rules, for purposes of the subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules."⁶²⁴

[P]roceedings to determine a violation of s. 120.54(1)(a), must be brought pursuant to this subsection. A proceeding

617. *Id.*

618. 1996 Fla. Laws ch. 96-159, § 19, at 187 (codified at FLA. STAT. § 120.57(1)(e)2. (Supp. 1996)).

619. *Id.* at 189 (codified at FLA. STAT. § 120.57(1)(j) (Supp. 1996)).

620. *Id.*

621. *Id.* at 188 (codified at FLA. STAT. § 120.57(1)(e)3. (Supp. 1996)).

622. 1996 Fla. Laws ch. 96-159, § 16, at 183 (codified at FLA. STAT. § 120.56(4)(d) (Supp. 1996)).

623. *Id.* (codified at FLA. STAT. § 120.56(4)(e) (Supp. 1996)).

624. *Id.*

pursuant to this subsection may be brought in conjunction with a proceeding under any other section of . . . [the APA], or consolidated with such a proceeding. Nothing in this paragraph . . . [is to] be construed to prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).⁶²⁵

Section 120.57(1)(e)1.⁶²⁶ provides that

any agency action that determines the substantial interests of a party and that is not based on an adopted rule is subject to de novo review. . . . The agency action shall not be presumed valid or invalid. The agency must demonstrate that the . . . [statement]:

a. [i]s within the powers, function, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is [acting] within that authority;

b. [d]oes not enlarge, modify, or contravene the specific provisions of law implemented;

c. [i]s not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. [i]s not arbitrary or capricious;

e. [i]s not being applied . . . [retroactively] without due notice;

f. [i]s supported by competent and substantial evidence; and

g. [d]oes not impose excessive regulatory costs on the regulated person, county, or city.⁶²⁷

The determination regarding the unadopted rule shall not be rejected by an agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that the determination is clearly erroneous or does not comply with essential requirements of law.⁶²⁸ If a reviewing court finds that the agency's rejection of the determination does not comport with the paragraph, the agency action will be set aside and the court must award to the

625. *Id.* (codified at FLA. STAT. § 120.56(4)(f) (Supp. 1996)).

626. 1996 Fla. Laws ch. 96-159, § 19, at 187.

627. *Id.*

628. CS/CS/SB 536, § 10, at 51.

prevailing party the reasonable costs and a reasonable attorneys' fee for the initial proceeding, and the proceeding for judicial review.⁶²⁹

Section 120.56(4) authorizes any person who is substantially affected by an agency statement to seek an administrative determination that the statement is violative of section 120.54(1)(a).⁶³⁰ Upon entry of a final order that all or part of such a statement violates section 120.54(1)(a), the administrative law judge must award reasonable costs and attorneys' fees to the petitioner.⁶³¹ The award is paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency.⁶³² An agency is not entitled to payment of an award or reimbursement for payment of an award under any provision of law.⁶³³

E. *Alternative Dispute Hearing Provisions*

1. Mediation of Disputes

The Act creates a new section 120.573 to authorize the use of mediation in administrative disputes.⁶³⁴ This provision was included in an effort to help reduce the time and expense of the administrative process.⁶³⁵ The Act provides that whenever an agency makes a decision that affects a person's substantial interests, the agency must indicate whether mediation is available to resolve any disputes arising from the decision.⁶³⁶ If all parties agree to mediation, in writing, then the time period for electing a formal hearing is tolled to allow the parties to

629. 1996 Fla. Laws ch. 96-159, § 19, at 188 (codified at FLA. STAT. § 120.57(1)(e)3. (Supp. 1996)). The CS/CS/SB 536 provided that subsequent to a hearing officer's determination that an agency's statement (unadopted policy) violates § 120.547(2), in that it should have been promulgated as a rule, if an agency relies upon the statement or one substantially similar, a person whose substantial interests are determined by the agency action, is entitled to payment of reasonable costs and attorneys' fees. The award was required to be paid from the agency's budget.

630. 1996 Fla. Laws ch. 96-159, § 16, at 182 (codified at FLA. STAT. § 120.56(4) (Supp. 1996)).

631. 1996 Fla. Laws ch. 96-159, § 25, at 196 (codified at FLA. STAT. § 120.595(4) (Supp. 1996)).

632. *Id.* (codified at FLA. STAT. § 120.595(4)(b) (Supp. 1996)).

633. *Id.*

634. 1996 Fla. Laws ch. 96-159, § 20, at 192 (codified at FLA. STAT. § 120.573 (Supp. 1996)). The mediation provisions do not preclude any other type of dispute resolution; the Act is suggesting it as one type to be considered by the parties. *Id.*

635. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., CS/SBs 2290 & 2288 (1996) Bill Analysis 33 (June 14, 1996).

636. In discussions with the Governor's office, it was the Governor's position that agencies should not be required to offer mediation. A compromise was reached which allowed the agencies to determine whether mediation would be available for each type of dispute involving agency action that affects the substantial interests of a person.

mediate the dispute.⁶³⁷ The mediation is required to be concluded within sixty days unless all parties agree otherwise.⁶³⁸

The mediation agreement must address: selection of the mediator, cost allocation, confidentiality, and any other provisions agreed to by the parties.⁶³⁹ If the mediation is successful, the agency will enter a final order incorporating the agreement.⁶⁴⁰ If the mediation is not successful, then the parties may proceed to a hearing under section 120.569 and 120.57.⁶⁴¹

2. Summary Hearing

The Act now provides for a simplified summary hearing process for administrative disputes.⁶⁴² The Division of Administrative Hearings is required, within five days of receipt of a petition or request for a hearing, to serve and issue on all original parties an initial order that assigns the case, provides information on practice before the division, and advises the parties on the availability of a summary hearing.⁶⁴³ Any party may file a motion for summary hearing within fifteen days of the division's order. If all parties agree, then the proceeding will be

637. 1996 Fla. Laws ch. 96-159, § 20, at 192 (codified at FLA. STAT. § 120.573 (Supp. 1996); *see also* Fla. H.R. Select Comm. on Streamlining Govtl. Regs., CS/SBs 2290 & 2288 (1996) Bill Analysis 33 (June 14, 1996).

638. 1996 Fla. Laws ch. 96-159, § 20, at 192 (codified at FLA. STAT. § 120.573 (Supp. 1996)). *see also* Fla. H.R. Select Comm. on Streamlining Govtl. Regs., CS/SBs 2290 & 2288 (1996) Bill Analysis 33 (June 14, 1996).

639. 1996 Fla. Laws ch. 96-159, § 20, at 192 (codified at FLA. STAT. § 120.573 (Supp. 1996)). The parties can agree to whatever terms fit their situation. There is nothing in the Act that prevents an agency from utilizing one of its employees from another office in the agency as a mediator, if the parties agree. The agency also can agree to pay all of the costs. The parties also may agree to utilize a certified mediator, even though this is not required.

640. The draft of the Uniform Rules prepared by the Administrative Law Section of the Florida Bar and suggested to the Administration Commission provides procedures for mediation in proposed FLA. ADMIN. CODE ANN. r. 28-106.401.

641. 1996 Fla. Laws ch. 96-159, § 20, at 192 (codified at FLA. STAT. § 120.574 (Supp. 1996)). The ability to proceed to a §§ 120.569 and 120.57 hearing provides the parties the ability to attempt mediation without sacrificing any of their rights to a more formal hearing under chapter 120.

642. 1996 Fla. Laws ch. 96-159, § 21, at 192 (codified at FLA. STAT. § 120.574 (Supp. 1996)).

643. *Id.* The Governor's Office also was concerned that all the parties must agree to conduct the hearing through the summary hearing process. The 1994 version of this provision in CS/HB 237 by the Florida House of Representatives Select Committee on Agency Rules and Representative Sam Mitchell provided that the administrative law judge (hearing officer) assigned the case would make the decision that the dispute could be handled in a summary manner. *See* CS/HB 237, at 18-19. Since the Act provides that the order is a final order and not a recommended order, the Governor's Office was insistent that the parties make the decision.

conducted within thirty days of the agreement. If no motion is filed, the case proceeds under section 120.57.

This section limits discovery,⁶⁴⁴ the number of motions,⁶⁴⁵ as well as requires a record of the proceedings. The hearing officer's decision must be rendered within thirty days of the final hearing or filing of the transcript, whichever is later, and the hearing officer's order is the final agency action. The bill also requires the division to maintain a register of the total number of formal proceedings filed with the division for two years following the effective date of the act.⁶⁴⁶

F. *Judicial Review*

1. Consolidation of Cases

The First District Court of Appeal has held that when appellate proceedings arise from the same underlying administrative proceeding and appeals from that proceeding are brought in two different District Courts of Appeal, the court lacks authority to transfer and consolidate the appellate proceedings in one district court.⁶⁴⁷

644. 1996 Fla. Laws ch. 96-159, § 21, at 193 (codified at FLA. STAT. § 120.574 (Supp. 1996)). Discovery is limited to the parties furnishing each other with copies of any documentary evidence and lists of witnesses who may testify at the hearing. The parties are required to furnish this information no later than five days prior to the final hearing.

645. *Id.*

The motions are limited to:

1. A motion in opposition to the petition.
2. A motion requesting discovery beyond the informal exchange of documents and witness lists described in paragraph (b) of this section. Upon a showing of necessity, additional discovery may be permitted in the discretion of the administrative law judge, but only if it can be completed not later than 5 days prior to the final hearing.
3. A motion for continuance of the final hearing date.
4. A motion requesting a prehearing conference, or the administrative law judge may require a prehearing conference, for the purpose of identifying: the legal and factual issues to be considered at the final hearing, the names and addresses of witnesses who may be called to testify at the final hearing, documentary evidence that will be offered at the final hearing, the range of penalties that may be imposed upon final hearing, and any other matter that the administrative law judge determines would expedite resolution of the proceeding.

Id.

646. The Act takes effect on October 1, 1996. 1996 Fla. Laws ch. 96-159, § 44, at 213.

647. *Coscan Florida, Inc. v. Metropolitan Dade County*, 567 So. 2d 19, 20 (Fla. 1st DCA 1990).

In response to this case, the Act now provides that when proceedings under chapter 120 are consolidated for final hearing and the parties to the consolidated proceeding seek review of final or interlocutory orders in more than one district court of appeal, a court of appeal is authorized to “transfer such appellate proceedings on its own motion, upon motion of a party to one of the appellate proceedings, or by stipulation of the parties. . . .”⁶⁴⁸ “In determining whether to transfer a proceeding, the court may consider such factors as the interrelationship of the parties and the proceedings, the desirability of avoiding inconsistent results in related matters, judicial economy, and the burden on the parties of reproducing the record for use in multiple appellate courts.”⁶⁴⁹

2. Modification of Findings of Fact

A new subsection (10) was added to section 120.68,⁶⁵⁰ which directs how a reviewing court is to consider an administrative law judge’s final order on appeal. Subsection (10) provides:

If an administrative law judge’s final order depends on any fact found by the administrative law judge, the court shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside the final order of the administrative law judge or remand the case to the administrative law judge, if it finds that the final order depends on any finding of fact that is not supported by competent substantial evidence in the record of the proceeding.⁶⁵¹

Review under the former 120.68(10)⁶⁵² is still available for proceedings conducted pursuant to sections 120.569 and 120.57.

One important procedural change, that was recommended by the Governor’s working group,⁶⁵³ has been made to the Act regarding the court’s treatment of enforcement of agency decisions.⁶⁵⁴ Prior to the enactment of the 1996 Act, section 120.68(3)(a) had provided that even

648. 1996 Fla. Laws ch. 96-159, § 35, at 202 (codified at FLA. STAT. § 120.68(2)(b) (Supp. 1996)).

649. *Id.*

650. *Id.* at 204 (codified at FLA. STAT. § 120.68(10) (Supp. 1996)).

651. *Id.*

652. This section is now codified at § 120.68(7)(b) (Supp. 1996).

653. Kearney, *supra* note 151, at 5 n.1.

654. 1996 Fla. Laws ch. 96-159, § 35, at 202 (codified at FLA. STAT. § 120.68(3) (Supp. 1996)).

though the filing of a petition for review does not stay enforcement of an agency decision, if the decision is to revoke a license “supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, *upon petition of the agency*, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state.”⁶⁵⁵

The new Act provides that, subject to the Florida Rules of Appellate Procedure,⁶⁵⁶ “no stay or supersedeas shall be in effect *until the party seeking relief files a petition for stay and the agency or court enters an order granting such relief.*”⁶⁵⁷ As a result, the burden now is on the petitioner in a revocation of a license proceeding to affirmatively request the stay.

III. CONCLUSION

The amendments which were made to the Administrative Procedure Act during the 1996 regular session resulted in the most comprehensive revision to the act since 1974. The revisions were driven by common concerns of the legislative and executive branches. These concerns may be summed up as a desire for greater government and private sector efficiency. The goal of greater efficiency appears to have had at least two parts: (1) balancing rule certainty and rule flexibility; and (2) reducing the number of administrative rules, as well as rule disputes.

Both the executive and the legislative branches expressed a desire for greater rule flexibility. Finding the proper balance between rulemaking certainty and this desired flexibility was a process that took years in the making. While it may be tempting, and might even be correct factually, to categorize the legislative and executive positions on the rulemaking standard of section 120.535 as pro and con respectively, over reliance on this categorization would diminish the primacy of the common desire for greater efficiency which ultimately helped lead to the passage of the Committee Substitute for Senate Bills 2290 and 2288. While the executive and legislative branches originally took very different paths toward this goal, members of both branches spent a great deal of time struggling with the impact of rules and rulemaking on government and the private sector. Ultimately, the balance was determined to be in maintaining the requirement that agencies adopt their policies as rules as soon as feasible and practicable, yet providing agencies with the authority to grant a waiver or variance of these rules under limited

655. FLA. STAT. § 120.68(3)(a) (1995) (emphasis added).

656. FLA. R. APP. P. 9.310.

657. 1996 Fla. Laws ch. 96-159, § 35, at 202 (emphasis added) (codified at FLA. STAT. § 120.68(3) (Supp. 1996)).

circumstances.⁶⁵⁸ Whether this balance will be effective ultimately will be determined by legislative and executive appraisal of agency experience.

It also is apparent that the legislative and executive branches shared a common desire for fewer rules. The rule reduction message, however, was two-fold. Not only are fewer rules superior to more rules, but the fewer rules which remain need to be improved. As well, fewer disputes in the rulemaking process were desired. These goals were approached from several angles. First, both branches instituted independent rule reduction efforts.⁶⁵⁹ Second, legislation was passed requiring the adoption of a variety of types of uniform rules.⁶⁶⁰ Third, rulemaking standards were tightened.⁶⁶¹ In addition, increased public participation was provided for in the Act and alternative dispute resolution processes were authorized. Finally, enhancements to legislative oversight of rules and rulemaking were made. Only time will tell whether these actions may result in a reduction in the absolute number of rules, as well as limit rulemaking disputes.⁶⁶²

658. 1996 Fla. Laws ch. 96-159, § 12, at 172 (codified at FLA. STAT. § 120.542 (Supp. 1996)).

659. As noted in the introductory section, the Governor in 1995 issued two executive orders requiring executive agencies to review their rules and reduce the number of rules. *See supra* notes 103, 105 and accompanying text. The Senate President, as part of budget reviews, also requested agencies to conduct rule reviews. The executive branch mandated a flat 50% reduction in the number of rules. The Senate President did not set a particular goal in the percentage of rules which agencies were requested to repeal, but instead requested agencies to repeal rules that were redundant, overlapping, obsolete, or unnecessary. Additionally, the Senate President requested a second stage review to encourage agencies to consider the economic cost of rules and to increase agency efficiency. The push toward fewer rules continued throughout the 1995 legislative interim. Executive agencies under the Governor continued to work toward the goal of 50% fewer rules. *See supra* note 102 and accompanying text. According to information compiled by the JAPC, just over half of the rule actions filed from January 1995 through the first week of August 1995 were rule repeals. *See supra* notes 111-12 and accompanying text.

660. CS/SBs 1626 & 1654.

661. 1996 Fla. Laws ch. 96-159, § 9, at 159-60 (codified at FLA. STAT. § 120.536 (Supp. 1996)).

662. A reduction in the absolute number of rules does not necessarily result in a reduction in the regulation which an agency enforces and with which the public must comply. Rules can be consolidated so that, while the requirements remain the same, the actual numbers of rules are reduced. In addition, it is possible, though it would not meet the requirement of the Act, for an agency to maintain the same policies and requirements that previously were contained in rule, as unofficial policies and requirements. It has been suggested some agencies attempt to operate under the old method of "phantom government." Maher, *supra* note 3, at 338; Stephen T. Maher, *Why Florida Needs Section 120.535, Florida Statutes*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Dec. 1995, at 6.

Editor's Note:

The 1997 Legislature passed a “glitch” bill that amended several sections of the new APA. The Legislature passed Committee Substitute for Senate Bill 1066 by the Florida Senate Select Committee on Governmental Reform and Oversight and Senator Charles Williams. The bill is codified at chapter 97-176, Florida Laws. The chapter law amends the APA to correct cross-reference errors, timing inconsistencies, and other technical problems that were identified during the interim.

Additionally, the chapter law makes the following changes to the APA: it clarifies that educational unites are within the definition of “agency” under the act; provides that a notice of rule development is not necessary for repeal of a rule; permits an agency to provide a statement of how a person may obtain without cost a copy of any preliminary rule draft; provides that an agency’s determination to utilize negotiated rulemaking is not agency action; provides that public employees are not persons subject to regulation for the purposes of petitioning for a variance or waiver; provides that agencies do not have authority to grant waivers or variances to rules required by the federal government for the agency’s implementation or retention of federally approved or delegated programs, except as authorized by those programs or the Federal government; authorizes expedited time frames, limited notice, and limited comments on petitions for emergency waiver or variance; authorizes durational limits and the placement of conditions upon waivers or variances, but only to the extent necessary for the purpose of the underlying statute to be achieved; provides a process for provision of additional information upon review of a petition for waiver or variance; requires a determination to mediate to be made within 10 days after the time period stated in the announcement for election of an administrative remedy; provides that the original parties to the case, not the administrative law judge, determine whether a case proceeds under the summary hearing process; provides that attorneys’ fees and costs do not have to be awarded if an agency has not adopted a statement as a rule and statement is required by the federal government to implement or retain a delegated or approved program or to meet a condition to receive federal funds; provides that the director and deputy director of the DOAH must meet the same requirements as administrative law judges; provides that the director of the DOAH is the chief administrative law judge; clarifies that agency heads and designees may be presiding officers who may not receive *ex parte* communications; clarifies that the entity that appoints the presiding officer is the entity that assigns a successor; reinserts language regarding judicial review and stays from the 1995 act that provides that the filing of a petition does

not itself stay enforcement of the agency decision; excepts the Board of Trustees of the Internal Improvement Trust Fund from the default provisions of waiver and variance; provides that students are not persons subject to regulation for the purposes of petitioning for a variance or waiver to rules of educational units; and provides that educational units, and units of local government do not have to publish notices in the *Florida Administrative Weekly*.

This new law amends the following sections of the Florida Statutes, 1996 Supplement: §§ 120.52; 120.54; 120.541; 120.542; 120.56; 120.569; 120.57; 120.573; 120.574; 120.595; 120.60; 120.65; 120.66; 120.68; 120.74; 120.80; and 120.81.

