



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** – The bill requires the Department of State to publish on an Internet website the Florida Administrative Weekly (FAW) accessible free of charge to the public, and to continue publishing the FAW in print format.

The bill increases the rulemaking authority of the Administration Commission for the limited purpose of prescribing the form and substantive provisions of bid-protest bonds.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Administrative Procedure Act**

##### **Background**

The Administrative Procedure Act (APA)<sup>1</sup> allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions. The Division of Administrative Hearings (DOAH), which consists of an independent group of administrative law judges, conducts hearings under chapter 120, F.S., when certain agency decisions<sup>2</sup> are challenged by substantially affected persons.<sup>3</sup>

Current law provides that a person substantially affected by a rule or proposed rule may file a petition seeking an administrative determination of the invalidity of a rule or proposed rule on the ground that the rule is an invalid exercise of delegated legislative authority. It also provides a mechanism for a substantially affected person to seek an administrative determination that an agency statement of generally applicable policy should have been adopted as a rule.<sup>4</sup>

A party wishing to challenge an agency determination of his or her substantial interests must file a petition for hearing with the agency. The agency must then request, from DOAH, an administrative hearing within 15 days. The APA also provides notice and pleading requirements, and the time parameters within which a final order must be completed.<sup>5</sup>

Current law requires the Administration Commission<sup>6</sup> to enact uniform rules of procedure governing DOAH. These uniform rules of procedure are analogous to the Florida Rules of Civil Procedure, used by the judicial branch. Legislation passed in 1998<sup>7</sup> clarified that the uniform rules of procedure for the filing of all petitions for administrative hearing under ss. 120.569 or 120.57, F.S., must include:

- The identification of the petitioner;
- A statement of when and how the petitioner received notice of the agency's action or proposed action;
- An explanation of how the petitioner's substantial interests are or will be affected by the action or proposed action;
- A statement of all material facts disputed by the petitioner or a statement that there are no disputed facts;

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<sup>1</sup> Ch. 120, F.S.

<sup>2</sup> For example, rules and determinations of a party's substantial interest.

<sup>3</sup> DOAH proceedings are conducted like nonjury trials and are governed by chapter 120, F.S.

<sup>4</sup> Sec. 120.56, F.S.

<sup>5</sup> Sec. 120.569, F.S.

<sup>6</sup> The Governor and the Cabinet make up the members of the Administration Commission. Sec. 14.202, F.S.

<sup>7</sup> Ch. 1998-200, Laws of Florida, sec. 3.

- A statement of the ultimate facts alleged, including a statement of the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
- A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes,<sup>8</sup> and
- A statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the agency to take with respect to the proposed action.<sup>9</sup>

There is a Joint Administrative Procedures Committee (JAPC), within the Legislature, made up of six members; three members of the House of Representatives and three members of the Senate. JAPC undertakes and maintains a systematic and continuous review of the statutes authorizing agencies to adopt rules. It makes recommendations to the appropriate standing committees of the Legislature regarding delegated legislative authority to adopt rules.<sup>10</sup>

## **Effect of Bill**

### Duties of JAPC

The bill requires JAPC to maintain a continuous review of statutes that authorize agencies to adopt rules and to make recommendations to appropriate standing committees. It removes the requirement that the committee "undertake a systematic review" of the statutes. According to JAPC, it is a more efficient use of committee resources to review statutes in the course of the rule review process.

### Agency Rulemaking

The bill locates all important rulemaking timeframes and deadlines in one section of the APA for improved accessibility. The bill also clarifies that an agency must file a Notice of Change after a final rulemaking hearing, if non-technical changes are made, and that the notice must be published in the FAW.

### Appeal of Administrative Determinations

The bill further provides that the filing of a petition for administrative determination of a proposed rule must toll the 90-day period during which a rule must be filed for adoption until 30 days after rendition of the final order, or until any judicial review of the final order is complete. Unless the decision of the administrative law judge is reversed on appeal, the proposed rule or provision of a proposed rule declared invalid will not be adopted. It clarifies that the term "administrative determination" does not include subsequent judicial review.

### Petitions for Administrative Hearing

The bill grants rulemaking authority to the Administration Commission in order to create a separate set of pleading requirements for those hearings filed by the respondent in an agency enforcement or disciplinary action. Uniform rules for this type of request require:

- The name, address and telephone number of the party making the request and the name, address and telephone number of the party's counsel or qualified representative upon whom service of pleadings and other papers will be made;
- A statement that the respondent is requesting an administrative hearing and disputes the material facts alleged by the petitioner, in which case the respondent must identify those material facts that are in dispute, or that the respondent is requesting an administrative hearing and does not dispute the material facts alleged by the petitioner; and

<sup>8</sup> The underlined text was not part of the 1998 amendment, but was inserted by chapter 2003-94, Laws of Florida, sec. 2.

<sup>9</sup> Sec. 120.54(5)(b)4., F.S.

<sup>10</sup> Sec. 11.60, F.S.

- A reference by file number to the administrative complaint that the party has received from the agency, and the date on which the agency pleading was received.

The pleading requirements are codified in the Florida Administrative Code at Uniform Rule 28-107.004(3), F.A.C., which was promulgated *before* the 1998 legislative amendment. The rulemaking authority granted to the Administration Commission serves to resolve the confusion between rule and statute.

### Equitable Tolling

The bill extends the deadline for filing a petition, if the petitioner has:

- Been misled or lulled into action;
- In some extraordinary way been prevented from asserting his or her rights; or
- Timely asserted his or her rights mistakenly in the wrong forum.

As reported by JAPC, these changes address concerns expressed in recent judicial decisions and by the administrative law judges and practitioners.

### Bid Protest Bonds

The bill provides rulemaking authority to the Administration Commission for the purpose of prescribing the form and substantive provisions of a bond required pursuant to a bid protest. According to JAPC, the Administration Commission already has adopted such form; however, the commission did not have proper rulemaking authority. This change merely puts the commission's rule in compliance with the Florida Statutes.

Current law requires an agency to include in its notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase the following statement: "Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes." The bill requires that the notice also state that "failure to post the bond or other security required by law within the time allowed for filing a bond" constitutes a waiver of proceedings under the APA.

### Final Orders

The bill provides additional requirements for final orders issued after a DOAH hearing under s. 120.57(1), F.S. The bill requires the agency to make an explicit ruling on each exception filed by any party after the recommended order is submitted by DOAH. The agency must report to DOAH its exceptions to the recommended order, and file a copy of the final order with DOAH.<sup>11</sup>

### Agency and DOAH Reporting

The bill requires DOAH and agencies to file certain reports with the Administration Commission and JAPC. DOAH and agencies must issue recommendations regarding the types of cases that should be conducted by the summary hearing process in s. 120.574, F.S. DOAH must report on agency compliance with the requirement to file final orders and exceptions with the division within 15 days of issuance.

The bill requires each agency to file its report of the agency's formal rule review with JAPC in addition to the President of the Senate and the Speaker of the House of Representatives.<sup>12</sup> As with DOAH, the report must include recommendations regarding the types of cases that should be conducted by the summary hearing process.

<sup>11</sup> Sec. 120.57(1)(m), F.S.

<sup>12</sup> See s. 120.65(10), F.S.

## Equal Access to Justice Act

The bill expands access to the Florida Equal Access to Justice Act, which allows certain small business owners to recover attorneys' fees when the agency action against the business entity is deemed not "substantially justified." The bill expands the definition of "small business party" to include individuals with a net worth of less than \$2M, when the agency makes a claim against that individual's license rather than a claim against the business entity. This change appears to address *Daniels v. Fla. Dep't of Health*, SC 04-230 (Fla. 2005), in which the sole proprietor of an S-Corporation was deemed not a small business party because the agency's claim was made against the owner's individual license rather than against her corporate entity.<sup>13</sup>

## Florida Administrative Weekly and Florida Administrative Code

### **Background**

Current law requires the Department of State (DOS) to publish rulemaking and public meetings notices, and various other materials filed by the state's administrative agencies, in the *Florida Administrative Weekly* (FAW).<sup>14</sup> DOS contracts with LexisNexis Matthew Bender for publication of the FAW in a printed format.<sup>15</sup> The FAW is published on Fridays and distributed for free to administrative agencies, courts, libraries, law schools, and legislative offices. The FAW has approximately 369 paid subscribers.<sup>16</sup> In addition to the paper version, DOS also posts copies of the FAW on its Internet website accessible to the public free of charge.

DOS is required to publish the Florida Administrative Code (FAC), which contains all rules adopted by agencies, together with references to rulemaking authority and history notes. The FAC must be supplemented at least monthly.<sup>17</sup> DOS also contracts with LexisNexis Matthew Bender for the printing of the FAC.

Current law creates the Publication Revolving Trust Fund, and specifies that all fees and moneys collected by DOS under the Administrative Procedure Act (APA) be deposited in the fund for the purpose of paying for the publication of the FAC and FAW, and for associated costs incurred by DOS in administering APA requirements. Unencumbered balances at the beginning of each fiscal year, which exceed \$300,000, are transferred to the General Revenue Fund.<sup>18</sup>

DOS is authorized to: (a) make subscriptions of the FAW available for a price computed as a pro rata share of 50 percent of the costs related to the publication of the FAW; and (b) charge agencies using the FAW a space rate (line charge) computed to cover a pro rata share of 50 percent of the costs related to publication of the FAW.<sup>19</sup> Subscription fees charged to FAW subscribers are retained by the publisher as compensation for printing the FAW. DOS does not receive royalties from FAW subscriptions.

### Internet Publication Pilot Project

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<sup>13</sup> Circuit appeals courts previously split on allowing fees under the Equal Access to Justice Act for petitioners in this situation. The 1st and 3rd DCA denied such claims while recognizing the unfairness of the result; the 4th DCA allowed the fees.

<sup>14</sup> According to DOS, approximately 600 entities publish notices in the FAW. These entities include state agencies, other units of state and local governments, and nongovernmental entities. Email from Dep't. of State, Feb. 9, 2006.

<sup>15</sup> *Report on Internet Noticing of the Florida Administrative Weekly*, Florida Joint Administrative Procedures Committee, October 2003, pp. 2-3.

<sup>16</sup> Telephone conversation with Department of State, Administrative Code and Weekly Unit, February 10, 2006. DOS indicated information was based on a recent report from FAW publisher.

<sup>17</sup> Sec. 120.55(1)(a), F.S.

<sup>18</sup> Sec. 120.55(5), F.S.

<sup>19</sup> Sec. 120.55(1), F.S.

In 2001, the Legislature authorized the Department of Environmental Protection (DEP) and the State Technology Office (STO) to establish an Internet publication pilot project for the purpose of determining the cost-effectiveness of publishing administrative notices on the Internet, rather than in the FAW, and to submit a report containing findings regarding the cost-effectiveness of Internet publication.<sup>20</sup> The report indicated that DEP paid \$44,179 for FAW line charges during calendar year 2001 and would have paid approximately \$32,100 for FAW line charges during calendar year 2002 if Internet publication had not been permitted. Nonrecurring costs to establish Internet publication were \$10,200 to develop the computer software application, and \$20,000 to program the e-mail registration service enhancement. The report indicated that the computer software application may be shared with other agencies at no cost and recommended that the Legislature permit all agencies to elect Internet publication in lieu of publication in the paper version of the FAW, given the potential for substantial agency savings.<sup>21</sup>

### 2003 Interim Study on FAW Internet Noticing

During the 2003 Legislative Interim, JAPC studied the feasibility of Internet noticing for all state agencies and other entities that advertise in the FAW.<sup>22</sup> In October 2003, the results were published in the "Report on Internet Noticing of the Florida Administrative Weekly." The report recommended publication of the FAW on a centralized website managed by DOS. Further, it was recommended that DOS continue to collect the space rate charge to fund its functions related to publication of the FAW and FAC.

### **Effect of Bill**

The bill requires DOS, effective December 31, 2007, to publish electronically the FAW on an Internet website managed by the department, which will serve as the official Internet website for such publication. The website is free to the public and must allow users to:

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

The bill requires DOS to continue to publish the printed version of the FAW and to make copies available on an annual subscription basis.

The bill:

- Requires DOS to review agency notices for compliance with format and numbering requirements before publication on the FAW Internet website.
- Extends the DEP Internet Publication Pilot Project from its current termination date of July 1, 2006, to December 31, 2007, when Internet publication of the FAW is required to begin.
- Requires DOS to make training courses available to assist agencies in the transition to publication on the FAW Internet website.

The bill removes current requirements that the annual subscription price and the space rate be computed to cover only costs related to the FAW. Instead, the space rate that may be charged is to cover the costs related to the FAW and the FAC, and no exact basis for determining an annual subscription price for the printed FAW is specified. It also amends current law to provide that the trust fund must fund the costs incurred by DOS in carrying out the APA.

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<sup>20</sup> Ch. 2001-278, L.O.F.; s. 120.551, F.S.

<sup>21</sup> *Joint Report and Recommendations of the Department of Environmental Protection, The State Technology Office, and The Department of State on the Internet Publication Pilot Project under Sec. 120.551, F.S.*, Jan. 31, 2003.

<sup>22</sup> This study included conducting surveys and consulting with DOS, DEP, STO, and an independent technology expert to determine specific technology requirements and estimates of potential costs.

The bill provides that agency forms incorporated by reference into a rule noticed pursuant to s. 120.55(1)(a), F.S., after December 31, 2007, must clearly display the number, title, and effective date of the form and the number of the rule in which the form is incorporated. It requires the FAW to contain: (1) the text of all proposed rules, rather than permitting a reference to that text in a prior edition of the FAW; and (2) a cumulative list of all rules that have been proposed, but not filed for adoption. The bill requires an agency, upon request, to provide copies of its rules with citations to, "the grant of rulemaking authority and the specific law implemented for each rule." It also requires DOS to maintain a permanent record of all notices published in the FAW.

The bill does not preclude publication of FAW materials on an agency's website or by other means.

#### C. SECTION DIRECTORY:

Section 1 amends s. 11.60, F.S., revising duties of the Joint Administrative Procedures Committee.

Section 2 amends s. 57.111, F.S., expanding the definition of "small business party."

Section 3 amends s. 120.54, F.S., relating to rulemaking and rule adoption procedures.

Section 4 amends s. 120.55, F.S., requiring Internet publication of the FAW.

Section 5 amends s. 120.551, F.S., postponing the repeal of the section.

Section 6 amends s. 120.56, F.S., revising provisions relating to withdrawal of challenged rules.

Section 7 amends s. 120.569, F.S., prescribing circumstances under which the time for filing a petition for hearing must be extended.

Section 8 amends s. 120.57, F.S., requiring the inclusion of additional information in final orders and modifying the required notice relating to protests of contract solicitations or awards.

Section 9 amends s. 120.65, F.S., requiring additional reports from DOAH and agencies regarding the administrative hearing process.

Section 10 amends s. 120.74, F.S., requiring the filing of agency reports with JAPC, in addition to the President and Speaker.

Section 11 requires DOS to provide certain assistance to agencies in their transition to publishing on the FAW Internet website.

Section 12 provides an effective date of July 1, 2006, unless otherwise expressly provided.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

It has not been determined how much agencies will save after the second year that the FAW Internet website is operational.

##### 2. Expenditures:

It is estimated that the FAW Internet website will require a non-recurring cost over three years of \$450,000 for DOS to comply with the proposed implementation timeline.<sup>23</sup> Per DOS, the Records Management Trust Fund cash balance and anticipated revenue is sufficient to support this project.<sup>24</sup>

DOS indicates that it will continue to charge 99 cents per line to agencies using the FAW from now through the second year that the FAW Internet website is operational. DOS also states that these revenues will be used to fund all costs associated with the Law, Code, and Administrative Weekly section within the Division of Library and Information Services.<sup>25</sup>

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

Per DOS, local governments advertising on the FAW Internet website will pay the current space rate charge of 99 cents per line until implementation of the new services is complete.<sup>26</sup>

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Currently, DOS publishes the FAW on its Internet website. The website is accessible by the public free of charge, but cannot be searched by topic. The bill provides for a free, fully searchable FAW Internet website, the ability for users to have selected notices e-mailed to users, and the ability for users to access forms incorporated by reference in rules. Accordingly, the bill will provide the public with greater access to the FAW and with advanced search capabilities.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

The bill provides rulemaking authority to the Administration Commission for the purpose of prescribing the form and substantive provisions of a protest bond. The bond form currently exists in rule,<sup>27</sup> however, there has been an outstanding objection from the Joint Administrative Procedures Committee

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<sup>23</sup> Telephone conversation with the Department of State, Administrative Code and Weekly Unit, February 10, 2006.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Ch. 28-110.005, *Fla. Admin. Code.*



since its promulgation.<sup>28</sup> The rulemaking authority granted by the bill specifically addresses the JAPC objection.

The bill provides additional rulemaking authority regarding a specific class of respondents requesting an administrative hearing. The Administration Commission currently has rulemaking authority to promulgate uniform rules applicable to requests for administrative hearings under ss. 120.569 and 120.57, F.S. The additional authority granted in this bill specifies the pleading requirements for a respondent requesting an administrative hearing as part of an agency enforcement or disciplinary action.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The Department of Environmental Protection (DEP) has maintained a “pilot project” regarding online publication of FAW materials. Under current statutes, this pilot project<sup>29</sup> expires on July 1, 2006.<sup>30</sup> The Department of State has indicated that the new Florida Administrative Weekly and Florida Administrative Code Internet website is substantially complete. As a result, the extension of the DEP pilot project<sup>31</sup> no longer appears necessary.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Governmental Operations Committee adopted a strike-all amendment and reported the bill favorably as amended.

In addition to the provisions provided in the bill, the amendment expands access to the Florida Equal Access to Justice Act by expanding the definition of “small business party” to include an individual whose net worth is less than \$2M, when an agency claim is made against that individual’s license, and the agency’s action is deemed not “substantially justified.”

The amendment also:

- Provides additional requirements for final orders issued after a DOAH hearing under s. 120.57(1), F.S.
- Requires DOAH and agencies to file certain reports with the Administration Commission and JAPC.
- Includes additional requirements (beyond those in the original bill) regarding the timing and substance of requests for administrative hearing.

In relation to agency rulemaking, the amendment clarifies that an agency must file a Notice of Change after a final rulemaking hearing, if non-technical changes are made, and requires publication of the notice in the FAW.

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<sup>28</sup> See *Fla. Admin. Weekly*, Vol. 24, No. 20, May 15, 1998.

<sup>29</sup> S. 120.551(1), *et seq.*, F.S.

<sup>30</sup> *Id.* at paragraph (3).

<sup>31</sup> Section 5, amending s. 120.551(3), F.S.