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 Governmental Oversight and Accountability

BILL:	CS/SB 1696
INTRODUCER:	Governmental Oversight and Accountability Committee and Senator Brandes
SUBJECT:	Administrative Procedures
DATE:	April 11, 2013 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	McVaney	GO	**Fav/CS**
2.			JU	
3.			AP	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

CS/SB 1696 amends provisions of ch. 120, Florida Statutes, the Administrative Procedure Act (APA), to enhance the opportunity of substantially affected parties to challenge rules, mediate declaratory statements, and be awarded attorney fees in certain challenges. Specifically, the bill:

- Adopts a definition of "small business" applicable to the entire APA;
- Expands the class of small businesses benefiting from attorney fee awards under the Equal Access to Justice Act;
- Clarifies the burden of pleading and proof of challengers and agencies in challenges to proposed and unadopted rules;
- Removes the defense to an unadopted rule challenge that an agency did not know or should not have known that an agency statement or policy was an unadopted rule in cases where notice is actually provided;
- Extends the time to appeal certain final orders when notice thereof to the party appealing was delayed;
- Authorizes rule challenges in defense of agency actions on the same terms as petitions challenging rules and unadopted rules, including the award of attorney fees to prevailing challengers;

- Authorizes parties to request mediation in proceedings relating to declaratory statements and rule challenges;
- Removes discretion of Cabinet agencies to identify rules for which first time, minor violations should be addressed by a notice of noncompliance;
- Requires agencies to review their rules and certify those rules for which a violation would be considered a minor violation, and publish all such rules;
- Requires agencies to ensure that all investigative and enforcement personnel are knowledgeable of the agency's "minor violation" designations; and
- Requires agencies to certify whether any part of rules filed for adoption is designated as one the violation of which would be a minor violation.

The bill amends the attorney fee provision in Ch. 119, F.S., relating to public records, to provide that the "reasonable costs of enforcement" for which attorney fees may be awarded include reasonable attorney fees incurred in litigating entitlement to attorney fees for the underlying matter.

The bill also makes conforming changes to statutes cross-referencing provisions renumbered in the bill.

This bill amends sections 57.111, 119.12, 120.52, 120.55, 120.56, 120.569, 120.57, 120.573, 120.595, 120.68, 120.695, 420.9072, 420.9075, and 443.091 of the Florida Statutes.

II. Present Situation:

Public Records and Attorney Fees

The Public Records Act[1] guarantees every person's right to inspect and copy any state or local government public record[2] at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.[3]

Anyone who is denied access to a public record may file a civil action to seek a court order requiring the agency that denied access to open its records.[4] If the court determines that the agency unlawfully refused to permit a public record to be inspected or copied, the court must assess and award, against the agency responsible, the reasonable costs of enforcement. Reasonable costs of enforcement include reasonable attorney's fees.[5]

[1] Chapter 119, F.S.
[2] Section 119.011(12), F.S., defines "public records" to mean "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Section 119.011(2), F.S., defines "agency" to mean "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).
[3] Section 119.07(1)(a), F.S.
[4] *See* s. 119.11, F.S.
[5] Section 119.12, F.S.

Rulemaking and the Administrative Procedure Act

The Administrative Procedure Act (APA) in ch. 120, F.S., sets forth a uniform set of procedures that agencies must follow when exercising delegated 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.[6] Rulemaking authority is delegated by the Legislature[7] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[8] a rule. Agencies do not have discretion whether or not to engage in rulemaking.[9] To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.[10] The grant of rulemaking authority itself need not be detailed.[11] 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.[12]

Small Business

The APA provides certain accommodations for small businesses[13] but only provides a definition of "small business" for use in s. 120.54(3)(b), F.S., which provides that an agency must consider the impact of rulemaking on small businesses defined for that purpose as employing less than 200 employees and having a net worth less than $5 million.[14] However, agencies are authorized to define "small business" to include businesses having more than 200 employees.

By contrast, Florida's Equal Access to Justice Act codified in ch. 57, F.S., provides for attorney fees to be awarded in administrative proceedings to a prevailing party who is a small business (defined in that instance as having not more than 25 employees and a net worth of not more than $2 million).[15]

Notice of Rules

Presently, the only notice of adopted rules is the filing with the Department of State (DOS). The Department publishes such rules in the Florida Administrative Code. However, as a courtesy, the DOS, once each week, lists newly adopted rules in the Florida Administrative Register, and includes a cumulative list of rules filed for adoption pending legislative ratification.

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[6] Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[7] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).
[8] Section 120.52(17), F.S.
[9] Section 120.54(1)(a), F.S.
[10] Sections 120.52(8) and 120.536(1), F.S.
[11] *Save the Manatee Club, Inc.*, supra at 599.
[12] *Sloban v. Florida Board of Pharmacy*,982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).
[13] Sections 120.54, 120.541, and 120.74, F.S.
[14] Section 120.54(3)(b), F.S., incorporates by reference the definition of "small business" in s. 288.703(6), F.S.
[15] Section 57.111, F.S.

Attorney Fees

For purposes of the Equal Access to Justice Act in awarding attorney fees to a small business, an agency action is reasonably justified if it has a reasonable basis in law and fact at the time the agency acted. In such cases, no fees are allowable.

In addition to the special attorney fee provisions in the Equal Access to Justice Act, the APA provides for the recovery of attorney fees when a non-prevailing party has participated for an improper purpose; when an agency's actions are not substantially justified; when an agency relies upon an unadopted rule and is successfully challenged after 30 days notice of the need to adopt rules; and when an agency loses an appeal in a proceeding challenging an unadopted rule.[16]

An agency defense to attorney fees available in actions challenging agency statements defined as rules is that the agency did not know and should not have known that the agency statement was an unadopted rule. Additionally, attorney fees in such actions may be awarded only upon a finding that the agency received notice that the agency statement may constitute an unadopted rule at least 30 days before a petition challenging the agency statement is filed, and the agency fails to publish a notice of rulemaking within that 30 day period.[17]

These attorney fee provisions supplement the attorney fee provisions provided by other laws.[18]

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.[19] 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.[20] In addition, a rule may not be filed for adoption until any pending challenge is resolved.[21]

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.[22]

Proceedings Involving Rule Challenges

The APA presently applies different procedures 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

[16] Section 120.595, F.S.
[17] Section 120.595(4)(b), F.S.
[18] See, for example, ss. 57.105, 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.
[19] Section 120.56(3), F.S.
[20] Section 120.56(2), F.S.
[21] Section 120.54(3)(e)2., F.S.
[22] Section 120.56(4), F.S.

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 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 a Division of Administrative Hearings (DOAH) judge 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 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.[23] Additionally, in proceedings initiated by agency action, when a DOAH 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.[24]

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

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 judge enters the final order).

Mediation

The APA provides for mediation by agreement of the parties in those cases where the agency offers mediation to a person whose substantial interests are affected by an agency's action.[25] The APA does not require mediation in any particular case. Without any formal mediation, many administrative disputes are resolved by negotiation prior to, or after the initiation of formal proceedings in the Division of Administrative Hearings.

Declaratory Statements

The APA provides that a substantially affected person may request the issuance of a "declaratory statement" of an agency's opinion on the applicability of a law or rule over which the agency has authority to a particular set of facts set forth in the petition.[26] When issued, a declaratory statement is the agency's legal opinion that binds the agency under principles of estoppel. An agency has the option to deny the petition and typically will do so if a live enforcement action is pending with respect to similar facts.

[23] Section 120.57(1)(e)3., F.S.
[24] Section 120.57(1)(k-*l*), F.S.
[25] Section 120.573, F.S.
[26] Section 120.565, F.S.

Judicial Review

A notice of appeal of an appealable order under the APA must be filed within 30 days of the rendering of the order.[27] An order, however, is rendered when filed with the agency clerk. On occasion, a party may 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 by appealing its adoption but authorizes an appeal from a final order in a rule challenge.[28]

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.[29] 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 the definition of rulemaking under the APA but may be subject to review and revision by the Governor or Governor and Cabinet.[30] 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[31] in the Executive Office of the Governor, for considering the impact of agency rules on the state's citizens and businesses. In carrying out duties as provided by law, the ombudsman must consult with Enterprise Florida, Inc., at which point the department may recommend to improve the regulatory environment of this state. The duties of the rules ombudsman are to:

- Carry out the responsibility 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 businesses.

[27] Section 120.68(2)(a), F.S.
[28] Section 120.68(9), F.S.
[29] 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."
[30] 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.
[31] The ombudsman is defined in s. 288.703(5), F.S., as an office or individual whose responsibilities include coordinating with the Office of Supplier Diversity for the interests of and providing assistance to small and minority business enterprises in dealing with governmental agencies and in developing proposals for changes in state agency rules.

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:

Section 1 amends s. 57.111(3), F.S., to expand the definition of small business for the purpose of awarding attorney fees in administrative proceedings from 25 employees to 200 and from $2 million net worth to $5 million. This will greatly expand the number of businesses protected in administrative proceedings by the Equal Access to Justice Act.

In addition, the bill provides that an agency may not establish that its action is substantially justified if it acts in contradiction to its own declaratory statement or the agency denies a petition for declaratory statement and thereafter pursues enforcement on facts submitted in the petition.

Section 2 amends the attorney fee provision in Ch. 119, F.S., relating to public records, to provide that the "reasonable costs of enforcement" for which attorney fees may be awarded include reasonable attorney fees incurred in litigating entitlement to attorney fees for the underlying matter.

Section 3 amends s 120.52, F.S., to adopt a definition of "small business" for the APA. The definition references s. 288.703, F.S., which defines "small business" as a business having less than 200 employees and $5 million in net worth. As described above, that definition is already incorporated elsewhere in the APA. The effect might be interpreted to reduce the flexibility allowed in rulemaking for agencies by expanding the definition to businesses with 200 or more employees.

Section 4 amends s. 120.55, F.S., to enhance notice of new rules. The bill requires the Department of State to publish in the Florida Administrative Register a listing of rules filed for adoption in the previous 7 days, and a listing of all rules filed for adoption but awaiting legislative ratification.

The bill also requires those agencies with e-mail alert services that provide regulatory information to interested parties to include notices of new rule development, proposed rules, and notice of adoption of rules in those e-mail alerts.

Section 5 amends s. 120.56, F.S., relating to petitions challenging the validity of rules, proposed rules, and unadopted rules. The changes clarify the terminology relating to unadopted rules. The bill also clarifies the initial burden on the petitioner for pleading on challenges to proposed rules and unadopted rules. For unadopted rules the revision requires the agency to prove, after the petitioner presents a prima facie case, that the statement alleged to be an unadopted rule is not a rule, that it was validly adopted, or that rulemaking is not feasible or not practicable.

Section 6 amends s. 120.569(2)(l), F.S., to alter the time for entry of final orders in proceedings relating to agency actions to allow, at the agency's discretion, for legal appeals of rule challenges proceeding concurrently with the enforcement action. An agency will have 10 days after the determination of the appeal to enter the final order on a related matter.

Section 7 amends s. 120.57, F.S., relating to hearings at the DOAH on agency-initiated actions involving disputed issues of material fact. The bill incorporates many of the provisions related to rule challenges in s. 120.56, F.S., and allows the DOAH judge to enter a final order on the challenge to the validity of a rule or to an unadopted rule. The bill allows the agency, within 15 days of notice of the challenge, 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 lawsuit.

To conform to the intention that rule challenges be fairly litigated in defensive cases, the bill excludes those challenges from summary final order procedures.

The section also revises the procedures of using challenges to the validity of rules and unadopted rules in defensive cases where there is no dispute of material fact, staying the proceeding on agency action during a separate proceeding challenging the rule.

Section 8 amends s. 120.573, F.S., relating to mediation of disputes, to authorize a party to request mediation in any case involving a challenge to the validity of an existing rule, proposed rule or an unadopted rule, or a proceeding pursuant to a petition seeking declaratory statement. This may have little impact on the effect of present law, particularly in light of the nature of the matters referenced, which constitute determinations of law that are not ordinarily amenable to mediation.

Section 9 amends s. 120.595, F.S., relating to attorney fees in APA proceedings. The bill clarifies the statute respecting participating in a proceeding for improper purposes and applying the attorney fee provisions for petitions challenging the validity of rules or unadopted rules to the defensive challenges revised in section 6 of the bill. It also makes conforming changes to the revised terminology regarding unadopted rules implemented in section 4 of the bill.

The bill provides that reasonable costs and attorney fees incurred in proving and prosecuting a claim for attorney fees under the statute are not subject to the fee cap applicable to costs and fees awardable in the underlying action.

The bill eliminates the defense that an agency's action can be "substantially justified" when a rule or unadopted rule is successfully challenged. It also eliminates a defense that the agency "did not know or should not have known" that it was relying on an unadopted rule. The bill retains an equitable defense of "special circumstances."

The bill rewrites the provisions for notice of an invalid rule or proposed rule, or of an unadopted rule, requiring notice 30 days prior to filing of a petition challenging a rule or unadopted rule, and 5 days prior to filing the petition challenging a proposed rule. Reasonable costs and attorney fees may be awarded only for the period beginning after notice. The agency may avoid an award of attorney fees and costs if, within the notice period provided, the agency provides notice that it will not adopt the proposed rule or will not rely upon the adopted rule or statement challenged as an unadopted rule until after the agency has complied with the rulemaking procedures of the APA to ensure its rules conform to the law. The bill also provides that taking such steps to cure

its faults would constitute "special circumstances" protecting the agency from an attorney fees judgment on the rule challenge.

The bill clarifies that the notice provisions do not apply to rule challenges raised in defense to agency actions.

Section 10 alters the appellate provisions in s. 120.68, F.S., to clarify that a final order on a rule challenge is directly appealable in the same manner as a final order in a petition challenging a rule. The bill also provides that the 30 day time to file a notice of appeal is extended 10 days if the party receives notice of the final order more than 25 days after the order was rendered. This section also makes conforming technical changes resulting from other amendments in the bill.

Section 11 amends s. 120.695, F.S., relating to notices of noncompliance.

Currently, each agency must review its rules and designate those for which a violation would be minor and a notice of noncompliance the first enforcement action taken. The bill removes the discretion of cabinet agencies to opt out of this requirement by keeping licensees regularly advised of the content of governing rules. As a result, every first violation of a rule that does not cause harm or threaten the public health, safety, or welfare could only be addressed by a notice of noncompliance. This may increase litigation over what is or is not a minor violation, while reducing the revenues generated from fines for first violations of many rules.

The bill also requires each agency to review its rules by June 30, 2014, and within 3 months of any subsequent request by the rules ombudsman, and certify to the Legislature and the rules ombudsman those rules for which a violation would be considered a minor violation. Agencies that fail to do so may not impose any sanction greater than the minimum authorized by law for an initial minor violation until the certification is filed.

Beginning July 1, 2014, each agency must:
- Publish all rules for which violation would be a minor violation;
- Ensure that all investigative and enforcement personnel are knowledgeable of the agency's "minor violation" designations; and
- For each rule filed for adoption, certify whether any part of the rule is designated as one the violation of which would be a minor violation.

The bill provides that s. 120.695, F.S., does not apply to the Department of Corrections or educational units.

Sections 12, 13, and 14 amend ss. 420.9072, 420.9075, and 443.091, F.S., respectively, to correct cross-references.

The bill takes effect July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article III, Section 6 of the Florida Constitution provides that "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." The single subject clause contains three requirements: that each law embrace only one subject, that the law may include any matter that is properly connected with the subject, and that the subject be briefly expressed in the title.[32] The single subject of an act is to be derived from the short title.[33] "A connection between a provision [in an act] and the subject is proper (1) if the connection is natural or logical, or (2) if there is a reasonable explanation for how the provision is (a) necessary to the subject or (b) tends to make effective or promote the objects and purposes of legislation included in the subject."[34]

The short title of this bill is "[a]n act relating to governmental procedures and legal proceedings," and the bill contains provisions relating to rulemaking under the APA, and attorney fees under the Public Records Act. If this bill were challenged under the single subject provision of the constitution, a court would apply a highly deferential standard of review.[35]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector might see some positive impact from a reduction of fines for first time violations of many rules. However, the impact upon business costs of any increase in investigations might offset any reduction in fines paid.

[32] *Franklin v. State*, 887 So.2d 1063, 1072, (Fla. 2004)
[33] *Id.* at 1075.
[34] *Id.* at 1078.
[35] *Id.* at 1073.

C. Government Sector Impact:

Agencies subject to Ch. 119, F.S., which unlawfully refuse to provide public records are potentially subject to paying more in awarded attorney fees.

The bill eliminates the ability of agencies to collect fines for many first-time rule violations that do not cause harm. A reasonable estimate of this revenue has not been made.

The bill may require additional enforcement expenditures in some regulatory areas where penalties imposed for first-time violations actually deter wrongdoing.

The bill may require some additional expenditures by the Department of State to comply with additional Florida Administrative Register notice requirements. However, some of the notices the bill would require are currently being published weekly by the Department as a public convenience.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill requires each agency to ensure that all investigative and enforcement personnel are knowledgeable of an agency's "minor violation" designation, but does not limit that duty to the personnel of that agency. As written, it appears an agency has the duty to ensure that all investigative and enforcement personnel, wherever employed, must be made aware of the agency's designations.

VIII. Additional Information:

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

CS by Governmental Oversight and Accountability on April 9, 1013:
The CS:

- Expands the class of small businesses benefiting from attorney fee awards under the Equal Access to Justice Act;
- Clarifies the burden of pleading and proof of challengers and agencies in challenges to proposed and unadopted rules
- Extends the time to appeal certain final orders when notice thereof to the party appealing was delayed;
- Requires agencies to review their rules and certify those rules for which a violation would be considered a minor violation, and publish all such rules;
- Requires agencies to ensure that all investigative and enforcement personnel are knowledgeable of the agency's "minor violation" designations; and
- Requires agencies to certify whether any part of rules filed for adoption is designated as one the violation of which would be a minor violation.

B. Amendments:

None.