

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

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

Prepared By: Governmental Operations Committee

BILL: SB 1592

INTRODUCER: Senator Bennett

SUBJECT: Administrative Procedures-Unadopted Rules

DATE: March 9, 2007                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	<b>Favorable</b>
2.	_____	_____	JU	_____
3.	_____	_____	TA	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

The bill revises provisions in ch. 120, F.S., relating to unadopted agency rules. The bill creates requirements for agency adoption of policy statements as rules, bolsters the ability of the Joint Administrative Procedures Committee to examine unadopted agency rules, and modifies provisions relating to the award of costs and fees in rule challenges.

This bill amends sections 120.52, 120.54, 120.545, 120.56, 120.57, 120.595, and 120.55 of the Florida Statutes.

**II. Present Situation:**

**The Joint Administrative Procedures Committee and Agency Rulemaking**

The Joint Administrative Procedures Committee (JAPC or the committee) is created in s. 11.60, F.S., as a legislative check on legislatively created authority as interpreted by executive agencies. JAPC is a joint standing legislative committee composed of six members, with three members from each house. The committee is assigned the duty of maintaining a continuous review of administrative rules and the statutory authority on which they are based.

Pursuant to s. 120.52(15), F.S., a “rule” is each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the 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.

Section 120.54(3)(a)4., F.S., requires an agency to furnish the following documents to JAPC at least 21 days prior to rule adoption: a copy of the proposed rule; a detailed written statement of

the facts and circumstances justifying the proposed rule; a copy of the economic impact statement, if required; a statement of the extent to which the proposed rule establishes standards more restrictive than federal rules, or that a federal rule on the same subject does not exist; and a copy of the notice of intent to adopt, amend, or repeal a rule.

The committee conducts a review of all proposed rules to determine whether: (a) the rule is an invalid exercise of delegated legislative authority; (b) the statutory authority for the rule has been repealed; (c) the rule reiterates or paraphrases statutory material; (d) the rule is in proper form; (e) the notice given prior to adoption was sufficient to give adequate notice of the purpose and effect of the rule; (f) an economic impact statement (EIS) was prepared, if required; (g) the rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements; (h) the rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule; (i) the rule could be made less complex or more easily comprehensible to the general public; (j) the rule reflects the approach to the regulatory objective involving the lowest net cost to society to the degree consistent with the provisions of law which the rule implements; (k) the rule will require additional appropriations; and (l) if the rule is an emergency rule, there exists an emergency justifying the rule, whether the agency has exceeded the scope of its statutory authority, and whether the emergency rule was promulgated in the manner required.<sup>1</sup>

If JAPC objects to a rule, it must certify the objection to the agency within five days of the objection. The committee also must notify the President of the Senate and the Speaker of the House of Representatives of any objection concurrent with certification to the agency.

Upon receipt of the objection, an agency must: (a) modify the proposed rule to meet JAPC's objection; (b) withdraw the proposed rule; or (c) refuse to modify or withdraw the proposed rule. If the objection is to an existing rule, the agency must notify the committee that: (a) it has elected to amend the rule to meet the objection; (b) it has elected to repeal the rule; or (c) it refuses to amend or repeal the rule.

If an agency elects to modify a proposed rule to meet the objection, after modification it must give notice in the first available issue of the Florida Administrative Weekly (FAW). If an agency elects to amend an existing rule to meet an objection, it must notify JAPC in writing and initiate the amendment procedure by giving notice in the next available issue of the FAW. The agency must complete the amendatory process to an existing rule under these circumstances within 90 days.

If the agency refuses to modify, amend, withdraw, or repeal a rule to which JAPC has filed an objection, JAPC must file a detailed notice of its objection with the Department of State. The department must publish this notice in the FAW and in the Florida Administrative Code (FAC). The committee may not require the agency to meet its objection. JAPC, however, may seek an administrative or judicial determination that a rule to which it has filed an objection is an invalid exercise of delegated legislative authority.

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<sup>1</sup> Section 120.545(1)(a)-(l), F.S.

## **JAPC Reports on Unadopted Rules**

In February 2006, JAPC released a report on unadopted rules, which contained a background and history of unadopted rules, and provided recommendations and proposals for consideration. JAPC released a Supplement to the Report on Unadopted Rules in February 2007. Research done by JAPC identified at least 130 instances of agency policy statements that appeared to meet the definition of a rule but were not adopted pursuant to the requirements of ch. 120, F.S.

JAPC recommended that the Administrative Procedure Act (APA) should be amended to address the use of unadopted rules by creating more incentives for agencies to adopt rules and for affected persons to challenge unadopted rules.

## **Costs and Attorney's Fee Awards in Administrative Proceedings**

Section 120.595, F.S., provides for an award of costs and attorney's fees in certain ch. 120, F.S., proceedings. In an unadopted rule challenge pursuant to s. 120.56(4), F.S., the Administrative Law Judge (ALJ) is required to award a prevailing petitioner reasonable costs and attorney's fees, unless the agency demonstrates that the statement is required to meet a federal government program requirement or for the receipt of federal funds.

### **III. Effect of Proposed Changes:**

**Section 1** adds a definition for "unadopted rule" to s. 120.52, F.S., which provides definitions for terms used in the Administrative Procedure Act (APA). "Unadopted rule" means an agency statement that meets the definition of "rule" but has not been adopted pursuant to the rulemaking requirements of the APA.

**Section 2** amends s. 120.54(1), F.S., by deleting a provision that agency rulemaking is presumed feasible unless an agency proves that the agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the agency statement. The bill also deletes provisions which are substantively changed by section 3 of the bill.

**Section 3** amends s. 120.545, F.S., by changing the duties of agencies and the Joint Administrative Procedures Committee (JAPC) with respect to rules and review of rules. JAPC is empowered to request from an agency information necessary to examine an unadopted agency statement, and provides specific measures that must be taken by an agency when JAPC objects to a rule, including an unadopted rule. If the rule is unadopted, the agency may file notice of an intent to adopt the rule, file a notice in the Florida Administrative Weekly that the agency has abandoned its reliance on the statement as a basis for agency action, or notify JAPC that it refuses to adopt a rule or abandon reliance on the statement.

The bill provides that agency failure to respond to a JAPC objection to a statement of regulatory costs constitutes a refusal to prepare a corrected statement, and agency failure to respond to a committee objection to an unadopted rule constitutes a refusal to adopt a rule and a refusal to abandon reliance upon the statement as a basis for agency action.

If JAPC objects to a rule and an agency refuses to adopt or abandon it, JAPC must file an objection with the Department of State, and if the rule is published in the Florida Administrative Code, a reference to the objection must be published in the history note in the Florida Administrative Weekly.

JAPC may also submit a recommendation to the Legislature that legislation be introduced to address the JAPC objection. If JAPC votes to recommend the introduction of legislation to address an objection, JAPC may request that the agency suspend reliance upon the statement as a basis for agency action. If JAPC prepares a bill to address its objection, it must comply with the rules of the Legislature. If such a bill becomes law, temporary agency suspension must expire.

The bill provides that after JAPC certifies an objection to an unadopted rule by an agency, the agency must suspend reliance on the statement, or notify JAPC that it refuses to suspend reliance on the statement. If the agency suspends reliance on the statement, it must give notice of the suspension in the Florida Administrative Weekly. Failure of an agency to respond to the JAPC certification constitutes failure to suspend reliance on the statement.

**Section 4** amends s. 120.56(4), F.S., by modifying those provisions relating to the ability of a person substantially affected by an agency statement to seek an administrative determination that the agency statement is a rule that has not been adopted by the rulemaking procedures. The bill provides that upon the filing for the petition for the administrative determination, that the agency must discontinue reliance on the statement as a basis for agency action until:

- The proceeding is dismissed;
- The statement is adopted and effective as a rule;
- A final order is issued determining that the petitioner failed to prove the statement constitutes a rule; or
- A final order is issued determining that rulemaking is not feasible or practicable.

A determination by the administrative law judge that agency inability to rely on the contested statement during the proceeding would constitute an immediate danger to the public health, safety, or welfare allows the agency to petition to use the statement until the end of the proceeding.

The bill provides that a proceeding to challenge an agency statement defined as a rule may be consolidated with a proceeding to challenge an existing rule.

**Section 5** amends s. 120.57(1)(e), F.S., to provide that agency action that determines the substantial interest of a party may not be based on an unadopted rule. Neither an agency nor an administrative law judge (ALJ) may enforce policy based on an unadopted rule when an agency fails to prove rulemaking is not feasible or practicable.

**Section 6** amends s. 120.595, F.S., by deleting the \$15,000 cap on attorney's fees that may be awarded against a party if an ALJ determines that a party participated for an improper purpose in a proceeding challenging:

- a proposed agency rule, or
- an existing agency rule.

In a proceeding brought to challenge an agency statement defined as a rule, a judgment or final order must be rendered against the agency for reasonable costs and attorney's fees unless:

- the proceeding is dismissed;
- the judgment or final order determines that petitioner failed to prove the agency statement constituted a rule;
- the judgment of final order determines that rulemaking is not feasible or practicable; or
- the agency demonstrates that the statement is required by the Federal Government.

The bill provides that a court or ALJ must award reasonable costs and fees against a party if the party participated for an improper purpose in a proceeding brought to challenge an agency statement defined as a rule.

**Sections 7 and 8** amend s. 120.55(1)(a), F.S., to correct cross references occasioned by section 3 of this bill. Section 7 amends the statute effective until December 31, 2007. Section 8 amends the statute that will be effective December 31, 2007, pursuant to section 4 of ch. 2006-82, L.O.F.

**Section 9** provides an effective date of July 1, 2007, for sections 1, 2, 3, and 7. Sections 4, 5, and 6, have an effective date of January 1, 2008, to give agencies time to address unadopted rules. Section 8 has an effective date of December 31, 2007, to amend the changes to s. 120.55, F.S., effectuated by ch. 2006-82, L.O.F.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

**C. Government Sector Impact:**

Agencies that have not adopted as rules those agency statements that should be adopted pursuant to ch. 120, F.S., may incur administrative costs associated with the rulemaking process. Those costs are indeterminate, and should be minimal. Agencies that lose in a proceeding challenging an agency statement not adopted as a rule may be liable for costs and attorney's fees. Those costs can be avoided by complying with the new provisions concerning unadopted rules, and may be offset across all agencies by the effect of the provision deleting the cap on attorney's fees that can be awarded to an agency if an ALJ determines that a party participated for an improper purpose in a proceeding challenging a proposed agency rule, or an existing agency rule.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

## **VIII. Summary of Amendments:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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