

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/SB 718

INTRODUCER: Appropriations Committee and Senator Lee

SUBJECT: Administrative Procedures

DATE: April 24, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Cibula	JU	Favorable
2.	Davis	DeLoach	AGG	Favorable
3.	Davis	Kynoch	AP	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 718 makes a number of changes to the Administrative Procedure Act (APA), which relate to a state agency's reliance on unadopted or invalid rules and the provision of notices and information to the public. Among the most notable changes, the bill:

- Generally requires an agency that initiates rulemaking after a public hearing relating to an unadopted rule to file a notice of proposed rule within a time certain.
- Increases the amount of information relating to agency rulemaking which must be published in the Florida Administrative Register.
- Provides that the decision of an administrative law judge on the validity of the rule or unadopted rule is final agency action during a rule challenge that is asserted as a defense to agency action.
- Prohibits an administrative law judge from entering a summary final order with respect to rule challenges asserted as a defense to agency action.
- Authorizes the petitioner in a hearing that does not involve disputed facts to assert a rule challenge as a defense to agency action and have the rule challenge decided by an administrative law judge instead of the agency.
- Authorizes the rules ombudsman in the Executive Office of the Governor to require an agency to review and designate rules the violation of which would be a minor violation.

This bill has an indeterminate fiscal impact.

The bill provides an effective date of July 1, 2015.

II. Present Situation:

Rulemaking and the Administrative Procedure Act

The Administrative Procedure Act (APA) in ch. 120, F.S., sets forth uniform procedures that agencies must follow when exercising rulemaking authority. A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency.¹ Rulemaking authority is delegated by the Legislature² through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”³ a rule. Agencies do not have discretion whether to engage in rulemaking.⁴ To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.⁵ The grant of rulemaking authority itself need not be detailed.⁶ The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.⁷

Notice of Rules

Under current law, the Department of State is required to publish the Florida Administrative Register on the Internet.⁸ This document must contain:

- Notices relating to the adoption or repeal of a rule.
- Notices of public meetings, hearing, and workshops.
- Notices of requests for authorization to amend or repeal an existing rule or for the adoption of a new uniform rule.
- Notices of petitions for declaratory statements or administrative determinations.
- Summaries of objections to rules filed by the Administrative Procedures Committee.
- Other material required by law or deemed useful by the department.

Burden of Proof

In general, laws carry a presumption of validity, and those challenging the validity of a law carry the burden of proving invalidity. The APA retains this presumption of validity by requiring those challenging adopted rules to carry the burden of proving a rule’s invalidity.⁹ However, in the case of proposed rules, the APA places the burden on the agency to demonstrate the validity of the rule as proposed, once the challenger has raised specific objections to the rule’s validity.¹⁰ In addition, a rule may not be filed for adoption until any pending challenge is resolved.¹¹

¹ Section 120.52(16), F.S.; *Florida Dep’t of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

² *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

³ Section 120.52(17), F.S.

⁴ Section 120.54(1)(a), F.S.

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

⁶ *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 at 599.

⁷ *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008) (internal citations omitted); *Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

⁸ Section 120.55, F.S.

⁹ Section 120.56(3), F.S.

¹⁰ Section 120.56(2), F.S.

¹¹ Section 120.54(3)(e)2., F.S.

In the case of a statement or policy in force that was not adopted as a rule, a challenger must prove that the statement or policy meets the definition of a rule under the APA. If so, and if the statement or policy has not been validly adopted, the agency must prove that rulemaking is not feasible or practicable.¹²

Proceedings Involving Rule Challenges

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

The APA does provide that an administrative law judge with the Division of Administrative Hearings (DOAH) may determine that an agency has attempted to rely on an unadopted rule in proceedings initiated by agency action. However, this is qualified by a provision that an agency may overrule the DOAH determination if it's clearly erroneous. If the agency rejects the DOAH determination and is later reversed on appeal, the challenger is awarded attorney fees for the entire proceeding.¹³ Additionally, in proceedings initiated by agency action, if a DOAH administrative law judge determines that a rule constitutes an invalid exercise of delegated legislative authority, the agency has full de novo authority to reject or modify such conclusions of law, provided the final order states with particularity the reasons for rejection or modifying such determination.¹⁴

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

Final Orders

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

Judicial Review

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

¹² Section 120.56(4), F.S.

¹³ Section 120.57(1)(e)3., F.S.

¹⁴ Section 120.57(1)(k-1), F.S.

¹⁵ Section 120.68(2)(a), F.S.

by appealing its adoption, but the statute authorizes an appeal from a final order in a rule challenge.¹⁶

Minor Violations

The APA directs agencies to issue a “notice of noncompliance” as the first response when the agency encounters a first minor violation of a rule.¹⁷ The law provides that a violation is a minor violation if it “does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm.” Agencies are authorized to designate those rules for which a violation would be a minor violation. An agency’s designation of rules under the provision is excluded from challenge under the APA but may be subject to review and revision by the Governor or Governor and Cabinet.¹⁸ An agency under the direction of a cabinet officer has the discretion not to use the “notice of noncompliance” once each licensee is provided a copy of all rules upon issuance of a license, and annually thereafter.

Rules Ombudsman

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

III. Effect of Proposed Changes:

This bill makes a number of changes to the Administrative Procedure Act (APA), which relate to a state agency’s reliance on unadopted or invalid rules and the provision of notices and information to the public.

Petition to Initiate Rulemaking; Unadopted Rule (Section 1)

Under existing s. 120.54(7)(b), F.S., a person may petition an agency to initiate rulemaking with respect to an unadopted rule. If after a public hearing on the unadopted rule, the agency chooses to initiate rulemaking, the statutes do not establish a timeframe or schedule for the rulemaking activities. Under the bill, an agency, within 30 days after the public hearing, must provide the notice required by the bill through a Notice of Rule Development. Unless the agency publishes a notice in the Florida Administrative Register explaining the reasons it cannot do so, the Notice of

¹⁶ Section 120.68(9), F.S.

¹⁷ Section 120.695, F.S. The statute contains the following legislative intent: “It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it.”

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

Proposed Rule must be filed within 180 days after the Notice of Rule Development. Lastly, unless the agency publishes a statement explaining why rulemaking is not feasible or practicable under s. 120.54(1), F.S., the bill prohibits the agency from relying on the unadopted rule until rulemaking is complete.

Distribution of Notices (Section 2)

The bill adds additional items to the list of required contents of the Florida Administrative Register, including:

- Notices of Rule Development Workshops.
- A listing of all rules filed for adoption within the previous 7 days.
- A listing of rules pending ratification by the Legislature.

The bill also requires agencies that provide notices by email to licensees or other interested persons to include within those email messages, notices of rule development workshops and notices of the intent to adopt, amend, or repeal a rule.

Rule Challenges (Section 3)

Burdens of Proof

The bill amends s. 120.56(1), (2) and (4), F.S., relating to petitions challenging the validity of rules, proposed rules and statements defined as rules (“unadopted rules”). The changes clarify the pleading requirements for the petitions. It also clarifies the parties’ respective burdens of proof in challenges to proposed or unadopted rules.

Time Period for Issuance of Final Order (Section 4)

Under existing law, an agency must issue a final order within 90 days after a DOAH administrative law judge issues a recommended order. The bill, however, contemplates that a DOAH administrative law judge’s decision on a rule challenge is final agency action, reversible only by an appellate court. But the bill, consistent with existing law, provides that the DOAH administrative law judge’s decision with respect to other disputed matters in the same proceeding is a recommended decision. As a result, the agency might not as a practical matter be able to issue a final order until an appellate court rules on the validity of a challenged rule. For those cases, the bill provides that an agency must issue its final order within ten days after the appellate court issues its mandate.

Rule Challenges in Proceedings Involving Disputed Facts (Section 5)

Section 5 amends s. 120.57, F.S., relating to DOAH hearings of agency-initiated actions involving disputed issues of material fact. The bill incorporates many of the rule challenge provisions of s. 120.56, F.S., allowing the administrative law judge to enter a final order on a challenge to the validity of a rule or to an unadopted rule in all contests before DOAH. This treats a challenge to a rule in defending against or attacking an agency action much as a challenge in an action initiated solely to challenge the rule. Notably, the decision on the rule challenge in the DOAH proceeding is binding on the agency.

The bill allows the agency, within 15 days after notice of the rule challenge in such matters, to waive its reliance on an unadopted rule or a rule alleged to be invalid and, thereby, eliminate that aspect of the litigation, without prejudice to the agency reasserting its position in another matter or rule challenge.

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

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

Judicial Review (Section 6)

Existing law requires an agency to notify the Administrative Procedures Committee of the appeal of orders from a rule challenge proceeding. The bill requires an agency to report to the committee the appeal of orders relating to the assertion of a rule challenge as a defense to agency action. The section also allows ten additional days to file an appeal if the appellant did not receive notice of the rendering of the final order within 25 days. Section 6 also contains provisions conforming to other provisions of the bill which allow the direct appeal of a decision of a DOAH administrative law judge ruling on a rule challenge asserted as a defense to agency action.

Designation of Minor Violation of Rules (Section 7)

Section 7 amends s. 120.695, F.S., to direct each agency to timely review its rules and certify to the President of the Senate, the Speaker of the House of Representatives, the Administrative Procedures Committee, and the rules ombudsman those rules that have been designated as rules the violation of which would be a minor violation no later than June 30, 2016, and after such date within three months after any request of the rules ombudsman. Each agency that fails to timely complete the review and file the certification will be reported by the rules ombudsman to the Governor, the President of the Senate, the Speaker of the House of Representatives and the Administrative Procedures Committee.

Beginning July 1, 2016, each agency will be required to publish all rules of that agency designated as rules the violation of which would be a minor violation either as a complete list on the agency's website or by incorporation of the designations in the agency's disciplinary guidelines adopted as a rule. Each agency must ensure that all investigative and enforcement personnel are knowledgeable of the agencies designations of these rules. The agency head must certify for each rule filed for adoption whether any part of the rule is designated as one the violation of which would be a minor violation and update the listing on the webpage or disciplinary guidelines.

Effective Date (Section 8)

The bill provides an effective date of July 1, 2015.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

This bill does not apply to counties or municipalities. As such, the bill is not subject to the constitutional restrictions on the Legislature to enact mandates.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

CS/SB 718 may require an agency to provide precise guidance through more precise rules to those regulated before the agency may sanction a regulated entity for a rule or statutory violation.

C. Government Sector Impact:

The bill has an insignificant, indeterminate fiscal impact. The bill may require some additional workload on state agencies and a minimal increase in expenditures related to state agencies filing more frequently in the Florida Administrative Register. However, the impact is likely insignificant and can be absorbed within existing resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

As the Administrative Procedure Act has evolved over time through amendments by the Legislature, it has become more complex. At some point, the Legislature may wish to simplify the structure of the act to ensure that persons regulated by an agency can easily understand their rights to challenge agency actions.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 120.54, 120.55, 120.56, 120.569, 120.57, 120.68, and 120.695.

IX. Additional Information:

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

CS by Appropriations on April 23, 2015:

The committee substitute:

- Deletes sections relating to declaratory statements, mediation, and attorney fees.
- Specifies that a petitioner in a hearing on an agency-initiated action involving disputed issues of material fact may pursue a separate, collateral rule challenge.
- Specifies that a final order entered in a rule challenge that is collateral to another proceeding will be directly appealable just as an order in a rule challenge under s. 120.56, F.S.
- Adds ten days to the 30 day time to appeal if a party does not receive notice of the final order until after the 25th day.
- Extends the effective date (from July 1, 2015, to July 1, 2016) of the provision requiring agencies to timely review and certify those rules that have been designated as minor violations.

- B. **Amendments:**

None.