

By the Committee on Judiciary; and Senator Bennett

590-2504-07

1 A bill to be entitled
2 An act relating to administrative procedures;
3 amending s. 120.52, F.S.; defining the term
4 "unadopted rule"; amending s. 120.54, F.S.;
5 prohibiting any agency from delegating
6 responsibilities to conduct a public hearing;
7 revising dates for filing rules for adoption;
8 revising provisions with respect to petitions
9 to initiate rulemaking; amending s. 120.545,
10 F.S.; revising duties of the Administrative
11 Procedures Committee and agencies with respect
12 to review of agency rules; providing for a
13 legislative committee to request agency
14 information for examination of an unadopted
15 rule; prescribing responses that may be made by
16 an agency to a committee objection to a rule or
17 statement of estimated regulatory costs;
18 prescribing presumptions resulting from an
19 agency's refusal to respond to committee
20 objections; amending s. 120.56, F.S.; revising
21 notice requirements with respect to challenges
22 of proposed rules; requiring an agency to
23 discontinue reliance on a statement when an
24 administrative determination is sought with
25 respect to the statement; allowing continued
26 reliance on a statement when an administrative
27 law judge determines that the inability to rely
28 on it would constitute an immediate danger;
29 deleting certain provisions relating to actions
30 before a final hearing is held; amending s.
31 120.57, F.S.; prescribing procedures with

1 respect to challenges to unadopted rules;
2 amending s. 120.595, F.S.; increasing maximum
3 attorney's fees; revising guidelines for award
4 of attorney's fees in challenges to agency
5 action; providing for attorney's fees and costs
6 in certain circumstances; amending s. 120.55,
7 F.S.; conforming a cross-reference; providing
8 effective dates.

9
10 Be It Enacted by the Legislature of the State of Florida:

11
12 Section 1. This act may be cited as the "Open
13 Government Act."

14 Section 2. Present subsections (18) and (19) of
15 section 120.52, Florida Statutes, are renumbered as
16 subsections (19) and (20), respectively, and a new subsection
17 (18) is added to that section to read:

18 120.52 Definitions.--As used in this act:

19 (18) "Unadopted rule" means an agency statement that
20 meets the definition of "rule" but has not been adopted
21 pursuant to the requirements of s. 120.54.

22 Section 3. Paragraphs (c) and (e) of subsection (3)
23 and subsection (7) of section 120.54, Florida Statutes, are
24 amended to read:

25 120.54 Rulemaking.--

26 (3) ADOPTION PROCEDURES.--

27 (c) Hearings.--

28 1. If the intended action concerns any rule other than
29 one relating exclusively to procedure or practice, the agency
30 shall, on the request of any affected person received within
31 21 days after the date of publication of the notice of

1 | intended agency action, give affected persons an opportunity
2 | to present evidence and argument on all issues under
3 | consideration. The agency may schedule a public hearing on the
4 | rule and, if requested by any affected person, shall schedule
5 | a public hearing on the rule. If the agency head is a board or
6 | other collegial body, other than one comprised of the Governor
7 | and Cabinet, the board or other collegial body shall conduct
8 | the requested public hearing itself and may not delegate this
9 | responsibility without the consent of the persons requesting
10 | the public hearing. Any material pertinent to the issues under
11 | consideration submitted to the agency within 21 days after the
12 | date of publication of the notice or submitted at a public
13 | hearing shall be considered by the agency and made a part of
14 | the record of the rulemaking proceeding.

15 | 2. Rulemaking proceedings shall be governed solely by
16 | the provisions of this section unless a person timely asserts
17 | that the person's substantial interests will be affected in
18 | the proceeding and affirmatively demonstrates to the agency
19 | that the proceeding does not provide adequate opportunity to
20 | protect those interests. If the agency determines that the
21 | rulemaking proceeding is not adequate to protect the person's
22 | interests, it shall suspend the rulemaking proceeding and
23 | convene a separate proceeding under the provisions of ss.
24 | 120.569 and 120.57. Similarly situated persons may be
25 | requested to join and participate in the separate proceeding.
26 | Upon conclusion of the separate proceeding, the rulemaking
27 | proceeding shall be resumed.

28 | (e) Filing for final adoption; effective date.--

29 | 1. If the adopting agency is required to publish its
30 | rules in the Florida Administrative Code, it shall file with
31 | the Department of State three certified copies of the rule it

1 | proposes to adopt, a summary of the rule, a summary of any
2 | hearings held on the rule, and a detailed written statement of
3 | the facts and circumstances justifying the rule. Agencies not
4 | required to publish their rules in the Florida Administrative
5 | Code shall file one certified copy of the proposed rule, and
6 | the other material required by this subparagraph, in the
7 | office of the agency head, and such rules shall be open to the
8 | public.

9 | 2. A rule may not be filed for adoption less than 28
10 | days or more than 90 days after the notice required by
11 | paragraph (a), until 21 days after the notice of change
12 | required by paragraph (d), until 14 days after the final
13 | public hearing, until 21 days after ~~preparation of~~ a statement
14 | of estimated regulatory costs required under s. 120.541 has
15 | been provided to all persons who submitted a lower cost
16 | regulatory alternative and made available to the public, or
17 | until the administrative law judge has rendered a decision
18 | under s. 120.56(2), whichever applies. When a required notice
19 | of change is published prior to the expiration of the time to
20 | file the rule for adoption, the period during which a rule
21 | must be filed for adoption is extended to 45 days after the
22 | date of publication. If notice of a public hearing is
23 | published prior to the expiration of the time to file the rule
24 | for adoption, the period during which a rule must be filed for
25 | adoption is extended to 45 days after adjournment of the final
26 | hearing on the rule, 21 days after receipt of all material
27 | authorized to be submitted at the hearing, or 21 days after
28 | receipt of the transcript, if one is made, whichever is
29 | latest. The term "public hearing" includes any public meeting
30 | held by any agency at which the rule is considered. If a
31 | petition for an administrative determination under s.

1 120.56(2) is filed, the period during which a rule must be
2 filed for adoption is extended to 60 days after the
3 administrative law judge files the final order with the clerk
4 or until 60 days after subsequent judicial review is complete.

5 3. At the time a rule is filed, the agency shall
6 certify that the time limitations prescribed by this paragraph
7 have been complied with, that all statutory rulemaking
8 requirements have been met, and that there is no
9 administrative determination pending on the rule.

10 4. At the time a rule is filed, the committee shall
11 certify whether the agency has responded in writing to all
12 material and timely written comments or written inquiries made
13 on behalf of the committee. The department shall reject any
14 rule not filed within the prescribed time limits; that does
15 not satisfy all statutory rulemaking requirements; upon which
16 an agency has not responded in writing to all material and
17 timely written inquiries or written comments; upon which an
18 administrative determination is pending; or which does not
19 include a statement of estimated regulatory costs, if
20 required.

21 5. If a rule has not been adopted within the time
22 limits imposed by this paragraph or has not been adopted in
23 compliance with all statutory rulemaking requirements, the
24 agency proposing the rule shall withdraw the rule and give
25 notice of its action in the next available issue of the
26 Florida Administrative Weekly.

27 6. The proposed rule shall be adopted on being filed
28 with the Department of State and become effective 20 days
29 after being filed, on a later date specified in the rule, or
30 on a date required by statute. Rules not required to be filed
31 with the Department of State shall become effective when

1 adopted by the agency head or on a later date specified by
2 rule or statute. If the committee notifies an agency that an
3 objection to a rule is being considered, the agency may
4 postpone the adoption of the rule to accommodate review of the
5 rule by the committee. When an agency postpones adoption of a
6 rule to accommodate review by the committee, the 90-day period
7 for filing the rule is tolled until the committee notifies the
8 agency that it has completed its review of the rule.

9
10 For the purposes of this paragraph, the term "administrative
11 determination" does not include subsequent judicial review.

12 (7) PETITION TO INITIATE RULEMAKING.--

13 ~~(a)~~ Any person regulated by an agency or having
14 substantial interest in an agency rule may petition an agency
15 to adopt, amend, or repeal a rule or to provide the minimum
16 public information required by this chapter. The petition
17 shall specify the proposed rule and action requested. Not
18 later than 30 calendar days following the date of filing a
19 petition, the agency shall initiate rulemaking proceedings
20 under this chapter, otherwise comply with the requested
21 action, or deny the petition with a written statement of its
22 reasons for the denial.

23 ~~(b) If the petition filed under this subsection is~~
24 ~~directed to an existing rule which the agency has not adopted~~
25 ~~by the rulemaking procedures or requirements set forth in this~~
26 ~~chapter, the agency shall, not later than 30 days following~~
27 ~~the date of filing a petition, initiate rulemaking, or provide~~
28 ~~notice in the Florida Administrative Weekly that the agency~~
29 ~~will hold a public hearing on the petition within 30 days~~
30 ~~after publication of the notice. The purpose of the public~~
31 ~~hearing is to consider the comments of the public directed to~~

1 ~~the agency rule which has not been adopted by the rulemaking~~
2 ~~procedures or requirements of this chapter, its scope and~~
3 ~~application, and to consider whether the public interest is~~
4 ~~served adequately by the application of the rule on a~~
5 ~~case by case basis, as contrasted with its adoption by the~~
6 ~~rulemaking procedures or requirements set forth in this~~
7 ~~chapter.~~

8 ~~(c) Within 30 days following the public hearing~~
9 ~~provided for by paragraph (b), if the agency does not initiate~~
10 ~~rulemaking or otherwise comply with the requested action, the~~
11 ~~agency shall publish in the Florida Administrative Weekly a~~
12 ~~statement of its reasons for not initiating rulemaking or~~
13 ~~otherwise complying with the requested action, and of any~~
14 ~~changes it will make in the scope or application of the~~
15 ~~unadopted rule. The agency shall file the statement with the~~
16 ~~committee. The committee shall forward a copy of the~~
17 ~~statement to the substantive committee with primary oversight~~
18 ~~jurisdiction of the agency in each house of the Legislature.~~
19 ~~The committee or the committee with primary oversight~~
20 ~~jurisdiction may hold a hearing directed to the statement of~~
21 ~~the agency. The committee holding the hearing may recommend~~
22 ~~to the Legislature the introduction of legislation making the~~
23 ~~rule a statutory standard or limiting or otherwise modifying~~
24 ~~the authority of the agency.~~

25 Section 4. Section 120.545, Florida Statutes, is
26 amended to read:

27 120.545 Committee review of agency rules.--

28 (1) As a legislative check on legislatively created
29 authority, the committee shall examine each proposed rule,
30 except for those proposed rules exempted by s. 120.81(1)(e)
31 and (2), and its accompanying material, and each emergency

- 1 rule, and may examine any existing rule, for the purpose of
2 determining whether:
- 3 (a) The rule is an invalid exercise of delegated
4 legislative authority.
- 5 (b) The statutory authority for the rule has been
6 repealed.
- 7 (c) The rule reiterates or paraphrases statutory
8 material.
- 9 (d) The rule is in proper form.
- 10 (e) The notice given prior to its adoption was
11 sufficient to give adequate notice of the purpose and effect
12 of the rule.
- 13 (f) The rule is consistent with expressed legislative
14 intent pertaining to the specific provisions of law which the
15 rule implements.
- 16 (g) The rule is necessary to accomplish the apparent
17 or expressed objectives of the specific provision of law which
18 the rule implements.
- 19 (h) The rule is a reasonable implementation of the law
20 as it affects the convenience of the general public or persons
21 particularly affected by the rule.
- 22 (i) The rule could be made less complex or more easily
23 comprehensible to the general public.
- 24 (j) The rule's statement of estimated regulatory costs
25 complies with the requirements of s. 120.541 and the rule does
26 not impose regulatory costs on the regulated person, county,
27 or city which could be reduced by the adoption of less costly
28 alternatives that substantially accomplish the statutory
29 objectives.
- 30 (k) The rule will require additional appropriations.
31

1 (1) If the rule is an emergency rule, there exists an
2 emergency justifying the adoption ~~promulgation~~ of such rule,
3 the agency is within ~~has exceeded the scope of~~ its statutory
4 authority, and the rule was adopted ~~promulgated~~ in compliance
5 with the requirements and limitations of s. 120.54(4).

6 (2) The committee may request from an agency such
7 information as is reasonably necessary for examination of a
8 rule as required by subsection (1) or for examination of an
9 unadopted agency statement. The committee shall consult with
10 legislative standing committees having ~~with~~ jurisdiction over
11 the subject areas. If the committee objects to ~~an emergency~~
12 ~~rule or a proposed or existing~~ rule, it shall, within 5 days
13 after ~~of~~ the objection, certify that fact to the agency whose
14 rule has been examined and include with the certification a
15 statement detailing its objections with particularity. The
16 committee shall notify the Speaker of the House of
17 Representatives and the President of the Senate of any
18 objection to an agency rule concurrent with certification of
19 that fact to the agency. Such notice shall include a copy of
20 the rule and the statement detailing the committee's
21 objections to the rule.

22 (3) Within 30 days after ~~of~~ receipt of the objection,
23 if the agency is headed by an individual, or within 45 days
24 after ~~of~~ receipt of the objection, if the agency is headed by
25 a collegial body, the agency shall:

26 (a) If the rule is not yet in effect ~~a proposed rule~~:

27 1. File notice pursuant to s. 120.54(3)(d) of only
28 such modifications as are necessary to address ~~Modify the rule~~
29 ~~to meet~~ the committee's objection;

30 2. File notice pursuant to s. 120.54(3)(d) of
31 withdrawal of ~~Withdraw~~ the rule ~~in its entirety~~; or

1 3. Notify the committee in writing that it refuses
2 ~~Refuse~~ to modify or withdraw the rule.

3 (b) If the rule is in effect ~~an existing rule~~:

4 1. File notice pursuant to s. 120.54(3)(a), without
5 prior notice of rule development, Notify the committee that it
6 ~~has elected~~ to amend the rule to address ~~meet~~ the committee's
7 objection ~~and initiate the amendment procedure~~;

8 2. File notice pursuant to s. 120.54(3)(a) Notify the
9 ~~committee that it has elected~~ to repeal the rule ~~and initiate~~
10 ~~the repeal procedure~~; or

11 3. Notify the committee in writing that it refuses to
12 amend or repeal the rule.

13 (c) If the ~~rule is either an existing or a proposed~~
14 ~~rule and the~~ objection is to the statement of estimated
15 regulatory costs:

16 1. Prepare a corrected statement of estimated
17 regulatory costs, give notice of the availability of the
18 corrected statement in the first available issue of the
19 Florida Administrative Weekly, and file a copy of the
20 corrected statement with the committee; or

21 2. Notify the committee that it refuses to prepare a
22 corrected statement of estimated regulatory costs.

23 (d) If the rule is unadopted:

24 1. File notice pursuant to s. 120.54(3)(a) of intent
25 to adopt the rule;

26 2. File notice for publication in the Florida
27 Administrative Weekly that the agency has abandoned all
28 reliance upon the statement or any substantially similar
29 statement as a basis for agency action; or

30 3. Notify the committee in writing that it refuses to
31 adopt the rule or to abandon all reliance upon the statement

1 or any substantially similar statement as a basis for agency
2 action.

3 ~~(4) If the agency elects to modify a proposed rule to~~
4 ~~meet the committee's objection, it shall make only such~~
5 ~~modifications as are necessary to meet the objection and shall~~
6 ~~resubmit the rule to the committee. The agency shall give~~
7 ~~notice of its election to modify a proposed rule to meet the~~
8 ~~committee's objection by publishing a notice of change in the~~
9 ~~first available issue of the Florida Administrative Weekly,~~
10 ~~but shall not be required to conduct a public hearing. If the~~
11 ~~agency elects to amend an existing rule to meet the~~
12 ~~committee's objection, it shall notify the committee in~~
13 ~~writing and shall initiate the amendment procedure by giving~~
14 ~~notice in the next available issue of the Florida~~
15 ~~Administrative Weekly. The committee shall give priority to~~
16 ~~rules so modified or amended when setting its agenda.~~

17 ~~(5) If the agency elects to withdraw a proposed rule~~
18 ~~as a result of a committee objection, it shall notify the~~
19 ~~committee, in writing, of its election and shall give notice~~
20 ~~of the withdrawal in the next available issue of the Florida~~
21 ~~Administrative Weekly. The rule shall be withdrawn without a~~
22 ~~public hearing, effective upon publication of the notice in~~
23 ~~the Florida Administrative Weekly. If the agency elects to~~
24 ~~repeal an existing rule as a result of a committee objection,~~
25 ~~it shall notify the committee, in writing, of its election and~~
26 ~~shall initiate rulemaking procedures for that purpose by~~
27 ~~giving notice in the next available issue of the Florida~~
28 ~~Administrative Weekly.~~

29 ~~(6) If an agency elects to amend or repeal an existing~~
30 ~~rule as a result of a committee objection, it shall complete~~
31

1 ~~the process within 90 days after giving notice in the Florida~~
2 ~~Administrative Weekly.~~

3 ~~(4)(7)~~ Failure of the agency to respond to a committee
4 objection to a ~~proposed~~ rule that is not yet in effect within
5 the time prescribed in subsection (3) ~~constitutes shall~~
6 ~~constitute~~ withdrawal of the rule in its entirety. In this
7 event, the committee shall notify the Department of State that
8 the agency, by its failure to respond to a committee
9 objection, has elected to withdraw the ~~proposed~~ rule. Upon
10 receipt of the committee's notice, the Department of State
11 shall publish a notice to that effect in the next available
12 issue of the Florida Administrative Weekly. Upon publication
13 of the notice, the ~~proposed~~ rule shall be stricken from the
14 files of the Department of State and the files of the agency.

15 ~~(5)(8)~~ Failure of the agency to respond to a committee
16 objection to a ~~an existing~~ rule that is in effect within the
17 time prescribed in subsection (3) ~~constitutes shall constitute~~
18 a refusal to amend or repeal the rule.

19 (6) Failure of the agency to respond to a committee
20 objection to a statement of estimated regulatory costs within
21 the time prescribed in subsection (3) constitutes a refusal to
22 prepare a corrected statement of estimated regulatory costs.

23 (7) Failure of the agency to respond to a committee
24 objection to an unadopted rule within the time prescribed in
25 subsection (3) constitutes a refusal to adopt the rule and a
26 refusal to abandon all reliance upon the statement or any
27 substantially similar statement as a basis for agency action.

28 ~~(8)(9)~~ If the committee objects to a ~~proposed or~~
29 ~~existing~~ rule and the agency refuses to adopt, abandon,
30 modify, amend, withdraw, or repeal ~~it the~~ rule, the committee
31 shall file with the Department of State a notice of the

1 objection, detailing with particularity its objection to the
2 rule. The Department of State shall publish this notice in
3 the Florida Administrative Weekly. If the rule is published
4 ~~and shall publish, as a history note to the rule~~ in the
5 Florida Administrative Code, a reference to the committee's
6 objection and to the issue of the Weekly in which the full
7 text thereof appears shall be recorded in a history note.

8 ~~(9)(10)~~(a) If the committee objects to a ~~proposed or~~
9 ~~existing~~ rule, or portion thereof, and the agency fails to
10 initiate administrative action to adopt, abandon, modify,
11 amend, withdraw, or repeal the rule consistent with the
12 objection within 60 days after the objection, or thereafter
13 fails to proceed in good faith to complete such action, the
14 committee may submit to the President of the Senate and the
15 Speaker of the House of Representatives a recommendation that
16 legislation be introduced to address the committee objection
17 ~~modify or suspend the adoption of the proposed rule, or amend~~
18 ~~or repeal the rule, or portion thereof.~~

19 (b)1. If the committee votes to recommend the
20 introduction of legislation to address the committee objection
21 ~~modify or suspend the adoption of a proposed rule, or amend or~~
22 ~~repeal a rule,~~ the committee shall, within 5 days after this
23 determination, certify that fact to the agency whose rule or
24 proposed rule has been examined. The committee may request
25 that the agency temporarily suspend the rule, ~~or~~ suspend the
26 adoption of the proposed rule, or suspend all reliance upon
27 the statement or any substantially similar statement as a
28 basis for agency action, pending consideration of proposed
29 legislation during the next regular session of the
30 Legislature.
31

1 2. Within 30 days after receipt of the certification,
2 if the agency is headed by an individual, or within 45 days
3 after receipt of the certification, if the agency is headed by
4 a collegial body, the agency shall ~~either~~:

5 a. Temporarily suspend the rule, ~~or~~ suspend the
6 adoption of the proposed rule, or suspend all reliance upon
7 the statement or any substantially similar statement as a
8 basis for agency action; or

9 b. Notify the committee in writing that it refuses to
10 temporarily suspend the rule, ~~or~~ suspend the adoption of the
11 proposed rule, or suspend all reliance upon the statement or
12 any substantially similar statement as a basis for agency
13 action.

14 3. If the agency elects to temporarily suspend the
15 rule, ~~or~~ suspend the adoption of the proposed rule, or suspend
16 all reliance upon the statement or any substantially similar
17 statement as a basis for agency action, it shall give notice
18 of the suspension in the Florida Administrative Weekly. The
19 rule or the rule adoption process shall be suspended upon
20 publication of the notice. An agency ~~may~~ ~~shall~~ not base any
21 agency action on a suspended rule, ~~or~~ suspended proposed rule,
22 or suspended statement or any substantially similar statement,
23 or portion thereof, prior to expiration of the suspension. A
24 suspended rule, ~~or~~ suspended proposed rule, or suspended
25 statement or any substantially similar statement, or portion
26 thereof, continues to be subject to administrative
27 determination and judicial review as provided by law.

28 4. Failure of an agency to respond to committee
29 certification within the time prescribed by subparagraph 2.
30 constitutes a refusal to suspend the rule, ~~or~~ ~~to~~ suspend the
31 adoption of the proposed rule, or suspend all reliance upon

1 the statement or any substantially similar statement as a
2 basis for agency action.

3 (c) The committee shall prepare bills to address the
4 committee objection ~~modify or suspend the adoption of the~~
5 ~~proposed rule or amend or repeal the rule, or portion thereof,~~
6 in accordance with the rules of the Senate and the House of
7 Representatives for prefiling and introduction in the next
8 regular session of the Legislature. The proposed bill shall be
9 presented to the President of the Senate and the Speaker of
10 the House of Representatives with the committee
11 recommendation.

12 (d) If a bill to address the committee objection
13 ~~suspend the adoption of a proposed rule is enacted into law,~~
14 ~~the proposed rule is suspended until specific delegated~~
15 ~~legislative authority for the proposed rule has been enacted.~~
16 ~~If a bill to suspend the adoption of a proposed rule fails to~~
17 ~~become law, any temporary agency suspension of the rule shall~~
18 ~~expire. If a bill to modify a proposed rule or amend a rule~~
19 ~~is enacted into law, the suspension shall expire upon~~
20 ~~publication of notice of modification or amendment in the~~
21 ~~Florida Administrative Weekly. If a bill to repeal a rule is~~
22 ~~enacted into law, the suspension shall remain in effect until~~
23 ~~notification of repeal of the rule is published in the Florida~~
24 ~~Administrative Weekly.~~

25 (e) ~~The Department of State shall publish in the next~~
26 ~~available issue of the Florida Administrative Weekly the final~~
27 ~~legislative action taken. If a bill to modify or suspend the~~
28 ~~adoption of the proposed rule or amend or repeal the rule, or~~
29 ~~portion thereof, is enacted into law, the Department of State~~
30 ~~shall conform the rule or portion of the rule to the~~
31

1 ~~provisions of the law in the Florida Administrative Code and~~
2 ~~publish a reference to the law as a history note to the rule.~~

3 Section 5. Paragraph (a) of subsection (2) and,
4 effective January 1, 2008, subsection (4) of section 120.56,
5 Florida Statutes, is amended to read:

6 120.56 Challenges to rules.--

7 (2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.--

8 (a) Any substantially affected person may seek an
9 administrative determination of the invalidity of any proposed
10 rule by filing a petition seeking such a determination with
11 the division within 21 days after the date of publication of
12 the notice required by s. 120.54(3)(a), within 10 days after
13 the final public hearing is held on the proposed rule as
14 provided by s. 120.54(3)(e)2. ~~s. 120.54(3)(e)~~, within 20 days
15 after ~~the preparation of~~ a statement of estimated regulatory
16 costs required pursuant to s. 120.541, if applicable, has been
17 provided to all persons who submitted a lower cost regulatory
18 alternative and made available to the public or within 20 days
19 after the date of publication of the notice required by s.
20 120.54(3)(d). The petition shall state with particularity the
21 objections to the proposed rule and the reasons that the
22 proposed rule is an invalid exercise of delegated legislative
23 authority. The petitioner has the burden of going forward. The
24 agency then has the burden to prove by a preponderance of the
25 evidence that the proposed rule is not an invalid exercise of
26 delegated legislative authority as to the objections raised.
27 Any person who is substantially affected by a change in the
28 proposed rule may seek a determination of the validity of such
29 change. Any person not substantially affected by the proposed
30 rule as initially noticed, but who is substantially affected
31 by the rule as a result of a change, may challenge any

1 provision of the rule and is not limited to challenging the
2 change to the proposed rule.

3 (4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES;
4 SPECIAL PROVISIONS.--

5 (a) Any person substantially affected by an agency
6 statement may seek an administrative determination that the
7 statement violates s. 120.54(1)(a). The petition ~~must shall~~
8 include the text of the statement or a description of the
9 statement and shall state with particularity facts sufficient
10 to show that the statement constitutes a rule under s. 120.52
11 and that the agency has not adopted the statement by the
12 rulemaking procedure provided by s. 120.54. Upon the filing of
13 a petition for an administrative determination under this
14 subsection, the agency shall immediately discontinue all
15 reliance upon the statement or any substantially similar
16 statement as a basis for agency action until:

17 1. The proceeding is dismissed for any reason other
18 than initiation of rulemaking under s. 120.54;

19 2. The statement is adopted and becomes effective as a
20 rule;

21 3. A final order is issued which contains a
22 determination that the petitioner failed to prove that the
23 statement constitutes a rule under s. 120.52; or

24 4. A final order is issued which contains a
25 determination that rulemaking is not feasible under s.
26 120.54(1)(a)1.a. or b. or not practicable under s.
27 120.54(1)(a)2.

28 (b) If the administrative law judge determines that
29 the agency's inability to rely upon the statement during the
30 proceeding under this subsection would constitute an immediate
31 danger to the public health, safety, or welfare, the

1 administrative law judge shall grant an agency petition to
2 allow application of the statement until the proceeding is
3 concluded.

4 ~~(c)(b)~~ The administrative law judge may extend the
5 hearing date beyond 30 days after assignment of the case for
6 good cause. If a hearing is held and the petitioner proves the
7 allegations of the petition, the agency shall have the burden
8 of proving that rulemaking is not feasible or not ~~and~~
9 practicable under s. 120.54(1)(a).

10 ~~(d)(e)~~ The administrative law judge may determine
11 whether all or part of a statement violates s. 120.54(1)(a).
12 The decision of the administrative law judge shall constitute
13 a final order. The division shall transmit a copy of the final
14 order to the Department of State and the committee. The
15 Department of State shall publish notice of the final order in
16 the first available issue of the Florida Administrative
17 Weekly.

18 ~~(d) When an administrative law judge enters a final~~
19 ~~order that all or part of an agency statement violates s.~~
20 ~~120.54(1)(a), the agency shall immediately discontinue all~~
21 ~~reliance upon the statement or any substantially similar~~
22 ~~statement as a basis for agency action.~~

23 ~~(e)1. If, prior to a final hearing to determine~~
24 ~~whether all or part of any agency statement violates s.~~
25 ~~120.54(1)(a), an agency publishes, pursuant to s.~~
26 ~~120.54(3)(a), proposed rules that address the statement, then~~
27 ~~for purposes of this section, a presumption is created that~~
28 ~~the agency is acting expeditiously and in good faith to adopt~~
29 ~~rules that address the statement, and the agency shall be~~
30 ~~permitted to rely upon the statement or a substantially~~
31

1 ~~similar statement as a basis for agency action if the~~
2 ~~statement meets the requirements of s. 120.57(1)(c).~~

3 ~~2.— If, prior to the final hearing to determine whether~~
4 ~~all or part of an agency statement violates s. 120.54(1)(a),~~
5 ~~an agency publishes a notice of rule development which~~
6 ~~addresses the statement pursuant to s. 120.54(2), or certifies~~
7 ~~that such a notice has been transmitted to the Florida~~
8 ~~Administrative Weekly for publication, then such publication~~
9 ~~shall constitute good cause for the granting of a stay of the~~
10 ~~proceedings and a continuance of the final hearing for 30~~
11 ~~days. If the agency publishes proposed rules within this~~
12 ~~30 day period or any extension of that period granted by an~~
13 ~~administrative law judge upon showing of good cause, then the~~
14 ~~administrative law judge shall place the case in abeyance~~
15 ~~pending the outcome of rulemaking and any proceedings~~
16 ~~involving challenges to proposed rules pursuant to subsection~~
17 ~~(2).~~

18 ~~3.— If, following the commencement of the final hearing~~
19 ~~and prior to entry of a final order that all or part of an~~
20 ~~agency statement violates s. 120.54(1)(a), an agency~~
21 ~~publishes, pursuant to s. 120.54(3)(a), proposed rules that~~
22 ~~address the statement and proceeds expeditiously and in good~~
23 ~~faith to adopt rules that address the statement, the agency~~
24 ~~shall be permitted to rely upon the statement or a~~
25 ~~substantially similar statement as a basis for agency action~~
26 ~~if the statement meets the requirements of s. 120.57(1)(c).~~

27 ~~4.— If an agency fails to adopt rules that address the~~
28 ~~statement within 180 days after publishing proposed rules, for~~
29 ~~purposes of this subsection, a presumption is created that the~~
30 ~~agency is not acting expeditiously and in good faith to adopt~~
31 ~~rules. If the agency's proposed rules are challenged pursuant~~

1 ~~to subsection (2), the 180 day period for adoption of rules is~~
2 ~~tolled until a final order is entered in that proceeding.~~

3 ~~5. If the proposed rules addressing the challenged~~
4 ~~statement are determined to be an invalid exercise of~~
5 ~~delegated legislative authority as defined in s.~~
6 ~~120.52(8)(b) (f), the agency must immediately discontinue~~
7 ~~reliance on the statement and any substantially similar~~
8 ~~statement until the rules addressing the subject are properly~~
9 ~~adopted.~~

10 ~~(e)(f)~~ All proceedings to determine a violation of s.
11 120.54(1)(a) shall be brought pursuant to this subsection. A
12 proceeding pursuant to this subsection may be consolidated
13 with a proceeding under subsection (3) or under any other
14 section of this chapter. Nothing in this paragraph shall be
15 construed to prevent a party whose substantial interests have
16 been determined by an agency action from bringing a proceeding
17 pursuant to s. 120.57(1)(e).

18 Section 6. Effective January 1, 2008, paragraph (e) of
19 subsection (1) of section 120.57, Florida Statutes, is amended
20 to read:

21 120.57 Additional procedures for particular cases.--

22 (1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS
23 INVOLVING DISPUTED ISSUES OF MATERIAL FACT.--

24 (e)1. ~~Any~~ Agency action that determines the
25 substantial interests of a party may not be ~~and that is~~ based
26 on an agency statement that violates s. 120.54(1)(a). Neither
27 an agency nor an administrative law judge has authority to
28 enforce agency policy that constitutes an unadopted rule when
29 the agency fails to prove that rulemaking is not feasible or
30 not practicable. This subparagraph does not preclude
31 application of adopted rules and applicable statutes to the

1 ~~facts~~ unadopted rule is subject to de novo review by an
2 administrative law judge.

3 2. ~~The agency action shall not be presumed valid or~~
4 ~~invalid. The agency must demonstrate that the unadopted rule:~~

5 a. ~~Is within the powers, functions, and duties~~
6 ~~delegated by the Legislature or, if the agency is operating~~
7 ~~pursuant to authority derived from the State Constitution, is~~
8 ~~within that authority;~~

9 b. ~~Does not enlarge, modify, or contravene the~~
10 ~~specific provisions of law implemented;~~

11 c. ~~Is not vague, establishes adequate standards for~~
12 ~~agency decisions, or does not vest unbridled discretion in the~~
13 ~~agency;~~

14 d. ~~Is not arbitrary or capricious. A rule is arbitrary~~
15 ~~if it is not supported by logic or the necessary facts; a rule~~
16 ~~is capricious if it is adopted without thought or reason or is~~
17 ~~irrational;~~

18 e. ~~Is not being applied to the substantially affected~~
19 ~~party without due notice; and~~

20 f. ~~Does not impose excessive regulatory costs on the~~
21 ~~regulated person, county, or city.~~

22 2.3. The recommended and final orders in any
23 proceeding shall be governed by the provisions of paragraphs
24 (k) and (l), except that the administrative law judge's
25 determination regarding the unadopted rule shall not be
26 rejected by the agency unless the agency first determines from
27 a review of the complete record, and states with particularity
28 in the order, that such determination is clearly erroneous or
29 does not comply with essential requirements of law. In any
30 proceeding for review under s. 120.68, if the court finds that
31 the agency's rejection of the determination regarding the

1 unadopted rule does not comport with the provisions of this
2 subparagraph, the agency action shall be set aside and the
3 court shall award to the prevailing party the reasonable costs
4 and a reasonable attorney's fee for the initial proceeding and
5 the proceeding for review.

6 Section 7. Effective January 1, 2008, subsections (2),
7 (3), and (4) of section 120.595, Florida Statutes, are amended
8 to read:

9 120.595 Attorney's fees.--

10 (2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO
11 SECTION 120.56(2).--If the court or administrative law judge
12 declares a proposed rule or portion of a proposed rule invalid
13 pursuant to s. 120.56(2), a judgment or order shall be
14 rendered against the agency for reasonable costs and
15 reasonable attorney's fees, unless the agency demonstrates
16 that its actions were substantially justified or special
17 circumstances exist which would make the award unjust. An
18 agency's actions are "substantially justified" if there was a
19 reasonable basis in law and fact at the time the actions were
20 taken by the agency. If the agency prevails in the
21 proceedings, the court or administrative law judge shall award
22 reasonable costs and reasonable attorney's fees against a
23 party if the court or administrative law judge determines that
24 a party participated in the proceedings for an improper
25 purpose as defined by paragraph (1)(e). No award of attorney's
26 fees as provided by this subsection shall exceed \$50,000
27 ~~\$15,000~~.

28 (3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO
29 SECTION 120.56(3) AND (5).--If the court or administrative law
30 judge declares a rule or portion of a rule invalid pursuant to
31 s. 120.56(3) or s. 120.56(5), a judgment or order shall be

1 rendered against the agency for reasonable costs and
2 reasonable attorney's fees, unless the agency demonstrates
3 that its actions were substantially justified or special
4 circumstances exist which would make the award unjust. An
5 agency's actions are "substantially justified" if there was a
6 reasonable basis in law and fact at the time the actions were
7 taken by the agency. If the agency prevails in the
8 proceedings, the court or administrative law judge shall award
9 reasonable costs and reasonable attorney's fees against a
10 party if the court or administrative law judge determines that
11 a party participated in the proceedings for an improper
12 purpose as defined by paragraph (1)(e). No award of attorney's
13 fees as provided by this subsection shall exceed \$50,000
14 ~~\$15,000~~.

15 (4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION
16 120.56(4).--

17 (a) Upon entry of a final order that all or part of an
18 agency statement violates s. 120.54(1)(a), the administrative
19 law judge shall award reasonable costs and reasonable
20 attorney's fees to the petitioner, unless the agency
21 demonstrates that the statement is required by the Federal
22 Government to implement or retain a delegated or approved
23 program or to meet a condition to receipt of federal funds.

24 (b) If the agency initiates rulemaking under s. 120.54
25 during a rule challenge under s. 120.56(4) and the statement
26 is adopted and becomes effective as a rule, the administrative
27 law judge shall award reasonable costs and reasonable
28 attorney's fees accrued to the date the agency initiated
29 rulemaking upon a finding that the agency knew or should have
30 known that the agency statement was an unadopted rule. The
31 administrative law judge may consider, among other factors,

1 whether or not the petitioner or other person had requested or
2 formally petitioned the agency to adopt the statement as a
3 rule prior to the filing of the s. 120.56(4) challenge.

4 ~~(c)(b)~~ Notwithstanding the provisions of chapter 284,
5 an award shall be paid from the budget entity of the
6 secretary, executive director, or equivalent administrative
7 officer of the agency, and the agency shall not be entitled to
8 payment of an award or reimbursement for payment of an award
9 under any provision of law.

10 (d) If the agency prevails in the proceedings, the
11 court or administrative law judge shall award reasonable costs
12 and reasonable attorney's fees against a party if the court or
13 administrative law judge determines that the party
14 participated in the proceedings for an improper purpose as
15 defined in paragraph (1)(e).

16 Section 8. Paragraph (a) of subsection (1) of section
17 120.55, Florida Statutes, is amended to read:

18 120.55 Publication.--

19 (1) The Department of State shall:

20 (a)1. Through a continuous revision system, compile
21 and publish the "Florida Administrative Code." The Florida
22 Administrative Code shall contain all rules adopted by each
23 agency, citing the specific rulemaking authority pursuant to
24 which each rule was adopted, all history notes as authorized
25 in s. 120.545(8) ~~s. 120.545(9)~~, and complete indexes to all
26 rules contained in the code. Supplementation shall be made as
27 often as practicable, but at least monthly. The department
28 may contract with a publishing firm for the publication, in a
29 timely and useful form, of the Florida Administrative Code;
30 however, the department shall retain responsibility for the
31 code as provided in this section. This publication shall be

1 | the official compilation of the administrative rules of this
2 | state. The Department of State shall retain the copyright over
3 | the Florida Administrative Code.

4 | 2. Rules general in form but applicable to only one
5 | school district, community college district, or county, or a
6 | part thereof, or state university rules relating to internal
7 | personnel or business and finance shall not be published in
8 | the Florida Administrative Code. Exclusion from publication in
9 | the Florida Administrative Code shall not affect the validity
10 | or effectiveness of such rules.

11 | 3. At the beginning of the section of the code dealing
12 | with an agency that files copies of its rules with the
13 | department, the department shall publish the address and
14 | telephone number of the executive offices of each agency, the
15 | manner by which the agency indexes its rules, a listing of all
16 | rules of that agency excluded from publication in the code,
17 | and a statement as to where those rules may be inspected.

18 | 4. Forms shall not be published in the Florida
19 | Administrative Code; but any form which an agency uses in its
20 | dealings with the public, along with any accompanying
21 | instructions, shall be filed with the committee before it is
22 | used. Any form or instruction which meets the definition of
23 | "rule" provided in s. 120.52 shall be incorporated by
24 | reference into the appropriate rule. The reference shall
25 | specifically state that the form is being incorporated by
26 | reference and shall include the number, title, and effective
27 | date of the form and an explanation of how the form may be
28 | obtained.

29 | Section 9. Effective December 31, 2007, paragraph (a)
30 | of subsection (1) of section 120.55, Florida Statutes, as
31 |

1 amended by section 4 of chapter 2006-82, Laws of Florida, is
2 amended to read:

3 120.55 Publication.--

4 (1) The Department of State shall:

5 (a)1. Through a continuous revision system, compile
6 and publish the "Florida Administrative Code." The Florida
7 Administrative Code shall contain all rules adopted by each
8 agency, citing the specific rulemaking authority pursuant to
9 which each rule was adopted, all history notes as authorized
10 in s. 120.545(8) ~~s. 120.545(9)~~, and complete indexes to all
11 rules contained in the code. Supplementation shall be made as
12 often as practicable, but at least monthly. The department
13 may contract with a publishing firm for the publication, in a
14 timely and useful form, of the Florida Administrative Code;
15 however, the department shall retain responsibility for the
16 code as provided in this section. This publication shall be
17 the official compilation of the administrative rules of this
18 state. The Department of State shall retain the copyright over
19 the Florida Administrative Code.

20 2. Rules general in form but applicable to only one
21 school district, community college district, or county, or a
22 part thereof, or state university rules relating to internal
23 personnel or business and finance shall not be published in
24 the Florida Administrative Code. Exclusion from publication in
25 the Florida Administrative Code shall not affect the validity
26 or effectiveness of such rules.

27 3. At the beginning of the section of the code dealing
28 with an agency that files copies of its rules with the
29 department, the department shall publish the address and
30 telephone number of the executive offices of each agency, the
31 manner by which the agency indexes its rules, a listing of all

1 rules of that agency excluded from publication in the code,
2 and a statement as to where those rules may be inspected.

3 4. Forms shall not be published in the Florida
4 Administrative Code; but any form which an agency uses in its
5 dealings with the public, along with any accompanying
6 instructions, shall be filed with the committee before it is
7 used. Any form or instruction which meets the definition of
8 "rule" provided in s. 120.52 shall be incorporated by
9 reference into the appropriate rule. The reference shall
10 specifically state that the form is being incorporated by
11 reference and shall include the number, title, and effective
12 date of the form and an explanation of how the form may be
13 obtained. Each form created by an agency which is incorporated
14 by reference in a rule notice of which is given under s.
15 120.54(3)(a) after December 31, 2007, must clearly display the
16 number, title, and effective date of the form and the number
17 of the rule in which the form is incorporated.

18 Section 10. Except as otherwise expressly provided in
19 this act, this act shall take effect July 1, 2007.

1 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
2 COMMITTEE SUBSTITUTE FOR
3 SB 1592
4 The committee substitute:
5 -- Creates a short title, providing that the act may be
6 cited as the "Open Government Act."
7 -- Reinstates a provision of existing law, deleted by the
8 bill, which provides that rulemaking is presumed feasible
9 unless the agency establishes that it is currently using
10 the rulemaking procedure expeditiously and in good faith.
11 -- Provides that if an agency head is a board or other
12 collegial body, other than one comprised of the Governor
13 and Cabinet, then the agency head may not delegate the
14 responsibility to conduct requested public hearings.
15 -- Provides that a statement of estimated regulatory costs
16 be provided to the public and all persons who submitted a
17 lower cost regulatory alternative.
18 -- Authorizes the Joint Administrative Procedures Committee
19 to examine whether a rule's statement of estimated
20 regulatory costs complies with statutory requirements.
21 -- Reinstates and raises the cap on attorney's fees, which
22 was deleted by the bill, by establishing that an award of
23 attorney's fees shall not exceed \$50,000.
24 -- Reinstates a provision of existing law, deleted by the
25 bill, which provides that an administrative law judge
26 must award reasonable attorney's fees and costs to the
27 petitioner upon entry of a final order that an agency
28 statement is an unadopted rule, unless the agency
29 demonstrates that the statement is required by the
30 Federal Government.
31 -- Provides an award of attorney's fees to the petitioner in
 an unadopted rule challenge, even if the agency initiates
 rulemaking during the rule challenge and the statement is
 later adopted and becomes effective as a rule, as long as
 the agency knew or should have known that the agency
 statement was an unadopted rule.