State Agency Rules Review

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Introduction

This report is the result of Interim Project Number 2007-128, which sought to catalogue, provide background information for, and provide recommendations by affected entities and committee staff for the retention, deletion, or modification of all statutory exceptions and exemptions to the Administrative Procedure Act, chapter 120, F.S.

Executive Agency Authority

Agencies are "creatures of statute" that only have those powers that the Legislature delegates to them[1] and they can only perform what they are authorized to do by the Legislature.[2] Administrative agencies may not expand their authority beyond that provided in a statutory grant or amend such provision.[3] They have no inherent[4] or common law powers.[5] When an agency acts outside the scope of its delegated authority, it acts illegally.[6] Statutory delegations probably cannot express every permissible act required to perform a function; however, authority is *implied* because the Legislature intended performance when delegating the duty.[7] Implied powers, however, must be necessary, may not be extended beyond the fair inferences of specific cases,[8] and may not be "in violation of law or public policy."[9] Florida case law has long restricted implied agency powers.[10] "If any

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[1] *Ocampo v. Dept. of Health*, 806 So.2d 633 (1st DCA 2002);
[2] *Ocampo* at 634.
[3] *Dept. of Environmental Regulation v. Falls Chase Special Taxing District*, 424 So.2d 787 (1st DCA 1984); Seitz v. Duval County School Board, 366 So.2d 119 (1st DCA 1979); *Dept. of Transportation v. James*, 403 So.2d 1066 (4th DCA 1981).
[4] *East Cent. Regional Wastewater Facilities Operation Bd. v. City of West Palm Beach*, 659 So.2d 402, 20 F.L.W. D1772 (4th DCA 1995); *Grove Isle, Ltd. v. Dept. of Environmental Regulation*, 454 So.2d 571 (1st DCA1984).
[5] *Florida Indus. Commission ex rel. Special Disability Fund v. National Trucking Co.*, 107 So.2d 397 (1st DCA 1958); *State ex rel. Greenberg v. Florida State Bd. of Dentistry*, 297 So.2d 628 (1st DCA 1974), cert. dismissed, 300 So.2d 900 (Fla. 1974).
[6] *Lee v. Division of Florida Land Sales and Condominiums*, 474 So.2d 282 (5th DCA).
[7] Am. Jur. 2d, *Public Officers and Employees*, s. 232.
[8] *White v. Crandon*, 116 Fla. 162, 156 So. 303 (1934); see also, AGO 079-47.
[9] Fla. Jur. 2d, *Civil Servants and Other Public Officers and Employees*, s. 63, citing *In re Advisory Opinion to the Governor*, 60 So.2d 285 (Fla. 1952); *Peters v. Hansen, 157 So.2d 103* (2nd DCA 1963).
[10] *Edgerton v. International Company*, 89 So.2d 488 (Fla. 1956); *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So.2d 628 (1st DCA 1974); *Gardinier, Inc. v. Florida Dept. of Pollution Control*, 300 So.2d 75 (1st DCA 1974).

doubt exists as to whether a particular power has been statutorily granted, such doubt must be resolved against the employment of that power."[11]

The Administrative Procedure Act (APA), Chapter 120, F.S.

The Administrative Procedure Act (APA) "presumptively governs the exercise of all authority statutorily vested in the executive branch of state government,"[12] and allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions.[13]

For purposes of the APA, the term "agency" is defined in s. 120.52(1), F.S., as each:

- State officer and state department, and each departmental unit described in s. 20.04, F.S.[14]
- Authority, including a regional water supply authority.
- Board and commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
- Regional planning agency.
- Multicounty special district with a majority of its governing board comprised of non-elected persons.
- Educational unit.
- Entity described in chapters 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation), F.S., and s. 186.504 (regional planning councils), F.S.
- Other units of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

The definition also includes the Governor in the exercise of all executive powers other than those derived from the State Constitution. The definition expressly includes a regional water supply authority.

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[11] Op. Atty. Gen 85-66, quoting from State v. Atlantic Coast Line R. Co., 47 So. 969 (Fla. 1908).
[12] *Gopman v. Dep't of Educ.*, 908 So.2d 1118, 1120 (Fla. 1st DCA 2005)
[13] Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, The Florida Bar Journal, Jan. 2001, at 14.
[14] Section 20.04, F.S., sets the structure of the executive branch of state government.

The definition of agency expressly excludes any legal entity or agency created in whole or in part pursuant to ch. 361, F.S., part II (Joint Electric Power Supply Projects); any metropolitan planning organization created under s. 339.175, F.S., or any separate legal or administrative agency of which a metropolitan planning organization is a member; an expressway authority pursuant to ch. 348, F.S.; any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), F.S., unless any party to such agreement is otherwise an agency as defined in the section; or any multicounty special district with a majority of its governing board comprised of elected persons.

Challenges to Proposed or Existing Rules

Section 120.56(1)(a), F.S., provides that a person who is substantially affected by a rule or proposed rule may file a petition seeking an administrative determination of the invalidity of a rule or proposed rule, on the ground that the rule is an "invalid exercise of delegated legislative authority." This term is defined in s. 120.52(8), F.S., to mean that the rule "goes beyond the powers, functions, and duties delegated by the Legislature." Subsection (8) further provides that a proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1., F.S.;
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1., F.S.;
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (e) The rule is arbitrary or capricious; or
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

Finally, subsection (8) requires that the rule be authorized by a grant of rulemaking authority and that it implement the specific powers and duties provided by the enabling legislation. In *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*,[15] the court held that "the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*."

[15] 773 So.2d 594, 599 (Fla. 1st DCA 2000).

Challenges to Agency Determinations of a Party's Substantial Interests

Section 120.569, F.S., provides that a party who wishes to challenge an agency determination of his or her substantial interests must file a petition for a hearing with the agency. Examples of such determinations include professional licensing, including discipline; environmental permitting, including environmental resource and consumptive water use permits; growth management decisions, including comprehensive plan amendments; bid protests by vendors vying for business with agencies; employment discrimination cases originating with the Commission on Human Relations; ethics and election violation cases; and others.[16] An agency request for an administrative law judge (ALJ) must be made to Division of Administrative Hearings (DOAH) within 15 days after receiving the petition.[17] [18] DOAH consists of an independent group of ALJs conducting hearings under ch. 120, F.S., when certain agency decisions, e.g., rules and determinations of a party's substantial interest, are challenged by substantially affected persons. In general, agencies request ALJs for cases in which there is a disputed issue of material fact.

Section 120.569, F.S., also specifies notice and pleading requirements, and the time parameters within which a final order must be completed. All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for a frivolous purpose or needless increase in the cost of litigation.[19] If the presiding officer[20] finds a violation of these requirements, the officer is required to impose an appropriate sanction, which may include an order to pay the other party's expenses, including attorney's fees, incurred because of the improper filing.[21]

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[16] Charles A. Stampelos, *Adjudication of Disputed Issues of Fact under the APA,* 78 Fla. B.J. 45 (2004).
[17] Section 120.569(2)(a), F.S.
[18] Section 120.569, F.S., applies except when mediation is elected by all parties pursuant to s. 120.573, F.S., or when a summary hearing is elected by all parties pursuant to s. 120.574, F.S.
[19] Section 120.569(2)(e), F.S.
[20] Pursuant to Rule 28-106.102, F.A.C., "Presiding officer" means an agency head, or member thereof, who conducts a hearing or proceeding on behalf of the agency, an administrative law judge assigned by the Division of Administrative Hearings, or any other person authorized by law to conduct administrative hearings or proceedings who is qualified to resolve the legal issues and procedural questions which may arise.
[21] *Id*.

Additional Procedures for Administrative Cases

Section 120.57(1), F.S., applies to hearings in which there is a disputed issue of material fact. In the majority of cases, these hearings are conducted by an ALJ.[22] The subsection sets forth evidentiary procedures, specifies the permissible contents of the record, and provides that, in the event a dispute of material fact no longer exists, any party may move the ALJ to relinquish jurisdiction to the agency.[23] The ALJ may grant or deny the motion to relinquish in his or her discretion.[24]

Further, the subsection provides that a presiding officer is to issue a recommended order that contains findings of fact, conclusions of law, and a recommended disposition or penalty.[25] The agency must allow each party 15 days in which to submit written exceptions to the recommended order.[26] The agency may adopt the recommended order as its final order, or in its final order the agency: (a) may reject or modify the order's conclusions of law and interpretations of rules over which the agency has jurisdiction, if it states its reasons for doing so with particularity and finds that its substituted conclusion is as reasonable as that which it rejected or modified; or (b) may reject or modify findings of fact if, after a review of the entire record, it states with particularity that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.[27] The agency may reduce or increase a recommended penalty only when it states its reason for the change with particularity.[28]

Section 120.57(2), F.S., applies to hearings that do not involve a disputed issue of material fact. Generally, these hearings are conducted by the agency, and the subsection requires that the agency: (a) provide reasonable notice to affected persons of its action; (b) provide the parties an opportunity to present evidence in opposition to the agency action; and (c) provide a written explanation to the parties if it overrules the parties' objections.[29]

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[22] *See* s. 120.57(1)(a), F.S. (providing that an ALJ or an agency head or member thereof may conduct the hearing); and ss. 120.80 and 120.81, F.S. (specifying exceptions when an agency must conduct its own hearing).
[23] Section 120.57(1)(i), F.S.
[24] *Id*., F.S.
[25] Section 120.57(1)(k), F.S.
[26] *Id.*
[27] Section 120.57(1)(l), F.S.
[28] *Id.*
[29] Section 120.57(2), F.S.

Statutory Exceptions and Exemptions from Chapter 120, F.S.

There are exceptions and exemptions from the APA, both in chapter 120, F.S., at ss. 120.80 and 120.81, and throughout the Florida Statutes. Section 120.80, F.S., contains exceptions applicable to specific agencies, and s. 120.81, F.S., contains exceptions applicable to general areas or types of agencies. Additionally, exceptions, exemptions, and special requirements (that act as exemptions) to the APA are located throughout the Florida Statutes, collocated within the appropriate substantive law. Other statutes are construed "*in para* materia with, not as repealers by implication of," the APA.[30] Exemptions[31] are passed by the Legislature for a wide variety of reasons, from administrative efficiency to Federal law compliance issues.[32]

Chronological Listing of Exemptions from Chapter 120, F.S.

In order to discover all statutory exemptions from ch. 120, F.S., a preliminary list of exemptions was given to those committees of the Florida Senate which had oversight responsibility for the identified exemptions. Each committee was tasked with working with relevant agencies to:

- ensure that all exemptions have been located;
- provide the policy rationale for the enactment of the exemption; and
- make a recommendation as to whether the exemption should be retained as is, modified, or deleted.

Each committee then supplied their work to the Committee on Governmental Oversight and Productivity for integration into this report.

As of October 23, 2006, approximately 195 exemptions were identified in the project.[33] Routine citation format has been eliminated for the initial identification

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[30] *Gopman v. Dep't of Educ.*, 908 So.2d 1118, 1120 (Fla. 1st DCA 2005), citing *Big Bend Hospice, Inc. v. Agency for Health Care Admin.*, 904 So.2d 610 (2005).

[31] For consistency in this report, all exceptions, exemptions, and special requirements are referred to as "exemptions."

[32] Section 120.63, F.S., provides a process by which agencies can petition the Administration Commission for exemption from one or more requirements of the APA. If granted, the exemption terminates 90 days following adjournment sine die of the then-current or next regular legislative session. Exemptions granted pursuant to this section are rare.

[33] The exact number of exemptions is dependent on whether the exemption is considered at the subsection or paragraph level of the Florida Statutes.

of each exemption in order to make the report more readable; citations for each exemption are to the Florida Statutes.

State Lotteries

24.105(19)(d)

Section 24.105(19)(d), F.S., provides that the Department of the Lottery "shall establish and maintain a personnel program for its employees, including a personnel classification and pay plan which may provide any or all of the benefits provided in the Senior Management Service or Selected Exempt Service. Each officer or employee of the department shall be a member of the Florida Retirement System." Employees serve at the pleasure of the Secretary of the department and are subject to personnel actions at the discretion of the Secretary. The personnel actions are exempt from the provisions of chapter 120, F.S.

Rationale: The Department of the Lottery responded "this section provides that the department shall establish and maintain a personnel program that is separate and apart from the Career Service, Selected Exempt Service and Senior Management Service. Under the statute, employees of the department are to serve at the pleasure of the Secretary and are subject to discipline, including dismissal, at the discretion of the Secretary."

"This is consistent with section 24.102(2)(b) which provides that the Lottery is to function as much as possible in the manner of an entrepreneurial business enterprise; and that due to the unique activities of the Lottery, the structures and procedures appropriate to other governmental functions may not be appropriate to the operation of the state lottery."

"In the Lottery context, making personnel actions exempt from chapter 120 is logical, compelling and certainly consistent with the statutory objective of maximizing revenues for education. Procedures and structures for operating the Career Service and other state personnel systems would not be appropriate to the operation of the Lottery, given the mandate to operate as nearly as possible in the manner of a private business. By allowing the Secretary to make personnel decisions within her discretion, and not subject to chapter 120, the Lottery is best able to operate similarly to the way a private sector business would operate. Making Lottery personnel actions subject to chapter 120 would result in the Lottery's personnel system being more like the Career Service than a business."

"The public policy purpose that is served by the exemption is that it enables the Lottery to operate with maximum efficiency. For example, as the Lottery seeks ways to increase sales and transfers to education, it sometimes implements structural and personnel changes. Positions may be reclassified to perform a

different mission than before, positions may be relocated to a different office, or positions may even be abolished. All of these types of changes have occurred. Had chapter 120 been applicable, the changes would have been slower to implement and the resulting improvements to sales and transfers would have been delayed or perhaps even derailed entirely."

Recommendation: The department "recommends retaining the exemption. The reason is that the exemption has worked well throughout the 18-year history of the Lottery, with no significant issues or problems having occurred. Allowing the Secretary to implement personnel changes—in some cases, including disciplinary actions—without having to go through the chapter 120 processes has made it possible for the Lottery to act quickly and efficiently, in short, to operate more like a business. Loss of the exemption would be a setback."

Staff of the Committee on Regulated Industries recommends that if the Legislature continues to believe that the Department of the Lottery should operate more as an entrepreneurial business enterprise due to the unique activities of the Lottery, then the exemption should be retained.

24.109(1)

Section 24.109(1), F.S., provides that the Department of the Lottery, when adopting emergency rules, need not make the findings required by s. 120.54(4)(a), F.S. Section 24.109(1), F.S., provides that "the Legislature further finds that the unique nature of state lottery operations requires, *from time to time*,[34] that the department respond as quickly as is practicable to changes in the marketplace." *[Emphasis added.]* Section 120.54(4)(a),F.S., requires an agency to state in writing the "specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances." The emergency rules adopted pursuant to s. 24.109(1), F.S., are also exempt from the provision in s. 120.54(4)(c), F.S., that provides that the emergency rules shall not be effective for longer than 90 days and are not renewable. If a proposed rule that addresses the subject of the emergency rule is challenged then the emergency rule is effective during the pendency of the rule challenge. Emergency rules for the department under s. 24.109(1), F.S., remain effective until replaced by other

[34] In 2005, the Department of the Lottery promulgated 30 rules by the regular rulemaking procedure and 93 emergency rules. This year, 30 rules have been promulgated pursuant to s. 24.109(1), F.S., with no rules promulgated by regular rulemaking. These rules promulgated as emergency rules include retailer applications and fee schedules (53ER5-09), retailer applicant background investigations (53ER5-10), change in retailer ownership (53ER5-12), and suspension and termination of retailer contracts (53ER6-24). In each example these rules were not new, but replaced other emergency Lottery rules.

emergency rules or by rules adopted under the non-emergency procedures of chapter 120, F.S. This exemption applies to all rules of the department, including rules specific to lottery games and rules that are not game specific.

Rationale: The department responded that "the requirement to make a finding of an immediate danger to the public health, safety, or welfare is an example of the type of 'procedures appropriate to other governmental functions [that] may not be appropriate to the operation of the state lottery' as provided in 24.102(2)(b). Although it would be appropriate for a regulatory agency to make such a finding before imposing an emergency requirement on an affected person or entity, the Lottery does not present a comparable situation. The Lottery's 'emergency' rules do not address dangers to the public heath, safety or welfare. Rather, they involve issues related to conducting the business of selling tickets, contracting with Lottery retailers, disclosing to players the number and size of prizes in the individual lottery games, claiming lottery prizes, and similar matters."

"Requiring the Lottery to adopt rules on certain topics, for example, the type of lottery games to be conducted [see 24.105(9)(a)], but not requiring that an emergency finding be made prior to adopting such rules is a workable compromise between: (1) totally exempting the Lottery from chapter 120 rule-making requirements, as the case would be for a truly private-sector business enterprise; and (2) subjecting Lottery rule-making to the same chapter 120 procedures that apply to state agencies in general."

"In 1987, when the Legislature was considering the adoption of chapter 24 and what a lottery statute should and should not contain, the issue of rule-making was specifically considered. According to a law review article titled, *The Florida Lottery Act*, 15 Florida State University Law Review 731 (1987), the Legislature entertained the view that the Lottery should have a total exemption from the [ch. 120, F.S.] for rule-making and certain other purposes. In the final analysis, it was decided that a total exemption was unnecessary, so long as emergency rule provisions could be adapted to the department's needs. Id. at 740. . . . What resulted was the Lottery's exemption from having to make a finding and, as discussed below, from the 90-day life span generally applicable to emergency rules. Thus, the rationale seems to have been one of trying to avoid unduly impairing or impeding the efficiency of Lottery operations."

"As relates to the exemption from the 90-day provision referred to above [120.54(4)(c)], the rationale is similar to the exemption from making emergency findings—that is, an adaptation to meeting the department's unique needs. Since the Lottery's emergency rules are not emergencies in the same sense as other agencies' rules, there is not a corresponding need to limit them to a shortened life-span. In many cases, to do so would be extremely harmful. For example, game

rules must be in effect for the life of the respective games, which have no predetermined life-span. Individual instant, or scratch-off, games generally remain on sale for six months or even longer, certainly longer than 90 days. Therefore, there is a compelling operational need for the rules to remain in effect longer than the customary 90 days."

Recommendation: The department recommends retaining the exemption for the reasons that are discussed above.

Staff of the Committee on Regulated Industries concurs with the department's recommendation to retain the exemption from the requirement for the department to make a finding of an immediate danger to the public health, safety, or welfare and to state its reasons for concluding that the procedure used is fair under the circumstances for emergency rules. However, committee staff does not concur with the department's recommendation to retain the exemption and allow the department to have the emergency rules in effect until they are replaced by other emergency rules or by non-emergency rules adopted through the regular rulemaking procedures. The ability for emergency rules to be effective indefinitely should be limited to the game rules only and not to all instances of rulemaking. Emergency rulemaking, other than for lottery games, should follow the time limitations provided in s. 120.54(4)(c), F.S.

24.109(2)(c)

Section 24.109(2)(c), F.S., provides an alternative to s. 120.57(3)(c), F.S., for the Department of the Lottery to use in bid disputes. Section 120.57(3)(c), F.S., requires that, "upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare." Section 24.109(2)(c), F.S., permits the department, as an alternative, to "proceed with the bid solicitation or contract award process when the secretary of the department sets forth in writing particular facts and circumstances which require the continuance of the bid solicitation process or the contract award process in order to avoid a substantial loss of funding to the state or to avoid substantial disruption of the timetable for any scheduled lottery game."

Rationale: The department responded that "this section allows the Secretary to proceed with a bid solicitation or contract award when there has been a bid protest by first setting forth in writing the particular facts and circumstances that require her to do so. The rationale and public policy justification, as expressed in the statute, is to avoid a substantial loss of funding (lost sales) or to avoid a

substantial disruption of the timetable for any scheduled lottery game. In other words, if there are compelling circumstances related to the state's finances or the operation of the games, and the Secretary makes a written determination of such facts and circumstances, the delays that would otherwise result from a bid protest can be avoided."

"This provision is similar to the exemption in 120.57(3)(c), which applies to other agencies. That section allows other agency heads to proceed with a bid solicitation or contract award when there is a bid protest by first determining in writing that delays would cause an immediate and serious danger to the public health, safety, or welfare. Again, the rationale is to avoid harm to the best interests of the state or its citizens."

Recommendation: The department "recommends retaining the exemption. Although the exemption has seldom if ever been invoked, the ability to avoid substantial harm to the state in a future case that so warrants should be preserved, in the department's judgment."

Staff of the Committee on Regulated Industries concurs with the department's recommendation. The standards are narrowly drawn and specifically address the issue of funding for the state's education programs and providing a continuous supply of games for the citizens to play.

State Employment

110.123(5)(a)

The Department of Management Services (DMS) may determine benefits and contributions without going through the rule-making process and without having its determinations be considered final orders under chapter 120, F.S.

Rationale: This statute permits DMS to efficiently set benefits schedules and thereby better serve those covered by the State Group Insurance Program. If DMS had to have the benefits schedules subjected to rule-making, such a process would take months, limiting DMS' ability to have the benefits schedules settled and in place before entering a contract with a coverage provider. If the benefits schedules were final orders, then those orders, to the extent that they affect substantial interests, could be challenged administratively. This would run the risk of further delays and also could lead to inconsistent results, should the process involve formal hearings before the Division of Administrative Hearings.

By permitting the DMS to establish the benefits schedules without these risks, time and money are saved and the customers (i.e., state employees) are more efficiently served.

Recommendation: The DMS recommends that this exemption be retained because it streamlines the process for establishing benefits schedules and avoids costly delays.

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained.

110.1523

Any employee or organization representing employees shall be considered a party for purposes of any rule required by ss. 110.1521-110.1523, F.S., notwithstanding any provision of chapter 120, F.S., to the contrary.

Rationale: This rule brings any employee or employee union into the rule-making process for the model employment rule for the Family Support Personnel Policies Act of 1991. It appears to be an exemption to the benefit of employees rather than the agency, and appears to be based on the belief that it would be fairer to include every employee or union in the process rather than making them show that they have a particular interest in order to gain standing.

Recommendation: The Department of Management Services expresses no opinion on this exemption's retention, but does note inclusiveness in the process has at least one benefit: it prevents the process from being bogged down by fights over who may participate. Also, by giving individuals and unions the right to participate in the process, the state avoids any contention that the rules simply were imposed from above without opening the process. The policies addressed by the Family Support Personnel Polices Act of 1991 have been incorporated into Florida Rule of Administrative Procedure 60L-34.

Staff of the Committee on Governmental Oversight and Productivity recommends that the exemption should be retained.

110.403(1)(a)

Senior management employees may not challenge personnel actions under chapter 120, F.S.

Rationale: This exemption makes senior managers of all agencies "at-will" employees, meaning they cannot challenge changes of assignment, demotion or termination through the administrative hearing process. By making such managers at-will, the exemption gives all state agencies greater flexibility in choosing management-level employees and, therefore, more efficiently serving the people

of the state. This makes state government more responsive to changing needs and makes managers more accountable.

Recommendation: The Department of Management Services recommends that this exemption be retained so that the distinction between career service employees and those who are “at will” can be realistically maintained. If senior management employees had the same powers to challenge personnel decisions, they would in essence be equivalent to career service employees. If senior managers were able to challenge personnel decisions through the ch. 120 process, department and division heads would be constricted in their ability to make rapid personnel decisions and might even be forced to retain a manager who did not agree with, and even attempt to thwart, the department or division head’s policies for the agency. Moreover, any changes that need to be made can be made quickly, so that managers with the proper skill-sets are in the proper positions without having to wait for a manager who has been demoted or terminated to take his case through the administrative process. The governing principles which led the Legislature to create the SMS and SES pay plans were to promote uniform practices relative to attracting, retaining, and developing employees exempt from the Career Service, while at the same time ensuring that these employees were held accountable for supporting managerial policies by providing for personnel/disciplinary action solely at the agencies' discretion. As such, their being exempt from the due process provisions of ch. 120 has been an inherent feature from the start.

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained.

110.604

Selected exempt employees may not challenge personnel actions under chapter 120, F.S.

Rationale: This exemption makes selected exempt employees “at-will,” meaning their assignments may be changed and they may be demoted or terminated without the agency having to justify the action in a ch. 120 proceeding. As stated by the Legislature in s. 110.601, F.S.:

> This part creates a system of personnel management the purpose of which is to deliver high-quality performance by those employees in select exempt classifications by facilitating the state's ability to attract and retain qualified personnel in these positions, while also providing sufficient management flexibility to ensure that the workforce is responsive to agency needs. The Legislature recognizes that the public interest is best served by developing and refining the technical

> and managerial skills of its Selected Exempt Service employees, and, to this end, technical training and management development programs are regarded as a major administrative function within agencies.

Recommendation: The Department of Management Services recommends that this exemption be retained so that the distinction between career service employees and those who are "at will" can be realistically maintained. The governing principles which led the Legislature to create the SMS and SES pay plans were to promote uniform practices relative to attracting, retaining, and developing employees exempt from the Career Service, while at the same time ensuring that these employees were held accountable for supporting managerial policies by providing for personnel/disciplinary action solely at the agencies' discretion. As such, their being exempt from the due process provisions of ch. 120, has been an inherent feature from the start.

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained.

Public Officers and Employees: General Provisions

112.0455(14)(c)

Challenges to personnel actions taken because of failed drug tests are taken before the Public Employee Relations Commission (PERC), rather than the Division of Administrative Hearings.

Rationale: When an executive-branch employee is disciplined or is denied employment because of a failed drug test, the sole administrative remedy is before PERC, unless a union employee wishes to file a grievance, which then becomes the sole remedy. Thus, these employee-relations matters are handled like all others, through either a grievance or through PERC. This exemption insures that all such appeals will be heard by hearing officers with special expertise in employee relations, rather than by administrative law judges, who lack that narrower expertise.

Recommendation: The Department of Management Services recommends that this exemption be retained because, by having the same commission review all claims, it advances uniformity of the relevant laws and rules to facts presented. In 2004 an OPPAGA report recommended keeping PERC and DOAH separate, as the disadvantages outweighed the advantages, and that merging PERC and DOAH could cost the state money. (See OPPAGA Report 04-37.)

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained.

112.3151

This section of the Florida Statutes gives the Florida Commission on Ethics (commission) and its chairman the authority to grant extensions of time for filing disclosure statements for good cause; this process is exempt from chapter 120, F.S.

Rationale: The exemption from ch. 120 for these extensions allows the expeditious resolution of requests for extensions of time. Many requests for extensions are not received until shortly before the filing deadline. If there were no exemption from ch. 120, there would not be enough time to comply with APA time frames; requests might become moot (go unanswered) in the time remaining before the filing deadlines.

Recommendation: The Florida Commission on Ethics recommends that the current exemption be retained.

The only person whose substantial interests are affected by the granting of an extension is the person making the request. Since the requestor must only show "good cause," the commission has never, in commission staff's collective memory, denied a request for an extension. Moreover, since most extension requests are received right before the filing deadline, it is highly desirable to have an informal process for granting extension requests expeditiously. Presently, upon receipt of a written request for an extension, staff communicates with the chair who authorizes the entry of an order granting the extension. A copy of the order is provided to the requestor and the filing authority (either the commission or a local Supervisor of Elections). There were 14 extension requests this filing cycle, mostly due to the filer's military deployment.

If an extension were to be denied, and the filer's form were filed after the September 1st deadline, the filer would be subject to the $25/day fine, but would be allowed the opportunity to appeal the fine to the commission. Fine appeals are subject to ch. 120, and the commission's decisions on fine appeals are reviewed by the District Courts of Appeal. In short, it is unnecessary and unduly burdensome for persons requesting extensions to subject this informal, essentially ministerial process to the requirements of ch. 120.

Staff of the Committee on Ethics and Elections concurs in the rationale and justification for retention of the exemption.

112.324(2)

This section provides that proceedings at which the Florida Commission on Ethics considers confidential complaints "are exempt from the provisions of . . . s. 120.525," until the complaint becomes public as provided in that section. Under s. 112.324(2), F.S., ethics complaints are designated confidential and exempt from the public records and sunshine laws until the commission dismisses the complaint, the official waives confidentiality, or the commission investigates and decides whether probable cause exists to believe that a violation of the law occurred.

Rationale: The exemption from ch. 120 is consistent with the exemptions from chs. 119 and 286, F.S., for confidential complaints, in that it assists the commission in making sure that confidential records are not available to the public.

Recommendation: The Florida Commission on Ethics recommends that the current exemption be retained.

Without the exemption from ch. 120, the commission would be required to publicly notice (in the F.A.W.) each meeting at which it will consider confidential matters and could be required to notice each of those confidential matters. The Legislature affords confidentiality to respondents in ethics complaint proceedings until the commission makes its probable cause determination. After probable cause is found, ch. 120 governs the process through final disposition. If the process were subject to ch. 120 earlier, it would contradict the legislative intent that pre-probable cause proceedings be confidential.

Staff of the Committee on Ethics and Elections concurs in the rationale and justification for retention of the exemption.

Administrative Procedure Act[35]

120.55(1)(a)2.

This section provides that certain school district, community college, and university rules do not have to be published in the Florida Administrative Code (Code).[36] Specifically, publication is not required for rules that are general in form but have limited application to a part of, or only one school district, community

[35] The exemptions contained in ss. 120.50, 120.52(1)(c), and 120.52(15), F.S., and the process in s. 120.63, F.S., by which the Administration Commission may grant a petition for an exemption, are not included in this review.

[36] The cost to entities publishing in the Florida Administrative Weekly is 99 cents per line; that cost covers subsequent publication in the Florida Administrative Code.

college district, or county, or state university rules that address internal personnel or business and finance. This section also specifies that the lack of publication does not affect the validity or effectiveness of the rules.

Rationale: The Department of Education indicates that this exemption results in a savings in cost that publishing in the Code would otherwise incur. Additionally, most clients of these entities are accustomed to looking for regulations that apply to them at the specific institution level, not those that apply to all institutions. Also, the validity statement is necessary to have in statute to remove any doubt about the rules' effectiveness, even if it is not published in the Code.

Recommendation: The Department of Education recommends that this exemption be retained.

Staff of the Committee on Education recommends that consideration should be given to improving the form of notice and publication given to the public.

120.57(1)(d)

The "Williams Rule" is a rule of evidence codified in s. 90.404(2)(a), F.S. It provides that similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.[37] The enumerated list of issues of which evidence of other crimes, wrongs, or acts may be relevant to prove a material fact is a non-inclusive list and is not statutorily limited to the instances specifically enumerated therein. This clarification is in accordance with existing case law.[38]

Even if evidence of other crimes is relevant and not barred by the "Williams Rule" (i.e., s. 90.404(2)(a), F.S.) it still may be excluded under s. 90.403, F.S., if its probative value is substantially outweighed by undue prejudice.[39] Section 90.403, F.S., provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

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[37]The *Williams Rule* was announced by the Florida Supreme Court in the case of *Williams v. State*, 110 So.2d 654 (Fla. 1959). In *Williams*, the court upheld the admission of the similar fact evidence and expressed the rule both in terms of when such evidence is admissible and when it is not.

[38] See *Saffor v. State*, 660 So.2d 668, 674 (Fla. 1995).

[39] See *Williams v. State*, 621 So.2d 413, 415 (Fla. 1993).

Section 120.569(2)(g), F.S., provides that in administrative hearings, irrelevant, immaterial, or unduly repetitious evidence must be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in court.

Section 120.57(1)(d), F.S., is a hybrid of the "Williams Rule". Section 120.57(1)(d), F.S., provides that, notwithstanding s. 120.569(2)(g), F.S., in any administrative proceeding, similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal.

In an administrative hearing, the "Williams Rule" provision allows admission of similar fact evidence to prove a material fact at issue, such as motive, opportunity, preparation, etc. For example, licensed health care professionals who are alleged to have committed sexual misconduct may schedule a patient's appointment for a time when other personnel are not likely to be in the office if the professional intends to take inappropriate action, e.g., very early or very late in the day. The "Williams Rule" allows the admission of such evidence.

The exemption to s. 120.569(2)(g), F.S., which is at issue was adopted in ch. 94-161, Laws of Florida, and was enacted along with a "rape-shield" type exemption that now appears in s. 120.81(4), F.S.

When both rules of evidence were initially adopted, they were placed in s. 120.58, F.S. (1994). As a part of the 1996 revisions to ch. 120, F.S., the "rape shield" provision was separated out and placed in s. 120.81, F.S., the "exemptions" section of ch. 120, F.S.

Rationale: The Department of Health argues that s. 120.57(1)(d), F.S., provides a means to admit probative evidence concerning prior bad acts that is relevant to the instant case, such as to prove motive, while trying to avoid the prejudicial effect of trying to prove up a case based simply on bad character or propensity.

Recommendation: The Department of Health recommends retaining s. 120.57(1)(d), F.S., for the reasons discussed above.

Staff of the Health Care Committee concur with the Department of Health's recommendation to retain the provisions of s. 120.57(1)(d), F.S., but recommends moving the provisions to s. 120.569(2)(g), F.S., or in the alternative, to move the provisions of s. 120.81(4), F.S., relating to rape shield, to s. 120.57(1)(d), F.S., to consolidate rules of evidence applicable to administrative hearings.

120.57(5)

Agency investigations which are preliminary to agency action are exempt from s. 120.57, F.S., which applies in proceedings in which the substantial interests of a party are determined by an agency. This means agency investigations cannot be stopped by a s. 120.57 challenge.

Rationale: The purpose of this statute is to prevent unnecessary litigation when an agency investigation may impact or threaten to impact the substantial interests of a party. Since the ultimate agency action resulting from the investigation will be subject to a ch. 120 hearing if it affects a substantial interest, impeding the investigation by subjecting it to a hearing is not necessary. Furthermore, individuals cannot impede an investigation by subjecting it to a lengthy hearing process and defeat the purpose of the investigation.

Moreover, if investigations were subject to a ch. 120 hearing, agencies would be required to send notices of right to challenge to individuals affected by the investigation. The number of people to be contacted would be a burden on the agency and the investigation, and would frustrate the legitimate exercise of police powers in regulatory matters. It would subject the agencies to challenges for not giving the right people a notice of rights (to challenge) at various times in an investigation and would ultimately hinder the ability to investigate.

Recommendation: This Department of Management Services recommends that the exemption should be retained to avoid unnecessary litigation and impeding an agency investigation. Parties will have their right to challenge any subsequent agency action that affects their substantial interests.

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained.

120.80(1)(a)

This subsection prohibits the Division of Administrative Hearings (DOAH) from hearing cases in which the Division is a party and requires the

Administration Commission to assign an attorney to be the hearing officer in that case.

Rationale: According to a representative of DOAH, "this exemption has existed since 1974 when the APA was enacted and DOAH was created. This subsection focuses on the appearance of neutrality and reflects the perception that the agency involved in a case should not hear it." In reality, all non-disputed fact cases are heard by the agency involved in the case. Since DOAH only enters a recommended order, most disputed-fact cases are resolved by the agency involved, since the agency has the final order authority.

"Only 8 cases in 32 years have involved this subsection: 2 bid protests to DOAH's lease, 3 challenges to DOAH's rules (which were repealed and replaced by the Uniform Rules of Procedure), 1 employee dismissal case, 1 employee moved from career service to the new select exempt classification, and 1 pending challenge to an alleged unpromulgated rule."

Recommendation: According to a representative of DOAH, "most of the 8 cases have been voluntarily dismissed by the petitioner before the appointment of a hearing officer by the Administration Commission. Only 3 have gone to hearing and resulted in recommended or final orders. Further, all of these cases are of the type DOAH regularly hears on behalf of other agencies, and the DOAH Administrative Law Judges are well-versed in the applicable law and have experience in these types of cases. The attorneys assigned by the Administration Commission are typically not experienced in the area of the law involved and have no experience in conducting evidentiary hearings. Since the ALJs at DOAH are Career Service employees with the legal protections attached to that employment status and are not reluctant to rule against any party if appropriate no matter the party's identity, it is recommended by the Division of Administrative Hearings that the exemption be removed and that the ALJs at DOAH hear cases falling under Chapter 120 even if DOAH is a party."

Staff of the Committee on Governmental Oversight and Productivity concludes that arguments for either retention or elimination of the exemption are equally meritorious.

120.80(1)(b)

This subsection provides that a judge of compensation claims in adjudicating claims under chapter 440, F.S., is not an agency or part of an agency for purposes of chapter 120, F.S.

Rationale: The judges of compensation claims (JCCs) are housed within the Office of the Judges of Compensation Claims (OJCC), which is housed within the

Division of Administrative Hearings (DOAH). The JCCs hear cases involving injuries to employees, in which the parties are the employee (or survivor) and the employee's employer and/or the employer's insurance carrier or servicing agent. No state agency is involved, and there is no preliminary agency action giving rise to the dispute. The litigation is between private parties and does not involve public policy implications as do most cases arising under ch. 120. The JCCs enter final orders, and judicial review is directly to the First District Court of Appeal.

A case is initiated by the filing of a petition for benefits. As the case progresses, additional petitions are filed in that same case seeking, for example, additional medical testing and treatment. As the case further progresses to final resolution, only some of the petitions in that case may remain pending for adjudication, while some of the petitions including the original one may have been amicably resolved by the parties.

Workers' compensation cases, because they are excluded from ch. 120 adjudication procedures, do not utilize the Uniform Rules of Procedure utilized by all state agencies; rather, they are processed in accordance with uniform rules of procedure promulgated pursuant to ch. 120 and found in Chapter 60Q-6, Florida Administrative Code. In other words, the actual workers' compensation adjudications are exempt from ch. 120 but, in other respects, the OJCC itself is within the executive branch and is subject to ch. 120 requirements other than for adjudication of disputes.

Recommendation: The Division of Administrative Hearings recommends that this exemption should be retained. Workers' compensation disputes do not lend themselves to ch. 120 dispute resolution procedures. They do not involve one and only one preliminary agency determination. They require procedures that are unique to workers' compensation adjudications. However, the language in this subsection could be made clearer.

This provision, although in existence since the APA was enacted, became the focus of a dispute within the last four years concerning whether the judicial branch (Supreme Court) or the executive branch (DOAH) had the authority to promulgate rules of procedure for workers' compensation adjudications. The Supreme Court ultimately ruled that DOAH possessed the rulemaking authority and responsibility, but the language of the subsection contributed to the confusion. Suggested language is as follows:

> “Judges of compensation claims are exempt from the notice and hearing requirements of ss. 120.569 and 120.57 in adjudicating matters under Chapter 440 but are subject to the rulemaking procedures in this chapter.”

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained and modified.

120.80(2)(a)

This section addresses agricultural marketing orders in Chapter 527, F.S., Florida Propane Gas Education, Safety, and Research Act; Chapter 573, Marketing of Agricultural Products; and Chapter 601, The Florida Citrus Code.

The purpose of marketing orders pertaining to propane gas is to (a) allow the establishment of plans and programs for advertising, sales promotion, and education to maintain present markets or to create new or larger markets for propane gas produced or marketed in Florida; (b) make provision for carrying on research studies, the expenditure of moneys for that purpose, and for industry assessments to fund the activities of the Council; (c) allow for the Department of Agriculture and Consumer Services to receive recommendations from the Florida Propane Gas, Education, Safety, and Research Council; and to (d) select appropriate research projects based on recommendations of the Council.

Marketing Orders pertaining to agricultural products prescribe the "rules governing the distributing, or handling of agricultural commodities in the primary channel of trade". The Department of Agriculture and Consumer Services has five Market Orders: Soybean, Peanuts, Tobacco, Viticulture and Citrus as it relates to research.

Marketing Orders for citrus products are also provided to the industry for the purpose of assuring quality products throughout the distribution or handling of citrus products produced in the state in the primary channel of trade.

Rationale: Subjecting the propane gas market order to the rules process under Section 120.80(2), F.S., would cause the market order to be unresponsive to the needs of the propane gas industry and would potentially impair marketing of the product, the selection of appropriate research projects and funding under ch. 527, F.S. Chapter 527, F.S., provides the process for establishing market orders and allows for rule making to facilitate the administration of the market orders as well as collecting, reporting, and the payment of assessments collected. Safeguards for the implementation of the marketing order are in place. For example, any marketing order must receive approval by referendum ballot of persons who represent two-thirds of the total gallonage of propane gas. Additionally, a process for judicial review is provided.

Subjecting agricultural marketing orders, including citrus, to the rules process under Section 120.80(2), F.S., would cause the market order to be unresponsive to the needs of the agricultural commodity groups with such orders. Under present

law producers of agricultural commodities can petition the department to issue marketing orders to assist producers in effectively marketing those commodities to meet consumer demand and to expand and develop new markets. Market demand for agricultural products is very fluid and requires flexibility which would make it impractical and not feasible to promulgate rules to accomplish changing marketing objectives.

Recommendation: The Department of Agriculture and Consumer Services recommends that this exemption be retained.

Staff of the Committee on Agriculture concurs that the exemption should be retained.

120.80(3)

There are three exemptions pertaining to the Office of Financial Regulation (OFR or office) under s. 120.80(3), F.S.:

1. Applications for establishing new financial institutions or the renewal, amendment or merger of licenses for existing financial institutions[40] shall be approved or denied within 180 days after receipt of the application, receipt of timely requested additional information, or correction of errors or omissions. Any application for such license which is not approved or denied within the 180-day period or within 30 days after conclusion of a public hearing, whichever is later, shall be deemed approved, subject to completion of required statutory conditions. Section 120.60(1), F.S., requires that applications be approved or denied within 90 days.

Rationale: The OFR is charged with the protection of the interests of the public through its regulation of the Florida financial institution system and the protection of the interests of depositors and creditors of such institutions. The office completes a de novo review process for each application for a new financial institution which is exceptionally thorough because its goal is to determine whether the proposed institution will be financially viable. Applications for new domestic financial institutions require significant ongoing review, evaluation, and commitment of staff time by the OFR. For example, OFR conducts complete background checks on applicants and requires the office to obtain additional information or clarification from applicants or third parties.

Extensive analysis of business plans, capital plans, and facilities are part of the review process. The OFR also works closely with Federal regulatory agencies, such as the FDIC (Federal Deposit Insurance Corporation) and the NCUA

[40] These include banks, trust companies, capital stock saving associations, credit unions, and savings and loan associations.

(National Credit Union Association), which review corresponding applications in their capacities as the insurer of deposits because state law requires that domestic depository institutions have federal deposit insurance. If the s. 120.60(1), F.S., exemption was not in place, the OFR would have to make premature decisions on applications, due to the shorter review period, which could likely increase the risk to the public. Such an action would affect the public adversely by reducing competition in the financial institution industry and would likely impede the economy of Florida. According to representatives with the OFR, the office makes every effort to review applications within a 90-day period; however, if the particular application is complex the review may take longer.

Recommendation: The OFR recommends the exemption be retained.

Staff of the Senate Banking and Insurance Committee concurs with this recommendation.

2. Domestic financial institution applications involving a foreign national shall be approved or denied within 1 year after receipt of the original application or timely requested additional information or within 30 days after conclusion of a public hearing, whichever is later. Section 120.60(1), F.S., requires that applications be approved or denied within 90 days.

Rationale: In addition to issues stated above, domestic applications involving a foreign national require significantly more processing time because of the lengthy process of conducting background investigations through domestic and international sources. Also, the OFR is required under this section to hold a public hearing on domestic applications involving foreign nationals pursuant to ss. 120.569 and 120.57, F.S. Concerns about foreign national involvement in financial institutions has been magnified by the attack on our country on September 11, 2001, as well as subsequent terrorist activity worldwide. If this exemption were removed, OFR could not be able to thoroughly investigate foreign nationals that are involved in domestic financial institution applications which could result in the denial of some applications. Such action would impede commerce which would be detrimental to the economy of Florida.

Recommendation: The OFR recommends the exemption be retained.

Staff of the Senate Banking and Insurance Committee concurs with this recommendation

3. Under this section, “any” person (other than the OFR or an applicant) may request an administrative hearing on a financial institution application before OFR

within 21 days of publication of the application in the Florida Administrative Weekly (FAW).[41]

Rationale: According to OFR officials, the public is best served by the exemption. This provision allows the public a point of entry to the process that is broader than that afforded under ch. 120. This exemption creates an orderly and timely process whereby all interested parties can exercise their right to request a public hearing on an application pending before OFR without disrupting the application process. Also, applicants are given an opportunity to request a public hearing at any time prior to the issuance of final agency action on their application.

Recommendation: The OFR recommends the exemption be retained.

Staff of the Senate Banking and Insurance Committee concurs with this recommendation.

120.80(4)(a)

Section 120.80(4)(a), F.S., provides that the Division of Pari-mutuel Wagering in the Department of Business and Professional Regulation is exempt from the hearing and notice requirements of ss. 120.569 and 120.57(1)(a), F.S., for stewards, judges, and boards of judges provided in chapter 550, F.S. The exemption is applicable to hearings that are held to determine fines or suspensions for interference with races or games, for violations of anti-drugging procedures, for reciprocal license suspensions from other states, for crimes of violence on the licensees' premises, or for prearranging the outcome of any race or game. It does not apply to license revocations.

Rationale: The department responded that "the need to protect the racing animals and integrity of the sport require that certain types of violations of chapter 550 be handled as expeditiously as possible. In furtherance of this, three-person panels of judges (greyhound) or stewards (horse) have been created at every track in Florida. It is their job and duty to ensure that violations, that do not rise to the level of revocation, be handled expeditiously to correct certain kinds of problems. See section 120.80(4)(a)1.-5., Florida Statutes. This enables the Division, if need be, to take swift action to protect the racing animals and integrity of the sport."

Recommendation: The department "unequivocally recommends that this exemption be retained due to its benefit in protecting the public health, safety, and welfare of the public. If the provisions of chapter 120 were to be followed, the

[41] Under ch. 120, F.S., only interested parties who have standing can request a public hearing.

time frame for hearing a case would be drawn out and the Division's ability to adequately enforce the provisions of chapter 550 would be frustrated."

Staff of the Committee on Regulated Industries concurs with the department's rationale and recommendations to retain the exemption in s. 120.80(4), F.S.

120.80(4)(b)

Section 120.80(4)(b), F.S., provides that formal hearings under s. 120.57(1)(a), F.S., shall not be conducted by the Secretary of Business and Professional Regulation or a board or member of a board within the Department of Business and Professional Regulation for matters relating to the regulation of professions under chapter 455, F.S.

Rationale: The department responded that "this language in section 120.80(4)(b), Florida Statutes, does not constitute an exemption. The agency head and boards may not conduct evidentiary hearings in professional regulation cases. These hearings are held before an administrative law judge."

Recommendation: The department "does not have a position in whether or not to keep or dispose of this provision."

Staff of the Committee on Regulated Industries believes that this is an exemption to the normal operation of proceedings under ch. 120, F.S.[42] Committee staff recommends the retention of this exemption because of the large number of licensees under the regulation of the department and need for an impartial fact finder in cases where a person's livelihood and license are in question. This exemption prevents the appearance of possible bias or prejudice when one member of a profession or occupation is tried by another member of that profession or occupation or by the agency that has conducted the investigation. As noted in *State ex rel. Dept. of Gen. Services v. Willis*, 344 So.2d 580, 591 (Fla. 1st DCA 1977), the administrative law judge can "independently serve the public interest by providing a forum to expose, inform and challenge agency policy and discretion."

120.80(5)

[42] Section 120.57(1)(a), F.S., provides in part "except as provided in s. 120.80 and 120.81, an administrative law judge assigned by the division [Division of Administrative Hearings] shall conduct all hearings under this subsection, except for hearings before agency heads or a member . . . [of the agency for agencies headed by boards and commissions]."

The Florida Land and Water Adjudicatory Commission (FLAWAC) is given an extended time to request assignment of an Administrative Law Judge in appeals under s. 380.07, F.S.

Rationale: This provision relates to a provision of ch. 380, F.S., which addresses FLAWAC review of local government orders. FLAWAC review of district orders and rules occurs under s. 373.114, F.S., and that review is considered appellate in nature.

Fifteen (15) days is insufficient for the FLAWAC to decide whether to refer a matter to DOAH, because the FLAWAC is a collegial body that only meets once a month and because of the need for a briefing by the parties as to statewide or regional interests of the development at issue.

Recommendation: The Commission recommends retention of the exemption.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

120.80(6)

Subsection (6) of s. 120.80, F.S., provides that law enforcement policies and procedures of the Florida Department of Law Enforcement (FDLE) relating to criminal investigations and criminal intelligence, confidential informants or sources, surveillance techniques, safety and release of hostages, security and protection of public figures, and witness protection are not rules as defined in chapter 120, F.S.

Rationale: The law enforcement function is not easily definable by rule. Processes and techniques could be compromised if articulated in rules. The FDLE needs flexibility to conduct criminal intelligence and investigations and perform its other duties. Procedures and processes utilized in criminal investigations are closely scrutinized by the courts in enforcing legal rights.

Recommendation: The FDLE recommends retaining the current exemption to prevent legal challenges that might be available should the policies, procedures or reports be classified as rules. The FDLE believes its law enforcement function could be severely restricted and limited by having to define those functions in a rulemaking context.

Staff of the Committee on Criminal Justice recommends that the current exemption be retained because it appears to serve the public policy purpose (previously described). Removing the exemption may detrimentally affect the

FDLE's ability to exercise its law enforcement function and compromise law enforcement processes and techniques.

120.80(7)

This section provides that notwithstanding s. 120.57(1)(a), F.S., hearings conducted within the Department of Children and Family Services (DCF) in the execution of those social and economic programs administered by the former Division of Family Services of the former Department of Health and Rehabilitative Services prior to the reorganization effected by chapter 75-48, Laws of Florida, need not be conducted by an administrative law judge assigned by the division.

Rationale: The Office of Appeal Hearings, located in the Office of Inspector General within DCF, has for many years provided federal "fair hearings" for applicants and recipients of federally-funded benefits programs. "Fair hearings" are required by the specific underlying federal programs and follow procedures set forth in federal regulations. Generally speaking, an individual is entitled to a fair hearing when a state agency denies benefits to a program applicant, or when the state agency reduces or terminates benefits to an existing recipient. The Office of Appeal Hearings has, in Chapter 65-2, F.A.C., promulgated rules that mirror the fair hearing requirements in the various federal program regulations.

The Office of Appeal Hearings in DCF has been conducting fair hearings for programs administered by DCF, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, and the Department of Revenue. The table below describes the hearings conducted for each agency:

Agency	**Hearing/Program**
Department of Children and Families	Medicaid eligibility; TANF eligibility and benefits; Food Stamp eligibility and benefits; Foster Care/Independent Living maintenance benefits; Optional Supplementation
Agency for Health Care Administration	Medicaid services/benefits
Department of Health	WIC eligibility and benefits; Adoption Assistance eligibility and benefits
Agency for Persons with Disabilities	HCBS Medicaid waiver eligibility and benefits
Department of Revenue	Child Support Enforcement federal income tax intercepts and state-collected payment distribution.

The recent case of *J. M. v. Agency for Persons with Disabilities*, 2006 WL 2251885 (Fla. 1st DCA, Aug. 8, 2006) held that s. 120.80(7), F.S., did not apply to persons challenging the denial, reduction, or termination of benefits from APD under the HCBS Medicaid waiver. The court's rationale was that s. 393.0651(8), F.S., provided a right to a hearing under s. 120.57, F.S., and was more specific and later-enacted than s. 120.80(7), F.S.

The result of the *J. M.* decision will be that HCBS med-waiver hearings will now be DOAH hearings. This means that DOAH will receive approximately 1000 new hearings annually. This will be costly to APD and the state.

Recommendation: The staff of the Committee on Children and Families recommends that APD or ACHA be given rule-making authority in order to comply with the decision in *J.M.*

120.80(8)(a)

See the analysis for s. 322.2615(12), F.S., in this report.

120.80(8)(b)

See the analysis for s. 321.051, F.S., in this report.

120.80(9)

An application for a certificate of authority issued by the Office of Insurance Regulation (OIR) under s. 624.401, F.S., must be approved or denied by the office within 180 days after receipt of the original application, or within 30 days of the conclusion of a public hearing on the application. This is an exemption from the requirements of s. 120.60, F.S., which generally requires that a license application be approved or denied within 90 days after receipt of a completed application, or within 15 days of the conclusion of a public hearing on the application.

Rationale: Representatives from the OIR state that the 180 day period for review of a licensure application is necessary given the complexity and length of an application to form an insurer. Extensive background and financial investigations must be conducted, reviewed and confirmed. This extensive review is warranted, given that licensed insurers handle vast amounts of fiduciary funds of policyholders. In order to protect the public from insurers that lack financial strength, expertise, or honesty, a full and thorough review of the proposed insurer is necessary. The expanded time frame contained within this exemption helps ensure the office has the time necessary to conduct a thorough review.

Recommendation: Representatives from the OIR state that the exemption should be retained.

Staff of the Banking and Insurance committee concurs that the exemption should be retained.

120.80(10) and 443.151(4)(e)

The Unemployment Compensation (UC) Program administered by the Agency for Workforce Innovation (AWI) is a state-implemented federal program. Administrative functions of the program are funded through federal grants to the states. Pursuant to federal law, the United States Department of Labor (USDOL) has issued rules and procedures that provide for a uniform UC system throughout the fifty states. These rules and procedures include very strict requirements for UC appeal hearings, which are provided for in chapter 443, F.S. Florida must conduct its appeal hearings in a manner that conforms with federal guidelines in order to receive continued funding. Specifically, subsections 302(a) and 303(a) and (b) of the Social Security Act, 42 U.S.C. 502 and 503, provide for payments to the states to assist in the administration of their UC laws only if the Secretary of Labor certifies that state practice, including appellate procedure, complies with federal law.

Chapter 443, F.S., outlines Florida's Unemployment Compensation (UC) Law. Section 443.151, F.S., details aspects of the UC claims procedure. Subsection 443.151(4), F.S., specifies that appeals referees are to be appointed by AWI to hear appeals and generally outlines guidelines for those appeals. Section 443.151(4)(e), F.S., provides that orders issued by the Unemployment Appeals Commission (the Commission),[43] a second level of appeal over appeals referees, may be subject to review in a district court of appeal. That statutory provision also provides that despite chapter120, F.S., which generally requires that the Division

[43] While the appeal referees are employees of AWI, ch. 443, F.S., gives rulemaking authority for the procedural rules governing their hearings to the Unemployment Appeals Commission (Commission). The Commission was established by the Legislature as a second appeal level with rule-making authority over appeals referees pursuant to s. 443.012(11), F.S. Under s. 443.012(3), F.S., "[t]he Commission has all authority, powers, duties, and responsibilities relating to unemployment compensation appeal proceedings under this chapter." Moreover, s. 443.012(11), F.S., provides that "[t]he Commission has authority to adopt rules under ss. 12.536(1) and 120.54, F.S., to administer the provisions of law conferring duties upon it." In addition, s. 443.151(4)(d), F.S., provides, "The manner that appealed claims are presented must comply with the commission's rules." Rules related to hearings conducted by appeals referees are contained in chs. 60BB-5, 6, and 7, F.A.C. These rules have been adopted to meet the federal hearing requirements and to ensure due process for all participants in appeal hearings.

of Administrative Hearings (DOAH) be a named party, the Commission is a party respondent in such proceedings.

Section 120.80(10), F.S., provides 3 exemptions from the Administrative Procedures Act (APA) for UC-related claims. That statutory provision states, in pertinent part:

Section 120.80(10) AGENCY FOR WORKFORCE INNOVATION.

> (a) Notwithstanding s. 120.54, the rulemaking provisions of this chapter do not apply to unemployment appeals referees.
>
> (b) Notwithstanding s. 120.54(5), the uniform rules of procedure do not apply to appeal proceedings conducted under chapter 443 by the Unemployment Appeals Commission, special deputies, or unemployment appeals referees.
>
> (c) Notwithstanding s. 120.57(1)(a), hearings under chapter 443 may not be conducted by an administrative law judge assigned by the division, but instead shall be conducted by the Unemployment Appeals Commission in unemployment compensation appeals, unemployment appeals referees, and the Agency for Workforce Innovation or its special deputies under s. 443.141.

Paragraph (a) exempts AWI from the s. 120.54, F.S., rulemaking requirements, thereby permitting the Commission to adopt rules for unemployment appeal hearings conducted by appeal referees under ch. 443, F.S.

Paragraph (b) exempts AWI from s. 120.54(5), F.S., which requires agencies to adopt uniform rules. This exemption permits the commission and AWI to adopt rules that recognize the unique requirements and circumstances of UC hearings (e.g., large volume of claims) conducted by appeal referees, reviews conducted by the commission, and the hearings related to UC tax conducted by special deputies. Other uniform rules, such as those relating to agency organization, bid procedures, etc., remain applicable to the agency.

Paragraph (c) exempts AWI from complying with s. 120.57, F.S., which outlines procedures for addressing particular cases (e.g., involving disputed issues of material fact, etc.). The exemption in s. 120.80(10)(c), F.S., permits appeals referees and special deputies appointed by AWI pursuant to ss. 443.141 and 443.151, F.S., to conduct unemployment compensation hearings in a manner consistent with AWI or Commission procedures rather than those outlined in this statute.

Rationale: The exemptions contained in s. 120.80(10), F.S., are necessary to clarify the differences between unemployment proceedings under ch. 443, F.S.,

and general administrative proceedings brought under ch. 120, F.S. The exemptions should be maintained to avoid confusion over the rulemaking obligations noted in ch. 120 and the applicability of the rule making provisions of ch. 443, pursuant to which chs. 60BB-5, 6 and 7, F.A.C., have been promulgated. The exemptions facilitate the prompt disposition of appeals.

The rules adopted under chs. 60BB-5, 6 and 7, F.A.C., are specifically drafted to address unemployment tax and benefit hearings and to conform with federal requirements related to UC funding. These rules also ensure a full and fair hearing that meets due process requirements, but relax some of the formalities which a pro se claimant may not fully understand. In addition, these rules permit unemployment and tax hearings to be decided within time frames that allow the state to comply with federal time limits. The state is required to have resolved 60 percent of the appealed cases with 30 days of the filing of the appeal and 80 percent within 45 days.

Appeals referees appointed pursuant to s. 443.151(4), F.S., and special deputies appointed pursuant to s. 443.141(2), F.S., conduct 60,000-90,000 administrative hearings per year to resolve disputed unemployment compensation benefit claims and tax cases. Virtually all hearings are conducted by telephone and primarily involve pro se parties on both sides. The sheer volume of cases would make it impossible to implement all requirements of the uniform rules with the current level of funding. For example, the uniform rules require that a notary public be physically present at each witness' location to administer the oath, which would require more than 100,000 notary visits to homes and workplaces each year. Under rules promulgated by the Commission for appeals referees and AWI for special deputies, a notary public is not required. In addition, the uniform rules require appeals and all pleadings to be filed in specific formats with specified elements. In unemployment cases, a party may simply state their desire to appeal with nothing further. The agency works with the party to determine the substance of the appeal and then provides notice to the other parties.

Recommendation: In view of the rationale expressed above, AWI strongly recommends retaining the exemptions provided in s. 120.80(10), F.S. Administration of the UC program is a complex process requiring efficiency. As the agency has indicated, subjecting UC hearings to all of the procedural requirements of the Administrative Procedures Act (APA) would impede the process through which those hearings are resolved. In addition, the exemptions assist the state in complying with federal law governing the disposition of UC claims, thereby retaining federal funding.

For these reasons, the staff of the Committee on Commerce and Consumer Services recommends that the exemptions be retained.

120.80(11)

The Department of Military Affairs is a state agency whose primary mission is to prepare for state and federal activation of the Florida National Guard. The National Guard serves as a reserve component of the Department of Defense. Training, staffing, and equipping of the National Guard is generally dictated by federal requirements. Section 120.08(11), F.S., broadly states that provisions governing the administration and operation of the National Guard are not rules for purposes of chapter 120, F.S.

Rationale: The Florida National Guard is organized by regulations established by the Department of Defense and the National Guard Bureau, Departments of the Army and Air Force. These federal entities have established uniform regulations that apply to all state National Guard units and effectively integrate these reserve units into the active duty component of the Department of Defense.

Recommendation: Florida Department of Military Affairs recommends retaining the exemption. A military unit's organization is unique to its mission. It must maintain that structure as a result of its future federal missions. The Department of Defense has established uniform rules, policies, and procedures governing the operation of state national guards. Federal requirements enable these reserve elements to be easily integrated into the overall national defense strategy.

Staff of the Committee on Community Affairs concurs with the Department of Military Affair's recommendation that this exemption be retained.

120.80(12)

Hearings within the jurisdiction of the Public Employees Relations Commission (PERC) need not be conducted by an administrative law judge assigned by the division.

Rationale: According to PERC, "this legislative exemption was passed in 1977 to enable PERC to more expediently process its cases and to receive the benefit of recommended orders prepared by hearing officers who specialize in public sector labor law. Previously, for the first three years of PERC's existence, its hearings were conducted by DOAH. Over its 32 years of operation, PERC has developed a seasoned group of hearing officers with an average of over 20 years of labor law experience. This exemption has enabled PERC to serve the State by quickly and expertly handling labor and employment law cases."

In 2004 an OPPAGA report recommended keeping PERC and DOAH separate, as the disadvantages outweighed the advantages, and that merging PERC and DOAH could cost the state money. (See OPPAGA Report 04-37.)

Recommendation: The Public Employee Relations Commission recommends retention of the exemption.

Staff of the Committee on Governmental Oversight and Productivity recommends retention of the exemption.

120.80(13)(a)

Section 120.80(13)(a), F.S., exempts Public Service Commission (PSC or commission) agency statements that relate to cost-recovery clauses, factors or mechanisms implemented pursuant to chapter 366, F.S., relating to public utilities.

Rationale: Currently, the PSC uses cost recovery clauses as the recovery mechanisms for utilities' fuel costs, wholesale energy sales and purchases, energy efficiency costs, environmental costs, and capacity purchases. Adjustment charges associated with the clauses are included on customers' electric bills. Conditions beyond the utilities' control may cause the charges to vary dramatically over relatively short time periods. The purpose of the charge is to allow utilities to pass on to customers certain costs of providing service which are volatile and attributable to forces beyond the control of the utility. Likewise, clauses allow reductions in utility costs to be quickly reflected on customers' bills when fuel prices go down. The use of clauses avoids expensive and time consuming rate cases. (See *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578 (Fla. 1984).

Cost recovery clauses are fluid and allow the PSC to respond quickly to events in the market. The current flexibility, without trying to ascertain through rulemaking all the factors which may arise, is important.

In addition to changes in fuel costs, other examples of external costs subject to clauses include new state or federal environmental costs and rising security costs post September 11th. More recently, the commission is being asked to respond quickly to a natural gas storage project recovery request to allow a company to better manage its gas inventory to ensure more reliable electric generation during storm-related shortages.

Recommendation: The PSC recommends retention of the exemption.

Staff of the Committee on Communications and Public Utilities recommends that this exemption should be retained.

120.80(13)(b)

A hearing on an objection to proposed actions of the PSC may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

Rationale: This exemption has been very important in terms of saving time and cost in cases. Prior to the exemption, a party could object to the commission order and all issues would have to be addressed in the hearing. Now a party must identify the specific issues in dispute. Only the specific issues in dispute are addressed during the hearing. This allows PSC staff and outside parties to prepare efficiently for the case. Further, reducing the number of issues to be heard results in a hearing that is more focused and less costly. Especially in the water and wastewater industry, this exemption reduces regulatory costs and fewer utility-incurred costs are passed on to ratepayers.

Recommendation: This exemption has contributed significantly to efficiency and cost savings in processing cases which go to hearing. The PSC recommends retention of the exemption.

Staff of the Committee on Communications and Public Utilities recommends that the exemption should be retained.

120.80(13)(c)

The Public Service Commission (PSC) is exempt from time limitations in s. 120.60(1), F.S., when issuing a license.

Rationale: The PSC certifications are related to “licenses.” The definition of “license” in s. 120.52, F.S., includes certification. Since the PSC has specific statutes governing granting of utility certificates, there was a need to exempt the PSC “licenses” from any provisions in s. 120.60, F.S., in order to avoid conflicts. PSC certificate statutes provide for public input and create a unique regulatory process for utilities. For example, the procedures for issuing water and wastewater certificates are prescribed in s. 367.045, F.S.

Recommendation: The PSC recommends retention of the exemption.

Staff of the Committee on Communications and Public Utilities recommends that this exemption should be retained.

120.80(13)(d)

The Public Service Commission (PSC) is authorized to employ procedures consistent with the Federal Telecommunications Act of 1996.

Rationale: In implementing the Telecommunications Act of 1996, the PSC is required by federal law to follow federal statutes and the rules of the Federal Communications Commission. The procedural requirements for conducting Telecommunications Act proceedings, such as compulsory arbitration under 47 U.S.C. §252, vary from those set out in ch. 120, F.S. Conflicts affecting competing telephone companies' procedural and substantive rights could result without the exemption in s. 120.80(13)(d), F.S., and consequently unnecessary and expensive litigation.

Recommendation: The PSC recommends retention of the exemption.

Staff of the Committee on Communications and Public Utilities recommends that this exemption should be retained.

120.80(13)(e)

Appellate decisions that implement the Telecommunications Act of 1996, Public Law No. 104-104, must be consistent with the provisions of that act.

Rationale: This addresses Florida telecommunications cases proceeding to Federal Court, as required by the Federal Telecommunications Act.

Recommendation: The PSC recommends that this exemption is not necessary and should be repealed. There is no reason for an exemption from ch. 120, F.S., in that ch. 120 does not even address appellate review of the PSC telecommunications cases. Cases may proceed to Federal Court or the Florida Supreme Court, according to existing jurisdictional divisions. There are provisions in the Federal Telecommunications Act and the Florida Constitution on jurisdiction.

Staff of the Committee on Communications and Public Utilities concurs.

120.80(13)(f)

Notwithstanding ch. 350, F.S., all public utilities and companies regulated by the PSC are entitled to proceed under interim rate provisions of chapter 364, F.S., ch. 74-195, L.O.F., or as otherwise provided by law.

Rationale: Interim rates are used in utility regulation in order to eliminate a long lag time before companies are able to collect monies necessary to continue operation.

Section 367.0814(4), F.S., authorizes interim rates for water and wastewater companies. The commission may, during any proceeding for a change of rates, upon its own motion, upon petition by any party, or by a tariff filing from a utility or regulated company, authorize interim rates until the effective date of the final order. There has to be a demonstration that the regulated company is earning below its authorizes rate of return in order for interim rates to be set. The collection of the additional amount is subject to refund with interest. The Commission must act within 60 days on interim rates.

Section 366.071, F.S., authorizes interim rates for public utilities (electric companies).

These statutes allow the Commission to approve interim rates to cover the company's operation and maintenance expenses while the full rate case is being processed. Ratepayers are customarily refunded the monies if the rates are not justified during the full rate proceeding; such refunds are with interest.

In *Citizens of Florida v. Public Service Commission*, 425 So. 2d 534 (Fla. 1982), the Court stated that the purpose of the interim rate provision is to protect utilities from the "regulatory lag" associated with full-blown rate proceedings. A number of cases note that the PSC correctly refrained from holding comprehensive ratemaking at an interim proceeding. One case, *Maule Industries v. Mayo*, 342 So.2d 63, 65 (Fla. 1976), noted that interim rates are reviewable only after final action by the commission.

Recommendation: The PSC recommends that this exemption should be retained. Approval of interim rates helps ensure that the regulated company will be able to cover its operation costs while the full rate review is being processed. If the utility receives monies, it is not ultimately entitled to receive, there are customarily refunds with interest to customers.

Staff of the Committee on Communications and Public Utilities recommends that this exemption should be retained.

120.80(14)

An assessment of tax, penalty, or interest by the Department of Revenue is not a final order. Taxpayer contest proceedings are governed by several special provisions.

Rationale: This exemption from ch. 120 provisions gives taxpayers the opportunity to informally resolve disputes with the Department of Revenue under s. 213.21(1), F.S. If a dispute cannot be resolved informally the taxpayer may elect to challenge assessments in Circuit Court. In FY 2005-06, 964 taxpayers opted to use the informal protest provisions to resolve disputes with Department of Revenue.

Recommendation: The Department of Revenue recommends retention so taxpayers will continue to be permitted to informally protest assessments and be heard in Circuit Court if they so choose.

Staff of the Committee on Government Efficiency Appropriations concurs that the exemption should be retained.

120.80(15)

Section 120.80(15), F.S., contains two categories of exemptions for the Department of Health from s. 120.57(1)(a), F.S., relating to procedures applicable to hearings involving disputed issues of material fact. The first category of exemption prohibits the Secretary of Health, the Secretary of Health Care Administration, or a board or member of a health profession board from conducting formal hearings relating to the regulation of professions. Section 120.57(1)(a), F.S., allows agency heads, including collegial bodies, such as boards of the various health professions, to conduct formal hearings that involve disputed issues of material fact regarding agency decisions that affect a person's substantial interests, such as disciplinary or other regulatory proceedings. With regard to disciplinary proceedings for health professions, however, s. 456.073(5), F.S., states: "A formal hearing before an administrative law judge from the Division of Administrative Hearings shall be held pursuant to chapter 120 if there are any disputed issues of material fact." Thus, the exemption in s. 120.80(15), F.S., clarifies that the specific provisions of s. 456.073(5), F.S., control over the general provisions of s. 120.57(1)(a), F.S., with regard to disciplinary proceedings for health professions that require formal hearings when there are disputed issues of material fact.

The second category of exemption contained in s. 120.80(15), F.S., authorizes the Department of Health to conduct hearings for specified programs without using an administrative law judge as required by s. 120.57(1)(a), F.S. Hearings conducted within the Department of Health in execution of the Special Supplemental Nutrition Program for Women, Infants, and Children; the Child Care Food Program; the Children's Medical Services Program; the Brain and Spinal Cord Injury Program; and the exemption from disqualification reviews for certified nurse assistants program need not be conducted by an administrative law

judge. The Department of Health may contract with the Department of Children and Family Services for a hearing officer in these matters.

Rationale: For regulated health professions, the exemption to ch. 120, F.S., assures the use of a neutral trier of fact and avoids potential claims about bias or conflict of interest in a formal hearing when there are disputed issues of material fact. The exemption also complements s. 120.651, F.S., which provides that the Division of Administrative Hearings must designate at least two administrative law judges who shall specifically preside over actions involving the Department of Health or boards within the Department of Health. Each designated administrative law judge must be a member of The Florida Bar in good standing and must have legal, managerial, or clinical experience in issues related to health care or have attained board certification in health care law from The Florida Bar.

The Special Supplemental Nutrition Program for Women, Infants, and Children and the Child Care Food Program are federally funded and governed by federal regulations.[44] The federal regulations authorize the Department of Health to convene internal hearings and contemplate that providers may appear pro se, representing themselves in the proceedings. An informal hearing is consistent with federal regulations and intent.

The Department of Health receives federal funds and administers, through the Children's Medical Services (CMS) Program, Part C of the federal Individuals with Disabilities Education Act (IDEA). The IDEA program is operated under federal statutes and regulations, including comprehensive regulations for administrative hearings.[45] The exemption to ch. 120, F.S., is consistent with CMS' implementation of ss. 391.026(14) and 391.081, F.S., to establish and operate a grievance and complaint resolution process for participants and providers in the CMS Network, which complies with certain federal regulations and also affords a vehicle to efficiently and fairly address those complaints and grievances that do not rise to the level of determining someone's substantial interests that may give rise to a formal or informal hearing under s. 120.569, F.S.

The Brain and Spinal Cord Injury Program is small and has relatively few administrative challenges. Historically, the program has had only a few hearing requests, and grievances primarily concern the lack of funds. Department of Health staff also note that formal hearings before the Division of Administrative Hearings are expensive and that they try to avoid them.

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[44] See Title 7 Code of Federal Regulations 246.9 for the Special Supplemental Nutrition Program for Women, Infants, and Children and Title 7 CFR 226.6 for the Child Care Food Program.

[45] See Title 35 CFR 303.400 et seq. for federal regulations applicable to the IDEA program.

The exemption from ch. 120, F.S., for disqualification reviews of certified nursing assistants, according to the Department of Health, is not consistent with any other health care profession regulated by the Department of Health. Disqualification reviews are available to nursing assistant applicants who have failed to pass the required criminal background check for certification. When the exemption was originally enacted, the Department of Health regulated certified nursing assistants and did the disqualification reviews and now the Board of Nursing performs this function.

A certified nursing assistant who is a prospective employee may apply for an exemption from employment disqualification under ch. 435, F.S., to the Board of Nursing. An exemption from disqualification gives individuals who are disqualified due to their criminal history, the opportunity to work within a health care facility, despite having a criminal history. Eligibility for an exemption requires that an individual must not have been adjudicated guilty of a disqualifying felony offense within the previous 3 years, and the individual must demonstrate by clear and convincing evidence that he or she will not present a danger if employed within the health care field. Individuals applying for an exemption have the burden of providing sufficient evidence of rehabilitation, including but not limited to: the circumstances surrounding the criminal incident for which an exemption is sought; the time period that has elapsed since the incident; the nature of the harm caused to the victim; a history of the applicant since the incident; and any other evidence or circumstance indicating that the applicant will not present a danger if continued employment is allowed. Removal of this exemption to ch. 120, F.S., for disqualification reviews of certified nursing assistants will ensure that the proceedings of the Board of Nursing for certified nursing assistant is consistent with other health care profession boards within the Department of Health.

Officials at the Department of Health have noted that the provision granting the Department of Health discretionary authority to contract with the Department of Children and Family Services for hearing officers is obsolete. According to the Department of Health, the Department of Children and Family Services has not had the resources or capacity to take on any additional hearing officer functions in many years.

Recommendation: The Department of Health recommends retaining s. 120.80(15), F.S., and modifying the exemptions to delete the disqualification reviews for certified nurse assistants and to delete the Department of Health's discretionary authority to contract with the Department of Children and Family Services for hearing officers.

Staff of the Health Care Committee concurs with the Department of Health's recommendation to retain s. 120.80(15), F.S., and to modify the exemptions in

s. 120.80(15), F.S., to delete the disqualification reviews for certified nurse assistants and to delete the Department of Health's discretionary authority to contract with the Department of Children and Family Services for hearing officers.

120.80(16)

This provision exempts the Department of Environmental Protection (DEP) from the requirement of s. 120.54(1)(d), F.S., that agencies adopt the Lowest Cost Regulatory Alternative (LCRA).

Rationale: Subsection 403.061(35), F.S., requires the DEP to implement the provisions of the Federal Clean Air Act, in conjunction with other duties to protect Florida's air quality. The provisions in s. 120.54(1)(d), F.S., generally require an agency to adopt rules with the lowest cost regulatory alternative that accomplishes the statutory objective. Section 120.80(16), F.S., makes it very clear that the DEP does not have to adopt the LCRA if doing so would prevent the DEP from implementing federal requirements.

Recommendation: The DEP recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

120.80(17)

This exception was enacted to facilitate the creation of the process codified at s. 553.775(3), F.S., which provides a mechanism using subject matter experts to resolve disputes about interpreting the Florida Building Code. The provision recognizes that system and exempts it from the requirements of chapter 120, F.S., however, the resulting decision is subject to review utilizing all the tools available within ch. 120.

Rationale: Several purposes are served by the existence of the s. 553.775, F.S., process as an intermediate step. Utilizing panels of building officials rather than administrative law judges to render a decision regarding the interpretation of the Florida Building Code applies technical expertise to the cases at hand, offering the potential for more reliable rulings that are more readily accepted by the parties and others in the industry. The alternative process is also designed for use by lay persons and to assure resolution in the shortest time period feasible with a minimum of procedural delay. The processes afforded by ch. 120 provide an important backstop for egregious cases and also for those who are not satisfied short of appearing before a judge, but, otherwise, the alternate process

recognized with the exception is more tailored to meet the needs of those using the Florida Building Code.

Recommendation: The Department of Community Affairs believes the exemption should be retained to allow the public to reap full benefits of the alternate system of resolving Building Code related disputes as cited in the rationale. There is no corresponding burden or cost to eliminating this exception, especially in light of the fact that participants have the full range of ch. 120 processes from which to choose in the event that they are dissatisfied with the result of the alternate process.

The exemption provides a timely and accessible means of resolving disputes involving the Florida Building Code. The use of qualified building officials with the appropriate technical expertise facilitates consistent and knowledgeable interpretations of the building code. The resulting interpretations remain subject to review under the provisions of ch. 120.

Staff of the Committee on Community Affairs concurs with the Department of Community Affairs recommendation that the exemption be retained.

120.81(1)(a)

This section grants authority to district school boards to adopt rules to implement certain general powers, regardless of Sections 120.536(1) and 120.52(8), F.S. Section 120.536(1), F.S., limits agency adoption of rules to those that implement or interpret specific powers and duties granted by an enabling statute. Section 120.52(8) provides, in relevant part:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

Rationale: The Department of Education indicates that unless the Legislature grants specific authority for each instance in which a school board will need to do rulemaking, this exemption is necessary given the scope and breadth of the School Code. The exemption in s. 120.81(1)(a), F.S., allows school boards to continue to adopt rules as required by the School Code, even though the Code may not have given specific authority to the school boards.

Recommendation: The Department of Education recommends that this exemption be retained.

Staff of the Committee on Education does not take a position regarding the retention of this exemption.

120.81(1)(c)

This section provides that the following student assessment tools that are developed or administered by the Department of Education are not considered to be rules:

- Tests;
- Test scoring criteria; or
- Testing procedures.

This provision applies regardless of the Administrative Procedure Act's definition of a "rule," as provided in s. 120.52(15), F.S.[46]

Rationale: According to the Department of Education (DOE), "the exemption from Chapter 120 requirements found at s.120.81(1)(c), F.S., is critical to preserve because it expresses the Legislative intent that any tests, test scoring criteria, or testing procedures relating to student assessment which are developed or administered by the DOE are not rules. This is a longstanding exemption." It ensures that every disagreement by a student or examinee with a given examination result does effectively become a legal case challenging the test instrument or criterion.

Recommendation: The DOE recommends retention of this exemption.

Staff of the Committee on Education acknowledges the need to provide public access to challenge government rules. However, staff recognizes the significant undue burden on the DOE that would be created if this exemption were repealed in its entirety. Therefore, staff recommends consideration of a potential narrowing, but not repeal, of the existing exemption.

[46] Section 120.52(15), F.S., provides: "Rule" means 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. Exceptions are also provided, including internal management memoranda which do not affect either the private interests of any person or a plan or procedure important to the public which has no application outside the agency issuing the memorandum.

120.81(1)(d)

The term "educational unit" is defined in statute to indicate a local school district, a community college district, the Florida School for the Deaf and the Blind, or a state university.[47] Section 120.81(1)(d) provides that regardless of any other ch. 120, F.S., requirements, educational units are not required to include full text of rule or rule amendments in notices relating to rules.[48] Further, educational units are not required to publish notices in the Florida Administrative Weekly (FAW), and are authorized, instead, to provide notice in the following manner:

- Through publication in a newspaper of general circulation in the affected area;
- By mail to all persons who have made advance notice requests of the educational unit regarding its proceedings, and by mail to organizations representing persons affected by the proposed rule; and
- By posting in targeted places so that specific classes of persons to whom the intended action is directed are notified.

Rationale: According to the DOE, this longstanding exemption allows notice of school board rules to be made locally and directed at those most likely to be affected, as opposed to notice made in the FAW. Local noticing reduces costs and focuses the rules on their intended audience. It should also be noted that this exemption is a companion to s. 120.55(1)(a)2., F.S., which exempts school boards from publishing their rules in the Florida Administrative Code in certain circumstances.

Recommendation: The DOE recommends retention of this exemption.

Staff of the Committee on Education concurs with the DOE's recommendation, in that it appears that alternate notice is sufficiently provided.

120.81(2)

Local governments are exempt from the APA under s. 120.52(1)(c), F.S., unless they are expressly made subject by general or special law. Special districts, boards, or authorities that are created by special act are sometimes made subject to the APA. If these entities that are made subject to the APA have jurisdiction in only one county or part thereof, s. 120.81(2), F.S., exempts that entity from submitting proposed rules to the Joint Administrative Procedures Committee and from publishing rulemaking notices in the Florida Administrative Weekly.

[47] Section 120.52(6), F.S.

[48] Section 120.52, F.S., defines the term "agency" to include educational units, thereby subjecting them to APA requirements.

Rationale: There are probably a limited number of entities that benefit from the exemption under s. 120.81(2), F.S. The enabling legislation for these entities likely provide a process for the adoption of rules, resolutions, or ordinances. Of course, these entities are still subject to the hearing provisions of the APA.

Recommendation: Staff of the Committee on Community Affairs recommends retention of the exemption.

120.81(3)

The 1992 Legislature removed prisoners from the class of persons authorized to make rule challenges. This change was sought by the Department of Corrections due to the prolific, burdensome and frivolous nature of many of the past challenges. This exemption effectively prevented prisoners from seeking rule relief through administrative law judges and district courts of appeal to challenge a Department of Corrections' rule. The exemption also denied parolees the ability to challenge agency action or judicial review when proceedings related to revocation of parole. While these legal avenues were closed off after 1992, remedies are still available to prisoners seeking to invalidate a rule through a petition for declaratory judgment filed in Leon County Circuit Court.

This exemption builds on a long standing precedent of removing civil rights from convicted criminals. It is also clear that without the exemption the agencies would be inundated with rule challenges that frequently are without legal merit. However, prisoners and parolees are substantially and uniquely impacted by the Department of Corrections' rulemaking and actions of the Parole Commission. Without authority to challenge the rules, the parties most critically impacted by the rules are barred from participation. On the other hand, prisons by their very nature are not designed to be consumer-friendly. However, does exempting the inmate's perspective allow the Department of Corrections and the Parole Commission to enjoy broad and unchallenged authority?

Rationale: Unnecessary and costly legal challenges are avoided and limited by exempting prisoners and parolees.

Recommendation: Both the Department of Corrections and the Florida Parole Commission agree that the exemption needs to be retained. The rationale for their recommendation is that the exemption provides a much needed limitation on the types of cases prisoners may bring against the department and commission. Both agencies state that they are called upon to answer numerous legal challenges filed by prisoners each year, many of which are legally without merit.

Further, the Parole Commission recommends that the exemption be amended to allow the commission to restrict prisoners to only submit written statements

concerning their rules. Current law only allows the Department of Corrections the ability to limit prisoners to the submission of written statements.

Staff of the Committee on Criminal Justice recommends that the exemption be retained, with modification. The rationale for this recommendation to retain the exemption is because unnecessary and costly legal challenges are avoided and limited by exempting state prisoners. Committee staff further recommends that the statute be amended to restrict parolees to only submit written statements concerning the rules. Suggested language:

> *(b) Notwithstanding s. 120.54(3)(c), prisoners, as defined by s. 944.02, may be limited by the Department of Corrections or the Parole Commission to an opportunity to present evidence and argument on issues under consideration by submission of written statements concerning intended action on any department or commission rule.*

120.81(4)

The rape shield statute which is codified in s. 794.022, F.S., provides that the testimony of the victim need not be corroborated and prohibits the admission of evidence relating to a rape victim's sexual relations with anyone other than the accused perpetrator of the rape with enumerated exceptions.

Section 120.569(2)(g), F.S., provides that in administrative hearings, irrelevant, immaterial, or unduly repetitious evidence must be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in court.

Section 120.81(4), F.S., is a hybrid of the rape shield statute. Section 120.81(4), F.S., provides that, notwithstanding s. 120.569(2)(g), F.S., in a disciplinary proceeding against a licensed professional or in a proceeding for licensure of an applicant for professional licensure which involves allegations of sexual misconduct:

- the victim's testimony of the sexual misconduct does not need to be corroborated;
- specific instances of prior sexual activity between the victim and any other person other than the offender are generally inadmissible except in enumerated circumstances; and
- reputation evidence relating to the prior sexual conduct of a victim of sexual misconduct is inadmissible.

The exemption to s. 120.569(2)(g), F.S., which is at issue was adopted in ch. 94-161, Laws of Florida, and was enacted along with a "Williams Rule" type exemption that now appears in s. 120.57(1)(d), F.S. The "Williams Rule" provision allows admission of similar fact evidence to prove a material fact at issue, such as motive, opportunity, preparation, etc. For example, licensed health care professionals who are alleged perpetuators may schedule a patient's appointment for a time when other personnel are not likely to be in the office if the professional intends to take inappropriate action, e.g. very early or very late in the day. The "Williams Rule" allows the admission of such evidence.

When both rules of evidence were initially adopted, they were placed in s. 120.58, F.S. (1994). As a part of the 1996 revisions to ch. 120, F.S., the "rape shield" provision was separated out and placed in s. 120.81, F.S., the "exemptions" section of ch. 120, F.S.

Rationale: The Department of Health argues that victims of sexual misconduct are frequently reluctant to complain and then testify against a perpetrator. The victim often perceives that the licensed professional has an elevated financial or social status which the victim believes will make it doubtful the perpetrator will be brought to justice. In addition to the stress of confronting the abuser, the victim may also fear being unfairly scrutinized and potential public disclosure of intimate details of the victim's life. The Department of Health suggests that the perpetrators of sexual misconduct often prey upon a victim, such as a mentally ill patient or an illegal alien, that the perpetrator perceives is most vulnerable to abuse or who may be viewed as a less credible accuser if an accusation is made against the abusive behavior.

The Department of Health states that the exception to s. 120.569(2)(g), F.S., which provides a rape shield gives prosecutors a tool to help alleviate the concerns of alleged victims so that they can come forward and tell about abuse without fear of unwarranted intrusion into private details of their lives. It also keeps the trial focused on the alleged wrongdoing rather than the sexual history of the alleged victim.

Recommendation: The Department of Health recommends retaining s. 120.81(4), F.S., for the reasons discussed above.

Staff of the Health Care Committee concurs with the Department of Health's recommendation to retain the provisions of s. 120.81(4), F.S., but recommends moving the provisions to s. 120.569(2)(g), F.S., or in the alternative, to move the provisions to s. 120.57(1)(d), F.S., which contains other rules of evidence applicable to administrative hearings, such as the "Williams Rule."

120.81(5)

Provides that agency actions that alter established hunting or fishing seasons, or established harvest limits on saltwater fishing are not rules.

Rationale: The provision permits the Fish and Wildlife Conservation Commission to alter hunting and fishing seasons and harvest limits when immediate action is required in order to protect animal or marine life.

Recommendation: The FWCC recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

Florida Retirement System

121.23

Challenges to decisions by the administrator of the State Retirement System are taken before the five-member Florida Retirement Commission rather than the Division of Administrative Hearings.

Rationale: When the administrator of the State Retirement System makes a decision that is adverse to the applicant and concerns "applications for disability retirement, reexamination of retired members receiving disability benefits, applications for special risk membership, and reexamination of special risk members in the Florida Retirement System," the decision is not reviewed by an administrative law judge but, rather, by the five-member State Retirement Commission. This exemption insures that all such appeals will be heard by the same body, and eliminates the risk that different Administrative Law Judges could, when viewing the same factual situations, reach differing results. It also means that the panel reviewing the administrator's action will be well versed in the subject area, whereas Administrative Law Judges may not be.

Recommendation: The Department of Management Services recommends that this exemption be retained because, by having the same commission review all claims, it advances uniformity of the relevant laws and rules to facts presented. Moreover, the hearings are held in a more timely fashion, are held regionally (eliminating the possibility of the member having to travel to Tallahassee) and are more cost-effective. In 2004 an OPPAGA report showed that it would be more costly to merge the Florida Retirement Commission with DOAH than to keep the entities separate. (See OPPAGA Report 04-37.)

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained.

Beach and Shore Preservation

161.053(2)(a)

Any coastal construction control line (CCCL) adopted under the procedures of this section as a rule is not subject to s. 120.54(4), F.S., challenge or s. 120.54(17), F.S., drawout, but, once adopted, shall be subject to s. 120.56, F.S., challenge. The rule is effective upon filing for adoption notwithstanding s. 120.54(13), F.S.

Rationale: The purpose was to provide for a more timely effective date for establishment of a revised control line and thus more environmentally protective permitting of structures. The control line can still be challenged as an existing rule. The February 1, 2006, Coastal High Hazard Study Committee Final Report recommended re-establishing CCCLs for the Florida Panhandle, which would subject certain structures to enhanced environmental review once the control line is re-established. The public interest is still served by this provision.

Recommendation: The DEP believes the exemption should be retained.

Staff of the Committee on Environmental Preservation recommends retention of the exemption.

Intergovernmental Programs

163.3177(9)

This statute exempts the original adoption of Rule 9J-5, F.A.C., from rule challenges under s. 120.56(2), F.S., and drawout proceedings under s. 120.54(3)(c)2, F.S. Instead, the rule was subject to legislative approval with or without modifications.

Rationale: During the enactment of the 1985 Growth Management Act, there was a strong interest in having the implementing rules (Rule 9J-5, F.A.C.) in place quickly so that local governments would have appropriate guidance for the content of their new plans. Allowing these rules to be subject to challenge or draw-out proceedings would have allowed the potential for a substantial delay in their effectiveness, so they were exempted from those two provisions of the Administrative Procedures Act as part of the original enactment of the Growth

Management Act. See ch. 85-55, L.O.F. The Legislature reserved to itself the sole ability to review and approve the rules.

Recommendation: According to the DCA, the cited provisions applied only to the original enactment of Rule 9J-5, F.A.C., which was accomplished almost twenty years ago. These provisions may be repealed and replaced by provisions that authorize further amendments or additions to Rule 9J-5, F.A.C., and subject them to the general provisions of ch. 120, F.S., relating to rules and rule challenges.

Staff of the Committee on Community Affairs recommends repealing this exemption. This exemption is obsolete because ch. 9J-5, F.A.C., has been in place for 20 years.

163.3177(10)(k)

When it adopted the 1985 Growth Management Act, the Legislature authorized the enactment of implementing rules (Rule 9J-5, Florida Administrative Code), and exempted this enactment from rule challenges and drawout proceedings. Instead, the rule was to be submitted to the Legislature for its approval. This legislative approval is found in s. 163.3177(10)(k), F.S. Importantly, in addition to approving the rule in this section, the Legislature shielded all rule provisions adopted prior to October 1, 1986, from rule challenges for the period beginning July 1, 1987 and ending April 1, 1993.

Rationale: The Legislature wanted to ensure that local governments are able to prepare and adopt comprehensive plans with knowledge of the rules that will be applied, and perceived the possibility of rule challenges as impeding this goal. Thus, the Legislature froze Rule 9J-5, F.A.C., in place for approximately six years so that the rules would not change in the middle of a local government's preparation of its comprehensive plan.

Recommendation: According to the Department of Community Affairs, the cited provisions applied only to the original enactment of Rule 9J-5, F.A.C., which was accomplished almost twenty years ago. These provisions may be repealed and replaced by provisions that authorize further amendments or additions to Rule 9J-5, F.A.C., and subject them to the general provisions of ch. 120, F.S., relating to rules and rule challenges.

Staff of the Committee on Community Affairs recommends deleting the exemption. This exemption has been obsolete since April 1, 1993. There is no need to add language regarding challenges to Rule 9J-5, F.A.C., under ch. 120, because the department falls under the definition of "agency" and its rules are subject to ch. 120.

State and Regional Planning

186.508(1)

This section of the Florida State Comprehensive Planning Act of 1972 exempts the rules adopting strategic regional policy plans from rule challenges and drawout proceedings, and makes them effective immediately upon filing with the Department of State instead of twenty days thereafter, as is the case under the default provisions of chapter 120, F.S.

Rationale: This particular provision was added to the 1972 Act as part of the Legislature's enactment of the 1985 Growth Management Act. The same purpose is served by this provision as is by the identical one that appears in s. 163.3177(9), F.S.; that is, to ensure that local governments are able to prepare and adopt comprehensive plans with knowledge of the rules that would apply. To allow rule challenges and drawout proceedings would have likely delayed the effective date of the regional plans, and may have resulted in their being altered while local governments were preparing their original plans.

Recommendation: The provisions in ch. 163, F.S., which contain this identical provision expressly apply only to the original enactment of Rule 9J-5, Florida Administrative Code. Accordingly, the Department of Community Affairs is recommending that they be modified to reflect the fact that Rule 9J-5, F.A.C., has been adopted and is in effect. The provision in this section is not expressly tied to the original regional policy plans. However, as this provision was added as part of the original enactment of the 1985 Act, it is reasonable to assume that the same logic applies. The department would not object to this provision being modified or removed. The department would recommend that the Florida Regional Council Association be contacted regarding any potential change.

Staff of the Committee on Community Affairs contacted the Florida Regional Councils Association. The association agrees with the department that the exemption applies only to the original adoption of the regional policy plans. If this assertion is correct, it seems inconsistent with the language of s. 186.508(1), F.S., which states "once adopted, shall be subject to an invalidity challenge under s. 120.56(3) by substantially affected persons…" Committee staff recommends revising this exemption to make it clear that the exemption applies only to the original adoption of a regional policy plan if this is the intent. Subsection (3) of s. 186.508, F.S., does make it clear that amendments to an adopted regional policy plan are subject to ch. 120, F.S.

189.4035(6)

Specifies the means by which a determination of the Department of Community Affairs regarding the status of a special district is challenged if that determination is inconsistent with that status submitted by the special district. Specifically, the special district is required to submit a Petition for Declaratory Statement to the department regarding the issue and either appeal the resulting declaratory statement or alter its charter.

Rationale: Given the ministerial nature of the department's role in listing special districts, identification of the declaratory statement as the means of redress rather than the process applicable to issues determining the substantial interests of parties is appropriate. It affords interested parties a more expeditious resolution of the issues tailored to identification of remedies for enactment by local government or the Legislature. In the worst case scenario, this process also affords the quickest route to the appropriate District Court of Appeal in the event that there is a dispute concerning the application of law.

Recommendation: The Department recommends that the provision should be retained as it reflects the agency's ministerial function in compiling the list, eliminates the potential for time consuming administrative litigation that would provide minimal benefit in this context, and retains procedural safeguards for the public.

Staff of the Committee on Community Affairs concurs with the department's recommendation. The department's role relating to special districts is a ministerial function and the option to petition for a declaratory statement likely affords interested parties a more expeditious resolution.

Assessments

193.1142(8)

Chapter 120, F.S., does not apply to the section of law which deals with Department of Revenue (DOR) approval of assessment rolls.

Rationale: Chapter 120 would add binding finality of department decisions, and preclude *de novo* circuit court review. Property appraisers and interested parties have adequate remedy in circuit court to review department actions under s. 195.092, F.S. Chapter 120 would create unacceptable delays in roll approval and would interfere with adoption of local governments' budgets.

Recommendation: The DOR recommends retention of the exemption, as property tax collections would be substantially delayed if the state would be unable to timely approve the assessment rolls.

Staff of the Committee on Government Efficiency Appropriations concurs.

193.1145(14)

Chapter 120, F.S., does not apply to situations in which an interim assessment roll must be used.

Rationale: Under Florida Statutes, taxing authorities are provided judicial procedure for assessing and collecting ad valorem tax when assessment roll has not been approved. Chapter 120 would add substantial complexity to, and substantially lengthen, this interim assessment roll process.

The procedure prescribed for interim assessment rolls allows a local government to function even though the tax roll has not been approved. The Legislature recognized the need for this mechanism when it was adopted. “It is the intent of the Legislature that no undue restraint shall be placed on the ability of local government to finance its activities in a timely and orderly fashion, and, further, that just and uniform valuations for all parcels shall not be frustrated if the attainment of such valuations necessitates delaying a final determination of assessments beyond the normal 12-month period.”

Recommendation: The DOR recommends retention of the exemption, as property tax collection would be substantially delayed and complicated if the taxing authority could not utilize the existing judicial procedure.

Staff of the Committee on Government Efficiency Appropriations concurs.

Administrative and Judicial Review of Property Taxes

194.034(1)(e)

Chapter 120, F.S., does not apply to hearings of the value adjustment boards.

Department of Revenue Rationale: Art. V, s. 20 of the Florida Constitution, retains circuit court jurisdiction for tax assessment cases. The Value Adjustment Board (VAB) process is carried out by local governments and is informal as there is no discovery, no subpoenas etc. Chapter 120 would add substantial complexity to, and substantially lengthen, the VAB process. There would have to be an election of remedies feature between the VAB and circuit court and elimination of the de novo feature of the circuit court proceeding, since ch. 120 would create binding finality of VAB decisions.

Committee Rationale: The Value Adjustment Board is an informal forum where taxpayers can appeal decisions of the property appraiser concerning valuation and tax exemptions. If this process were subject to ch. 120 requirements it is likely that many taxpayers would be shut out from the process because of additional complexity. The process would also be drawn out much longer and would interfere with timely finalizing the property tax rolls.

Recommendation: The DOR recommends retention of the exemption, since including VAB proceedings under ch. 120 might be contrary to constitutional provisions.

Staff of the Committee on Government Efficiency Appropriations concurs.

Property Assessment Administration and Finance

195.062(1)

Standard measures of value shall be adopted in general conformity with s. 120.54, F.S., procedures but shall not have the force or effect of such rules.

Department of Revenue Rationale: Property tax is local and administered locally. The state does not order assessments individually but assists local officials (see s. 195.002, F.S.) Substantial discretion is given to local officials. Rules would substantially and intolerably impair the presumption of correctness of the local property appraiser and are too inflexible to be of use in the measure of property values, a task infused with judgment and discretion. The presumption of correctness belongs to local officials only and rules would give presumption to state action. Challenge cannot be made to guidelines as they are not rules.

Committee Rationale: The language in the statute was crafted to allow for notice and public input into the process of preparing and updating guidelines, while ensuring that the guidelines would be available in a timely manner.

Recommendation: The DOR recommends retention of the exemption.

Staff of the Committee on Government Efficiency Appropriations recommends retention of the exemption.

195.092(5)

Chapter 120, F.S., does not apply to the section of law which pertains to the authority of the Department of Revenue to bring and maintain suits to enforce tax laws and rules, and the authority of property appraisers or taxing authorities to

bring and maintain actions to contest the validity of any rule, order, directive, or determination of state agencies.

Department of Revenue Rationale: Property tax collection would be substantially delayed if the state would be unable to timely approve assessment rolls or if the Department's initial decision to order compliance or to seek court involvement could be blocked or delayed. Rules can currently be contested under ch. 120.

Committee Rationale: The statute provides an alternative to ch. 120 by which a property appraiser or any taxing authority shall have the authority to challenge any rule, regulation, order, directive, or determination of any agency of the state, including, but not limited to, disapproval of all or any part of an assessment roll or a determination of assessment levels, without delaying property tax collections.

Recommendation: The DOR recommends retention of the exemption.

Staff of the Committee on Government Efficiency Appropriations recommends retention of the exemption.

195.096(9)

Chapter 120, F.S., shall not apply to this section of law which concerns the review of assessment rolls by the Division of Ad Valorem Tax and the authority of the Auditor General to perform performance audits of the administration of ad valorem tax laws by the Department of Revenue.

Rationale: Property tax collection would be substantially delayed if the state would be unable to timely investigate and study the assessment rolls, and timely produce study findings and approve the assessment rolls. This exemption is necessary to ensure timely collection of property taxes.

Recommendation: The DOR recommends retention of the exemption.

Staff of the Committee on Government Efficiency Appropriations recommends retention of the exemption.

195.097(6)

Chapter 120, F.S., does not apply to this section of law which concerns postaudit notification by the Division of Ad Valorem Tax of defects regarding listings on assessment rolls.

Rationale: Property tax collection would be substantially delayed if the state would be unable to timely order the assessment rolls to be remedied. Chapter 120, F.S., would add binding finality of department decisions, and preclude de novo circuit court review. Property appraisers have adequate remedy in circuit court to review department post audit notifications under s. 195.097(3), F.S., by filing a refusal; upon receipt of a notice of intended noncompliance, the department must take such action as it deems necessary pursuant to s. 195.092, F.S.

The statute provides an alternative to ch. 120 by which the property appraiser can contest the Department of Revenue's findings of defects in the property tax roll.

Recommendation: The DOR recommends retention of the exemption.

Staff of the Committee on Government Efficiency Appropriations recommends retention of the exemption.

195.0995(3)

Chapter 120, F.S., does not apply to the section of law which pertains to the qualification and disqualification of sales transactions by property appraisers, and the review of such sales by the Department of Revenue.

Department of Revenue Rationale: Property tax collection would be substantially delayed if the state would be unable to timely produce study findings and approve the assessment rolls. Chapter 120 would add binding finality of department decisions, and preclude de novo circuit court review. Property appraisers have adequate remedy in circuit court to review department post audit notifications under s. 195.097(3), F.S., by filing a refusal; upon receipt of a notice of intended noncompliance, the department must take such action as it deems necessary pursuant to s. 195.092, F.S.

Committee Rationale: The statute provides an alternative to ch. 120 by which the property appraiser can go to circuit court to obtain a review of department post audit notifications under s. 195.097(3), F.S.

Recommendation: The DOR recommends retention of the exemption.

Staff of the Committee on Government Efficiency Appropriations recommends retention of the exemption.

Tax on Tobacco Products

210.151(1)

Section 210.151(4), F.S., provides that the Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation may issue a temporary initial cigarette permit that shall be valid for up to 90 days and may be extended for an additional 90 days for good cause, notwithstanding the provisions of s. 120.60, F.S.

Rationale: The department responded that "these exemptions allow the applicant to obtain a temporary license and thus begin selling the product until the background investigation is completed and qualifications for the license is determined by the Division of Alcoholic Beverages and Tobacco ("Division"). Frequently the license is issued within 90 days as required by section 120.60, F.S. However, when the complexity of the applications requires additional time to complete the investigation (good cause), the statute authorizes an additional 90 days to grant or deny the license."

Recommendation: The department "unequivocally recommends keeping this exemption to allow for a thorough investigation of the applicant's qualifications for the license prior to issuance of the same."

Staff of the Committee on Regulated Industries concurs with the department's recommendations. Due to the type of permitting, it is essential that the department have sufficient time to investigate the background of each applicant to assure that the person is qualified for licensure. Because the applicant has an initial temporary permit, once the 90 days expires, the license would become permanent without the extension.

210.405(1)

Section 210.405(1), F.S., provides that the Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation may issue a temporary initial permit for tobacco products other than cigarettes or cigars that shall be valid for up to 90 days and may be extended for an additional 90 days for good cause, notwithstanding the provisions of s. 120.60, F.S.

Rationale: Identical to rationale for s. 210.151(1), F.S., above.

Recommendation: Identical to recommendation for s. 210.151(1), F.S., above.

Tax on Sales, Use, and Other Transactions

212.08(14)

In determining taxability and in preparing a list of specific products and product lines which are or are not taxable, the technical assistance advisory committee shall not be subject to chapter 120, F.S.

Department of Revenue Rationale: Dealers require timely guidance regarding the taxability of specific products sold to the public under existing statutes and rules. A large volume of consumer products constantly change and tax determinations often require technical expertise. Rulemaking is not always practical.

Committee Rationale: As new products are introduced into commerce, it is necessary for the Department of Revenue to be able to advise sales tax dealers about the taxability of these products as they become available. The rulemaking process would introduce unacceptable lags into making these determinations.

Recommendation: The DOR recommends retention of the exemption in order to continue a mechanism that allows dealers to be informed about the taxability of specific products in a timely manner.

Staff of the Committee on Government Efficiency Appropriations concurs in the recommendation.

State Revenue Laws

213.06(2)

Legislative finding that certain circumstances qualify as exceptions to the prerequisite of finding immediate danger to public health, safety, or welfare as set forth in s. 120.54(9)(a), F.S., and qualifying such circumstances as requiring an emergency rule.

Rationale: The provision allows the department to provide timely rule guidance to dealers and taxpayers regarding new or recently changed statutory requirements that may require a behavior change, or changes to a public use form, in less time than necessary under normal rule adoption processes. Emergency rules are necessary to provide guidance to taxpayers while the normal rule adoption process occurs.

Recommendation: The DOR recommends retention of the exemption in order to continue a mechanism that allows the Department to inform dealers and taxpayers about the implementation of statutory changes in a timely manner.

Staff of the Committee on Government Efficiency Appropriations concurs in the recommendation.

213.22(1)

A taxpayer technical assistance advisement is not an order issued pursuant to ss. 120.565 or 120.569, F.S., or a rule or policy of general application under s. 120.54. Section 120.53(1), F.S., is not applicable to technical assistance advisement.

Rationale: Taxpayers require a quick and efficient method for obtaining guidance and certainty regarding the taxability of specific transactions, products and services. Advice – binding only on the Department - is often requested about an imminent or ongoing activity and involves technical information of limited application to other taxpayers.

By providing timely advice through technical assistance advisements to taxpayers, the department is able to reduce uncertainty about various provisions of tax law and improve taxpayer compliance.

Recommendation: The DOR recommends retention of the exemption as a mechanism that allows taxpayers to receive advice that is binding on the department about an imminent or ongoing activity that involves technical information of limited application to other taxpayers.

Staff of the Committee on Government Efficiency Appropriations concurs in the recommendation.

Financial Matters - General

215.422(3)(b)

This section relates to late payment for goods and services purchased by state agencies. For purposes of ss. 120.569, and 120.57(1), F.S., no party to a dispute involving less than $1,000 in interest penalties shall be deemed to be substantially affected or to have a substantial interest in the decision resolving the dispute.

Rationale: According to the Department of Financial Services (DFS), the exemption from the Administrative Procedures Act (APA) process for disputes over small sums of interest penalties is in the best interest of the public and should

be retained. In FY 2005-2006, of the less than 100 interest penalty correction requests, all presented to OIR were less than $1,000. The median amount of the interest penalty invoices that were disputed was $25 or less.

Pursuant to s. 215.422(8), F.S., the Department of Financial Services (DFS) is authorized and directed to adopt and promulgate rules and regulations to implement this section and for resolution of disputes involving amounts less than $1,000 in interest penalties for state agencies.

According to representatives of the DFS, the procedures of Rule 691-24.004, Florida Administrative Code, are completely adequate to resolve all foreseeable disputes over interest penalties. This offers a more expeditious and cost effective process than that of the APA.

Recommendation: The DFS recommends maintaining this exemption.

Staff of the Senate Banking and Insurance Committee concurs.

Financial Matters Relating to Political Subdivisions

218.76

Certain dispute resolution procedures are not subject to chapter 120, F.S.

Rationale: Section 218.76, F.S., outlines a process for the resolution of disputes between local government entities and vendors over payment. In any case in which an improper payment request or invoice is submitted by a vendor, the local governmental entity has 10 days after the improper payment request or invoice is received to notify the vendor that the payment request or invoice is improper and indicate what corrective action on the part of the vendor is needed to make the payment request or invoice proper.

Subsection (2) governs disputes between a vendor and a local governmental entity over payment of a payment request or invoice. Each local governmental entity is required to establish a dispute resolution procedure to be followed in cases of such disputes. Such procedure must provide that proceedings to resolve the dispute be commenced not later than 45 days after the date on which the proper payment request or invoice was received by the local governmental entity and be concluded by final decision of the local governmental entity not later than 60 days after the date on which the proper payment request or invoice was received. Such procedures are not subject to ch. 120, F.S. If the dispute is resolved in favor of the local governmental entity, then interest charges begin to accrue 15 days after the local governmental entity's final decision. If the dispute is

resolved in favor of the vendor, interest begins to accrue as of the original date the payment became due.

Recommendation: Staff of the Committee on Community Affairs recommends retaining the exemption. Section 218.76, F.S., contains specific timeframes for the required dispute resolution process that a local governmental entity must establish to resolve certain payment disputes. These timeframes ensure a speedy resolution of these disputes.

Income Tax Code

220.187(9)(f)

As a part of the Department of Education's (DOE) oversight responsibilities for the Corporate Tax Credit Scholarship Program, the DOE must establish a process for individuals to notify the DOE of violations of law related to scholarship program participation. Further, the DOE must conduct an inquiry of a legally sufficient complaint about a violation by a parent, a private school, or a school district. Alternatively, the DOE may refer the complaint to the appropriate agency for investigation. Section 220.187(9)(f), F.S., provides that the DOE's inquiry into a complaint is not subject to the requirements of chapter 120, F.S.

Rationale: This provision was enacted by the 2006 Legislature and establishes a complaint process for alleged violations of the scholarship program requirements by parents, private schools, and school districts. The DOE is currently proposing rules for adoption by the State Board of Education to implement this provision. The proposed rules include more specific details for handling these types of complaints.[49]

Recommendation: The DOE noted that the inquiry process is less formal than the process set forth in chapter 120, F.S., and recommends retaining the current exemption. The DOE indicated that chapter 120, F.S., safeguards are provided in other provisions of s. 220.187, F.S. According to the DOE, the provisions of chapter 120, F.S., do apply to an inquiry resulting in a proposed agency action that affects the substantial interests of parties. The DOE considers this inquiry process to be a type of consumer complaint process, open to the public at large. If the exemption was repealed, chapter 120 rights would be given to the public at large.

Staff of the Committee on Education recommends that modification of the exemption be considered to include requiring the DOE to provide notice to a party substantially affected by the outcome of the inquiry.

[49] Proposed Rules 6A-6.03315 and 6A-6.0960.

Land Acquisitions for Conservation or Recreation

259.041(1)

The Board of Trustees may waive any s. 259.041, F.S., requirement, except (3), (13), and (14), and notwithstanding chapter 120, F.S., may waive any rule adopted pursuant to s. 259.041, F.S., except rules adopted pursuant to (3), (13), and (14).

Rationale: Funding, timing and market conditions are important components in successful land transactions. Real estate is a dynamic process with rapidly changing market conditions. Flexibility is critical to compete in the real estate marketplace and accomplish land acquisition goals. The ability to substitute reasonable and prudent procedures when special opportunities arise is absolutely necessary and can directly impact the success or failure of the real estate transaction. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the committee on Environmental Preservation recommends that the exemption be retained unchanged.

Procurement of Personal Property and Services

287.042(2)(b)

The Department of Management Services (DMS) Secretary may proceed with a contract award even when a bid protest had been filed upon grounds less restrictive than those found in s. 120.57(3)(c), F.S.

Rationale: This statutory exemption from the ch. 120 process gives the Secretary of DMS the option of awarding a contract to an intended award recipient even when there has been a bid protest filed that, under normal circumstances, would prevent the contract from being signed.
Section 120.57(3)(c), F.S., also gives agencies the authority to sign a contract during a bid protest, but the agency head must find than an emergency exists, whereas under this exemption there must be a finding, supported by written facts and circumstances, that a delay in executing the contract would be detrimental to the state. This exemption promotes efficient delivery of goods and services to the state and its customers.

Recommendation: The DMS recommends that this exemption be retained because it permits the department to move forward with a contract when the delays inherent in the bid protest system will be detrimental to the interests of the state, rather than having to justify an "emergency." In other words, if the new contract will save the state substantial amounts of money or will greatly enhance the services that the state delivers to its citizens, those benefits can be realized as soon as possible. The protesting bidder is protected in that the statute also provides that, if the award was made incorrectly, the department can cancel the contract and re-award it.

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained.

287.0574(4)

The business case agencies undertake prior to outsourcing work is not subject to challenge or protest under chapter 120, F.S.

Rationale: Under this statute when an agency wishes to outsource work that is not part of its core function, it must develop a business case that justifies the decision. This exemption makes that business case immune from protest or challenge under ch. 120, which will streamline the process for procuring the work that is outsourced. This will, in turn, aid the efficient delivery of goods and services to the State and its customers by not adding another "layer" of protests to the procurement process. The specifications of the contract still may be protested, of course, once the solicitation is made.

Recommendation: The Department of Management Services recommends that this exemption be retained because it streamlines the process for agencies outsourcing services outside of its core mission.

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained.

287.133(3)(e)2.

Proceedings concerning the convicted vendor list have procedures that vary from typical chapter 120, F.S., proceedings.

Rationale: This section slightly alters the procedures under ch. 120 for businesses and individuals that the department intends to place on the convicted vendor list. The exemption to the normal procedures appears intended to be for the benefit of the vendor, but also advances the state's interest in speedy determination of such matters. When the department receives information that a

vendor has been convicted of a public entity crime (as defined elsewhere in the statute), it gives notice to that vendor that the vendor may request a hearing. The hearing must be "formal" – i.e., an evidentiary hearing before the Division of Administrative Hearings, rather than "informal" before a hearing officer appointed by the department. Also, the hearing is held on an accelerated schedule that could bring the matter to trial within 61 days of the department giving notice that it intended to place the vendor on the list and a final order within 91 days. The administrative law judge's ruling is the final agency action, meaning the DMS Secretary does not make the ultimate decision.

Recommendation: The Department of Management Services recommends that this exemption be retained because it accelerates the process of determining whether a person or entity is prohibited from doing business with the State. This is better for the vendor and better for the State, as well, because a lengthy delay in the proceedings could result in a vendor that should be suspended from doing business acquiring more work during the interim between notice and adjudication.

Staff of the Committee on Governmental Oversight and Productivity concurs that the exemption should be retained.

Commercial Development and Capital Improvements

288.1226(2)(d)

Section 288.1226(2)(d), F.S., provides that the Florida Tourism Industry Marketing Corporation ("the corporation", which presently does business as VISIT FLORIDA), is not considered an agency for the purposes of several statutes including ch. 120, F.S. Section 288.1226(2)(d), F.S., is one of the statutory provisions generally outlining the characteristics of the corporation. According to this provision, the corporation is a direct-support organization operating as a corporation not for profit.

Rationale: The corporation is the private component of a public/private partnership and was created expressly to act as a private organization rather than a state agency.[50] The corporation was designed to increase private participation in the promotion of Florida tourism. The application of ch. 120 to the business of the corporation would likely impede its ability to attract private sector partners.

[50] The legislation creating the corporation states, "It is in the public interest for activities in promotion and support of Florida tourism to be carried out by a private sector, direct support organization created expressly for such purpose as the Florida Tourism Industry Marketing Corporation." Section 288.1221(2), F.S., and ch. 92-299, L.O.F.

The Administration Procedures Act (APA) was created to provide for fairness in rulemaking, adjudication, and licensing activities. It focuses primarily on regulatory matters. The corporation is not a regulatory body. In fact, it operates as a 501(c)(6) corporation, providing marketing opportunities to tourism-related entities in Florida. According to a VISIT FLORIDA representative, the corporation raises substantial private funds to accomplish this purpose. The Florida Commission on Tourism, a public body, and the Office of Tourism, Trade, and Economic Development of the Executive Office of the Governor oversee the funding and functions of the corporation.

Recommendation: VISIT FLORIDA recommends that the exemption be retained as is since it was created as a private entity and is not a regulatory body—a characteristic that differs from entities that usually fall within the purview of ch. 120, F.S.

Section 288.1221, F.S., outlines the legislative intent that undergirds the creation of the corporation. It states, in pertinent part:

> By creating this public-private partnership, it is the intent of the Legislature to coordinate existing private and public-funded tourism promotional activities *in a cost-effective manner to avoid waste and duplication in these activities* while achieving the maximum public benefit from all expenditures that directly and indirectly support Florida tourism. (Emphasis added)

It appears that the Legislature intended to create this corporation in this manner to avoid the type of bureaucracy that, at times, slows the work of government agencies. By exempting VISIT FLORIDA from ch. 120, F.S., and its attendant notice requirements, for example, the Legislature sought to create an efficient method of promoting Florida tourism. There is no indication that this partnership has failed to accomplish its statutory mandate in the manner intended.

For these reasons, staff of the Committee on Commerce and Consumer Services recommends that the exemption be retained.

Motor Vehicle Licenses

320.781(7)

Decisions by the Department of Highway Safety and Motor Vehicles (DHSMV) on whether to pay claimants seeking monies from the Mobile Home and Recreational Vehicle Trust Fund are not subject to review under chapter 120, F.S.

Rationale: Section 320.781, F.S., establishes a trust fund administered by HSMV to be used to reimburse consumers who have unsatisfied judgments, or in certain limited instances, unsatisfied claims against mobile home or recreational vehicle dealers resulting from a cause of action directly related to the conditions of any written contract made by them in connection with the sale, exchange, or improvement of any mobile home or recreational vehicle. This section further provides the criteria which must be met by the claimant in order to recover from the trust fund. Section 320.781(7), F.S., exempts the DHSMV's decisions on payment from review under ch. 120, F.S. Instead, the Legislature allows a claimant to seek review (by writ of certiorari) of DHSMV's payment decisions from the circuit court in the county in which the claimant resides. See s. 320.781(7), F.S.

Recommendation: The DHSMV recommends that the exemption be retained.

Staff of the Committee on Transportation recommends that the exemption be retained.

Highway Patrol

321.051

Section 321.051(2), F.S., exempts denying, suspending, or revoking a wrecker operator's participation in the Florida Highway Patrol's wrecker allocation system from the provisions of chapter 120, F.S. This exemption is also codified in s. 120.80(8)(b), F.S.

Rationale: Section 321.051, F. S., provides the Florida Highway Patrol (FHP), a division of the Department of Highway Safety and Motor Vehicles, authority to establish a wrecker operator system to facilitate the removal and storage of crashed, disabled or abandoned vehicles. This section also authorizes the FHP to establish maximum rates for the towing and storage of vehicles.

The FHP's wrecker allocation system is used when vehicles must be removed from a highway and the owner is unable to request a specific wrecker operator due to injury or lacks knowledge of available operators. In these cases, owners expect the wrecker operator is reputable and the fees charged will be reasonable. To protect the vehicle owners and the State, the FHP must be able to react to issues as they arise.

The inclusion of a wrecker operator in the FHP's wrecker allocation system is voluntary. By voluntarily applying for inclusion in the system, the wrecker

operator agrees to abide with the rules and regulations established by the FHP. See Florida Administrative Code Rule 15B-9.

This exemption protects the owners of vehicles towed and stored by wrecker operators in the FHP's wrecker operator system by ensuring fees charged are reasonable and wrecker operators meet acceptable standards of operation. The wrecker operators in the wrecker allocation system operate in local areas.

Recommendation: The agency recommends retention of the exemption.

Staff of the Committee on Transportation recommends retention of the exemption.

Drivers' Licenses

322.2615(12)

The Department of Highway Safety and Motor Vehicles (DHSMV) has exceptions relating to the administrative hearing process for hearings involving drivers' licensing authorized by chapter 322, F.S.

Rationale: Section 322.2615, F.S., authorizes the DHSMV to suspend the driver's license of any person 21 years of age or older who has been arrested for unlawful blood/breath alcohol level or who has refused to submit to a breath, urine, or blood test.

Section 120.80(8)(a), F.S., exempts hearings regarding drivers' licensing pursuant to ch. 322, F.S., from being conducted by an administrative law judge assigned by the Division of Administrative Hearings. Instead, the Legislature has authorized the DHSMV to adopt rules for the conduct of formal and informal review hearings regarding drivers' licensing. See ss. 322.2615(12), 322.2616(13) and 322.64(12), F.S. See also Rule 15A-6, F.A.C.. The unique nature of issuing, denying, suspending or revoking a driver license under ch. 322, F.S., and the volume of reviews conducted is why these hearings are exempt from being conducted by administrative law judges. Section 322.31, F.S., provides for a speedy appeal of DHSMV's decisions by a review before the circuit court (by a writ of certiorari) in the county where the driver resides or where the hearing was held.

Recommendation: The agency recommends retention of the exemption.

Staff of the Committee on Transportation recommends retention of the exemption.

322.2616(13)

The Department of Highway Safety and Motor Vehicles (DHSMV) has exceptions relating to the administrative hearing process for hearings involving drivers' licensing authorized by chapter 322, F.S.

Rationale: Section 322.2616, F.S., authorizes the DHSMV to suspend the driver's license of any person under 21 years of age who has been arrested for unlawful blood/breath alcohol level or who has refused to submit to a breath, urine, or blood test.

Section 120.80(8)(a), F.S., exempts hearings regarding drivers' licensing pursuant to ch. 322, F.S., from being conducted by an administrative law judge assigned by the Division of Administrative Hearings. Instead, the legislature has authorized the DHSMV to adopt rules for the conduct of formal and informal review hearings regarding drivers' licensing. See ss. 322.2615(12), 322.2616(13) and 322.64(12), F.S. See also Rule 15A-6, F.A.C. The unique nature of issuing, denying, suspending or revoking a driver license under ch. 322, F.S., and the volume of reviews conducted is why these hearings are exempt from being conducted by administrative law judges. Section 322.31, F.S., provides for a speedy appeal of DHSMV's decisions by a review before the circuit court (by a writ of certiorari) in the county where the driver resides or where the hearing was held.

Recommendation: The agency recommends retention of the exemption.

Staff of the Committee on Transportation recommends retention of the exemption.

322.27(1)

Section 322.27(1), F.S., authorizes the Department of Highway Safety and Motor Vehicles (DHSMV) to suspend a driver's license without a preliminary hearing in certain situations.

Rationale: Section 322.27(1), F.S., authorizes the DHSMV to suspend the driver's license of any person without a hearing upon the showing of its records or other sufficient evidence that the licensee: (1) committed an offense for which mandatory revocation of license is required upon conviction; (2) has been convicted of a violation of any traffic law which resulted in a crash causing the death or injury of another or property damage in the amount of $500; (3) is incompetent to drive a motor vehicle; (4) has permitted an unlawful or fraudulent use of the license; (5) has committed an offense in another state which if

committed in this state would be grounds for suspension or revocation; or (6) has committed a second or subsequent violation involving stopping for school buses.

Section 322.31, F.S., provides for a speedy appeal of DHSMV's decisions by a review before the circuit court (by a writ of certiorari) in the county where the driver resides or where the hearing was held.

Recommendation: DHSMV recommends the exemption be retained.

Staff of the Committee on Transportation recommends the exemption be retained.

322.31

Section 322.31, F.S., requires that final orders of the Department of Highway Safety and Motor Vehicles (DHSMV) denying, canceling, or suspending a driver's license are reviewable under Florida Rules of Appellate Procedure only by a writ of certiorari issued by a circuit court.

Rationale: Section 322.31, F.S., provides for a speedy appeal of the DHSMV's decisions by a review before the circuit court in the county where the driver resides or where the hearing was held. The record, in the form of an Appendix, goes before the circuit court for certiorari review on the issues of competent substantial evidence, due process violations and compliance with the essential requirements of law. There is a substantial body of case-law that involves such reviews and the driver's rights to judicial review of administrative action are fully protected. Review in circuit court should be less costly than bringing an appeal before a District Court of Appeal as otherwise prescribed in s. 120.68, F.S. Second tier certiorari review is available before a District Court of Appeal by a dissatisfied party, subject to a more narrow review standard. The less expensive and speedier nature of local certiorari review is a good compliment to the limited nature of most of the administrative hearings conducted by DHSMV.

Recommendation: The agency recommends that the exemption be retained.

Staff of the Committee on Transportation recommends that the exemption be retained.

322.64(12)

The Department of Highway Safety and Motor Vehicles (DHSMV) has exceptions relating to the administrative hearing process for hearings involving drivers' licensing authorized by chapter 322, F.S.

Rationale: Section 322.64, F.S., authorizes the DHSMV to disqualify a person from operating a commercial motor vehicle when the person is driving with an unlawful blood/breath alcohol level or when the person refuses to submit to a breath, urine or blood test.

Section 120.80(8)(a), F.S., exempts hearings regarding drivers' licensing pursuant to ch. 322, F.S., from being conducted by an administrative law judge assigned by the Division of Administrative Hearings. Instead, the legislature has authorized the DHSMV to adopt rules for the conduct of formal and informal review hearings regarding drivers' licensing. See ss. 322.2615(12), 322.2616(13) and 322.64(12), F.S. See also Rule 15A-6, F.A.C. The unique nature of issuing, denying, suspending or revoking a driver license under ch. 322, F.S., and the volume of reviews conducted is why these hearings are exempt from being conducted by administrative law judges. Section 322.31, F.S., provides for a speedy appeal of DHSMV's decisions by a review before the circuit court (by a writ of certiorari) in the county where the driver resides or where the hearing was held.

Recommendation: The agency recommends that the exemption be retained.

Staff of the Committee on Transportation recommends that the exemption be retained.

Contracting; Acquisition, Disposal, and Use of Property

337.165(2)(b)1.

This section provides notice and hearing requirements when a contractor is convicted of a contract crime, notwithstanding any contrary provision in ch. 120, F.S.

Rationale: The exemption provided is only for the initial agency action the Florida Department of Transportation (FDOT) is required to take upon receiving notice a contractor has been convicted of a contract crime. The statute directs the FDOT to revoke or deny the certificate of prequalification for any convicted contractor or contractor's affiliate. A 36 month period of revocation is specifically required. The exemption provides a mechanism for a hearing before the FDOT prior to the required revocation.

The issues that could be presented at this hearing are very limited. The conviction will already be a matter of public record and the contractor will have had the full due process afforded any person accused of a criminal violation. An affiliate whose certificate is being revoked because of its status as an affiliate of a convicted contractor may contest its affiliate status. The term "affiliate" is clearly

defined in s. 337.165, F.S. The determination of an individual's affiliate status would normally rest on public records or previous incontestable statements and actions by the affected persons, as opposed to requiring FDOT to weigh the credibility of conflicting evidence.

Significantly, the exemption only extends to the initial required revocation decision. Once a certificate is revoked or denied for a contract crime, the interested person may obtain a full evidentiary proceeding before the Division of Administrative Hearings to determine whether the certificate should be reinstated. The administrative law judge has final order authority over this determination.

The two part process in the current law provides a mechanism for the FDOT to quickly and efficiently block a convicted criminal, or its affiliates, from obtaining further work from the FDOT, while effectively providing a full ch. 120 hearing to determine the length of time an affected person will be barred from obtaining new work from the FDOT.

Recommendation: The agency recommends that the exemption be retained.

Staff of the Committee on Transportation recommends that the exemption be retained.

337.167(1)

A certificate to bid on a Florida Department of Transportation (FDOT) contract, or to supply services to the FDOT, is not a license under s. 120.52, F.S., and denial or revocation of a certificate is not subject to ss. 120.60 or 120.68(3), F.S.

Rationale: This provision is not an exemption of the certificates to bid from ch. 120, F.S., but is a definition of what a certificate to bid is in a legal sense. Sections 120.60 and 120.68(3), F.S., pertain to agency action involving a "license" which is defined within s. 120.52(9), F.S., as "a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act." Revocation or denial of a license has been judicially deemed as penal because such action could impede the license holder's ability to even exist or conduct any business. Higher standards of proof apply in licensure cases, making it harder for an agency to revoke the license holder's ability to conduct business.

A certificate to bid is not the same as a license because a certificate is not necessary for the entity holding the certificate to bid to conduct its business. Rather, a certificate to bid allows the holder to compete for FDOT contracts.

Denials and revocations of certificates to bid are subject to all other aspects of ch. 120 including the right to formal or informal hearings under ss. 120.569 and 120.57, F.S.

Note case law from the late 1970's, *Capeletti v. Florida Department of Transportation*, 362 So.2d 346 (Fla. 1st DCA 1978), held a certificate to bid is a license, but that was in a different context. However, to remove the statutory language at issue may invite further litigation on this issue.

Recommendation: The agency recommends that the exemption be retained.

Staff of the Committee on Transportation recommends that the exemption be retained.

Gas Transmission and Distribution

368.106(3)

This section provides that rates of intrastate pipelines negotiated at arms length are presumptively valid. The exemption was intended to avoid delays from chapter 120, F.S., processes. Avoided delays would allow the pipeline to react to market conditions quickly, and ultimately to provide for more pipeline infrastructure in the state. On the other hand, if this presumption of rate validity is rebutted, the case would proceed under ch. 120 and s. 368.106(4), F.S.

Recommendation: The PSC recommends that the exemption be retained.

Staff of the Committee on Communications and Public Utilities recommends that the exemption should be retained.

Saltwater Fisheries

370.26(2) and (3)

Provides that the process used for developing a consolidated aquaculture permit or the criteria used for issuing temporary permits for aquaculture activities shall not be subject to s. 120.52, F.S.

Rationale: The exemption was granted in order to allow the Department of Environmental Protection to consolidate a series of internal requirements into one general permit.

Recommendation: The Department of Agriculture and Consumer Services indicates this provision could be repealed. The Department of Environmental Protection indicated that since aquaculture activities are now with Agriculture they feel the provisions may need to be updated.

Staff of the Committee on Environmental Preservation recommends repeal of the exemption.

Water Resources

373.0361(4)

Governing board approval of a regional water supply plan is not subject to the rulemaking requirements of chapter 120, F.S., although any portion of an approved plan which affects the substantial interests of a party shall be subject to s. 120.569, F.S.

Rationale: The regional water supply plans were exempted from the rulemaking requirements of ch. 120 as the plans only identify source and project options that a water supplier may choose to meet future projected needs. Section 373.0361(6), F.S., specifically indicates that water suppliers are not required to select a water supply development project merely because it is identified in the plan. The initial policy was to allow a water supplier the flexibility to identify a different project than those included in the plan, and to implement that project if it met the consumptive use permitting criteria and a permit was obtained. In addition, a regional water supply plan includes many elements, such as technical information, projected population estimates, and potential funding sources that are not appropriate to be adopted as rules. If determined to be appropriate, a Water Management District (WMD) has the ability to adopt appropriate portions of a regional water supply plan by rule and apply that rule in the consumptive use permitting process. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.042(2)

The priority list and schedule for the establishment of minimum flows and levels for surface watercourses, aquifers, and surface waters within a water management district is not subject to any proceeding under chapter 120, F.S.

Rationale: The priority list and schedule is essentially a work plan developed by a WMD for developing rules that establish MFLs. The Governing Board determines the priorities of the water bodies on the list based on factors in the statute, and the schedule is controlled by available WMD staffing and resources. Given the nature of the decisions involved, and the need to annually revise the list and schedule to respond to changing conditions, the initial policy was that oversight of the WMDs' priority list and schedule should be done by the Department of Environmental Protection by annual submittal of the priority list and schedule for review and approval. The opportunity for substantially affected persons to file a petition under ch. 120 occurs when an MFL is proposed for rule adoption, and is also available after it is adopted. See s. 373.042(5), F.S. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommend that the exemption be retained unchanged.

373.042(4)(b)

Initiation of peer review of scientific or technical data used to establish a minimum flow or level shall toll applicable deadlines under chapter 120, F.S., until 60 days following submittal of the final report. Such deadlines shall also be tolled for 60 days following withdrawal of the request for peer review or agreement between the parties that peer review will not be pursued.

Rationale: The initial policy was to allow a substantially affected person the ability to request an independent peer review of the technical underpinnings of a proposed MFL. This provision was needed to allow time for such a peer review to be conducted when requested, and for the result of the peer review to be considered in any agency action without violating the permitting, rulemaking, or administrative hearing deadlines. Also, the provision was needed to allow the involved parties to prepare to resume such activities in a timely manner if a request for peer review is withdrawn. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.086(3)(a)

Provides an exemption from ch. 120, F.S., and Department of Environmental Protection permitting requirements for water management districts for certain temporary activities in a water emergency.

Rationale: The purpose of this provision is to allow the Water Management Districts and department to quickly act to address a water emergency that constitutes an immediate danger to the public health, safety or welfare. This provision can work in conjunction with the authority granted in s. 120.569(2)(n), F.S., for agencies to issue emergency orders in specific exigent situations. Similar to s. 120.569(2)(n), F.S., the water emergency order would be appealable under s. 120.68, F.S. If the normal administrative procedure was applicable, a request for an administrative hearing would preclude action in a timely manner to address the emergency because the agency's proposed action would be rendered non-final pending an administrative hearing which could delay action for 30 days or more. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.086(3)(b)

Notwithstanding the provisions of ch. 120, F.S., emergency orders issued pursuant to this subsection shall be valid for 90 days and may be renewed for a single 90-day period.

Rationale: The purpose of this provision is to allow water management districts to quickly respond to water emergencies through an immediate emergency order. This allows the districts to authorize the emergency activity for a period of time not to exceed 180 days without the need to go through a more time intensive permitting process. If it is anticipated that the emergency situation will exceed 180 days, a permit could be applied for and obtained or the water management district could invoke the provisions of ss. 120.569(2)(n) or 373.009(2), F.S. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.1131(2)

This section provides that procedures adopted to provide for consolidated permitting actions do not constitute rules within the meaning of s. 120.52, F.S.

Rationale: The purpose of this provision is to allow for procedural streamlining of permitting processes by consolidating the application review and action (without changing the substantive permitting criteria) without lengthy rulemaking procedures. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.1961(3)

Concerns development of alternative water supplies, including reclaimed water.

Rationale: The statute already provides the criteria that the Governing Board must give significant weight or consider when determining which projects to fund in the Water Protection and Sustainability Program. The initial policy was to allow the Governing Board the flexibility to implement these criteria, with the discretion to add additional criteria, based on the priorities and conditions that exist in a particular funding year. Treating a district's decision on water funding as agency action subject to challenge under ch. 120, F.S., could inhibit the development of water supply projects that the statute is designed to promote. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.2295(6)(b)

The filing of certain notices regarding interdistrict transfers of groundwater, tolls the time periods set forth in s. 120.60, F.S.

Rationale: When an interdistrict transfer of water is proposed and a substantially affected person objects, the policy and purpose is to have the department, as the statewide agency with general supervisory oversight of the water management districts, review the district's proposed action and issue a final order that can then be challenged in an administrative hearing. Because a substantially affected person has 14 days after the water management district notice of intended action to seek department review, the tolling language is necessary to avoid a default permit since no final action can occur within the time period of s. 120.60, F.S., if such review is sought. For this purpose to be achieved, the exceptions to the normal APA procedure provided in ss. 373.2295(6)(b), (6)(d), and (7)-(8), F.S., are necessary. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.2295(7)

Imposes a 30 day period for reviewing a request for review of water management district actions on any proposed interdistrict transfer and use of groundwater.

Rationale: When an interdistrict transfer of water is proposed and a substantially affected person objects, the policy and purpose is to have the department, as the statewide agency with general supervisory oversight of the water management districts, review the district's proposed action and issue a final order that can then be challenged in an administrative hearing. Because a substantially affected person has 14 days after the water management district notice of intended action to seek department review, the tolling language is necessary to avoid a default permit since no final action can occur within the time period of s. 120.60, F.S., if such review is sought. For this purpose to be achieved, the exceptions to the normal APA procedure provided in ss. 373.2295(6)(b), (6)(d), and (7)-(8), F.S., are necessary. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.2295(9)

Interagency agreements under Part II, Chapter 373, F.S., are not subject to chapter 120, F.S.

Rationale: The rulemaking exception facilitates review of applications for interdistrict transfers and uses of groundwater by allowing the appropriate districts to quickly enter an agreement regarding the division of agency review responsibilities (and actions) associated with a particular application and then process the application. Each such application has the potential to require a unique multi-agency review procedure depending on, among other things, the location of the project, the size of the use, and the level of information that a particular district has regarding the conditions of the drawdown area. A substantially affected person can still ultimately challenge the permitting action itself under s. 373.2295(7), F.S. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.244(5)

Temporary permits issued under this statute are exempted from ch. 120, F.S., notice and hearing requirements.

Rationale: A temporary consumptive use permit (TCUP) only lasts up to 30 days (it expires the day after the next Governing Board meeting), so it would not be possible to seek review of the decision before the TCUP expired. A TCUP can only be issued when the TCUP applicant already has a pending application for a CUP that meets the conditions for issuance and the applicant demonstrates an immediate need for the water prior to issuance of the TCUP. A substantially affected person's rights are protected, because such person can challenge the agency decision on the pending application for a TCUP. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.414(18)

A water management district and any other governmental agency subject to ch. 120, F.S., may apply the uniform wetland mitigation assessment method without the need to adopt it pursuant to s. 120.54, F.S.

Rationale: The policy and purpose was to have a single (uniform) mitigation assessment methodology that would be the "exclusive and consistent process for determining the amount of mitigation required to offset impacts to wetlands and other surface waters, and that would be binding on the department, the water management districts, local governments, and any other governmental agency…." Because the districts and all other governmental agencies are required to use the department's rule as is, there is no purpose in requiring the districts or other governmental agencies to separately adopt the rule pursuant to s. 120.54, F.S., before applying it. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.421(5)

A formal determination of the extent of surface waters and wetlands issued by a district or Department of Environmental Protection and obtained under the requirements of s. 373.421, F.S., is final agency action and is in lieu of a declaratory statement of jurisdiction obtainable under s. 120.565, F.S., but the provisions of ss. 120.569 and 120.57, F.S., apply to the formal determination.

Rationale: Sections 373.421(5) and (6), F.S., state that formal determinations under s. 373.421(5), F.S., and validated informal nonbinding determinations under s. 373.421(6), F.S., are final agency action subject to ss.120.569 and 120.57, F.S. The intent and purpose is to provide a point–of–entry for substantially affected persons to request an administrative hearing on such formal determinations or validated informal nonbinding determinations. The use of the term final agency action may be inconsistent in that agency action does not become final until after a timely requested administrative hearing or until the time to request such hearing has expired. Proposed amendments to remove any inconsistency are suggested below. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be amended as follows:

(5) A formal determination obtained under this section is ~~final agency action and is~~ in lieu of a declaratory statement of jurisdiction obtainable under s. 120.565 and is final agency action unless a timely and sufficient petition for administrative hearing under ~~.~~ Sections 120.569 and 120.57 is filed. ~~apply to formal determinations under this section.~~

(6) The district or the department may also issue nonbinding informal determinations or otherwise institute determinations on its own initiative as provided by law. A nonbinding informal determination of the extent of surface waters and wetlands issued by the South Florida Water Management District or the Southwest Florida Water Management District, between July 1, 1989, and the effective date of the methodology ratified in s. 373.4211, shall be validated by the district if a petition to validate the nonbinding informal determination is filed with the district on or before October 1, 1994, provided:

* * * *

Validated informal nonbinding determinations issued by the South Florida Water Management District and the Southwest Florida Water Management District shall remain valid for a period of 5 years from the date of validation by the district, as long as physical conditions on the property do not change so as to alter the boundaries of surface waters or wetlands. A validation obtained under this section is final agency action unless a timely and sufficient petition for administrative hearing under ~~.~~ Sections 120.569 and 120.57 is filed. ~~apply to validations under this section.~~

Staff of the Committee on Environmental Preservation recommends that the exemption be retained with potential modifications.

Section 373.421(6)

A validated informal nonbinding determination for wetlands delineation issued by the South Florida Water Management District or the Southwest Florida Water Management District constitutes final agency action but the provisions of ss. 120.569 and 120.57, F.S., apply to the validation.

Rationale: Sections 373.421(5) and (6), F.S., state that formal determinations under s. 373.421(5), F.S., and validated informal nonbinding determinations

under s. 373.421(6), F.S., are final agency action subject to ss. 120.569 and 120.57, F.S. The intent and purpose is to provide a point–of–entry for substantially affected persons to request an administrative hearing on such formal determinations or validated informal nonbinding determinations. The use of the term final agency action may be inconsistent in that agency action does not become final until after a timely requested administrative hearing or until the time to request such hearing has expired. Proposed amendments to remove any inconsistency are suggested below. The public interest is still served by this provision.

Recommendation: The agency recommends that the exemption be amended as follows:

> (5) A formal determination obtained under this section is ~~final agency action and is~~ in lieu of a declaratory statement of jurisdiction obtainable under s. 120.565 and is final agency action unless a timely and sufficient petition for administrative hearing under~~.~~ Sections 120.569 and 120.57 is filed. ~~apply to formal determinations under this section.~~
>
> (6) The district or the department may also issue nonbinding informal determinations or otherwise institute determinations on its own initiative as provided by law. A nonbinding informal determination of the extent of surface waters and wetlands issued by the South Florida Water Management District or the Southwest Florida Water Management District, between July 1, 1989, and the effective date of the methodology ratified in s. 373.4211, shall be validated by the district if a petition to validate the nonbinding informal determination is filed with the district on or before October 1, 1994, provided:
>
> * * * *
>
> Validated informal nonbinding determinations issued by the South Florida Water Management District and the Southwest Florida Water Management District shall remain valid for a period of 5 years from the date of validation by the district, as long as physical conditions on the property do not change so as to alter the boundaries of surface waters or wetlands. A validation obtained under this section is final agency action unless a timely and sufficient petition for administrative hearing under~~.~~ Sections 120.569 and 120.57 is filed. ~~apply to validations under this section.~~

Staff of the Committee on Environmental Preservation recommends that the exemption be retained with potential modifications.

373.427(1) and (2)

Provides limited exceptions to s. 120.60, F.S., requirements, (timeframes, etc.).

Rationale: The purpose is to provide for concurrent review of all necessary permits, authorizations, or waivers or variances when a particular activity requires a permit under Part IV of Chapter 373, F.S., and also requires one or more of (1) an authorization to use sovereign submerged lands, (2) a coastal construction permit under s. 161.041, F.S., (3) a coastal construction control line permit under s. 161 053, F.S., or (4) a waiver or variance of setback requirements under s. 161.052, F.S.

Absent an exception to s. 120.60, F.S., when an applicant submits all the information necessary for any of the permits listed above, the application for that permit becomes complete and the 90-day timeframe for agency action on the application commences even though the application for other required permits may not be complete. In order for there to be concurrent review of all required permits under the same processing deadlines, it is therefore necessary to provide that notwithstanding s. 120.60, F.S., an application under this part is not complete and the timeframes for license approval or denial shall not commence until all information required for all the applications by rules adopted under this section is received.

Thus the statute provides that the 90-day processing deadline commences when all required applications are complete, and the timeframe for requesting an administrative hearing [when the BOT has delegated final authority for the sovereign submerged lands authorization] commences when the agency issues a consolidated notice of intent to grant or deny all of the concurrently processed applications.

Subsection (2) further addresses special timeframe considerations necessary for concurrent review for those cases where the BOT has not delegated sovereign submerged lands authorization and the matter must therefore go before the BOT for agency action. In such cases the DEP or WMD issues a “recommended consolidated intent” that does not commence the timeframe for petitioning for an administrative hearing because the ultimate agency action is still contingent on the decision of the BOT to grant or deny the application for the use of sovereign submerged lands. Once the BOT has directed the DEP or WMD on the sovereign submerged lands application, the DEP or WMD issues a notice of consolidated

intent to grant or deny all applications, and this issuance commences the timeframe for petitioning for an administrative hearing.

Consistent with law, because an authorization to use sovereign submerged lands is a proprietary authorization and is not a permit or license, there is no default under s. 120.60, F.S., on the decision to grant or deny an application to use sovereign submerged lands. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.441(1)(h)

Authorizes the Department of Environmental Protection, "in consultation with the Water Management Districts," to adopt rules regarding participation of local governments in a streamlined permitting system. Paragraph (h) states that the subsection (1) rules shall include provisions for the applicability of ch. 120, F.S., to local government programs when the environmental resource permit program is delegated to counties, municipalities, or local pollution control programs.

Rationale: The purpose of this provision is to authorize the department, by rule, to determine whether, and if so to what extent, a local government environmental protection program's permitting decisions under a delegated Part IV, Chapter 373, F.S., ERP program will be subject to ch. 120 procedures or by local ordinance procedures. Absent this provision, a local program's permitting decisions under a delegation from the DEP or WMD would be subject, as the agent of the DEP or WMD, to the same ch. 120, F.S., provisions as the delegating agency. This provision allows the department to determine whether a local government's administrative procedures under its ordinances provide equal or substantially equivalent procedural protections to applicants and substantially affected persons as ch. 120, F.S. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.4592(6)(g)

Notwithstanding any contrary provisions in ch. 120, F.S., or any provision of any other law, an action in circuit court shall be the exclusive remedy to challenge the assessment of an Everglades agricultural privilege tax and owners of property subject to such tax have no right or standing to initiate administrative proceedings under ch. 120 to challenge the assessment of the tax.

Rationale: This language is more in the nature of a notice provision than an exemption, as ch. 120 is never applicable to parties who wish to challenge assessment of a tax; circuit court is the traditional venue for such challenges. Because many actions of water management districts are subject to challenge under the APA, the legislature wanted to insure that property owners were clearly advised of the venue for any challenge to these kinds of actions (assessing of the applicable taxes) by the water management district. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

373.4592(7)(f)

Notwithstanding any contrary provisions in ch. 120, F.S., or any provision of any other law, an action in circuit court shall be the exclusive remedy to challenge the assessment of a C-139 agricultural privilege tax[51] and owners of property subject to such tax have no right or standing to initiate administrative proceedings under ch. 120, F.S., to challenge the assessment of the tax.

Rationale: This language is more in the nature of a notice provision than an exemption, as ch. 120 is never applicable to parties who wish to challenge assessment of a tax; circuit court is the traditional venue for such challenges. Because many actions of water management districts are subject to challenge under the APA, the Legislature wanted to insure that property owners were clearly advised of the venue for any challenge to these kinds of actions (assessing of the applicable taxes) by the water management district. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained.

[51] The C-139 basin is located in the Lake Okeechobee/Everglades region; the full legal description is contained in s. 373.4592(16), F.S.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained.

373.59(2)

Requires hearings similar to s. 120.54, F.S., public hearing prior to acquisition of lands under the Preservation 2000 Program.

Rationale: This provision was effective only until the Preservation 2000 Program was concluded. It is obsolete.

Recommendation: The Department of Environmental Protection recommends that the exemption be repealed.

Staff of the Committee on Environmental Preservation recommends repeal of the provision.

Pollutant Discharge and Removal

376.30713(3)(c)

This provision exempts from ch. 120, F.S., the Department of Environmental Protection's decision not to enter into a pre-approved advanced cleanup contract.

Rationale: It is in the public interest and of substantial economic benefit to the state to provide an opportunity for site rehabilitation to be conducted on a limited basis at contaminated sites in advance of the site's priority ranking to facilitate property transactions or public works projects. Allowing challenges to a decision by the department not to enter such an agreement would delay the award of funding to other sites. This would defeat the goal of allowing clean-up in advance of the time funds would otherwise become available. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

376.3075(11)

The provisions of chapter 120, F.S., shall not apply to the Inland Protection Financing Corporation (which finances petroleum-contaminated site rehabilitation).

Rationale: The Inland Protection Financing Corporation (IPFC) is a nonprofit public benefit corporation established by the Legislature for the purpose of financing the rehabilitation of petroleum contamination sites pursuant to ss. 376.30-376.319, F.S. It was created to address widespread concern about the timeliness of payment to persons cleaning up petroleum contaminated sites. Additionally, the IPFC has been determined not to be a government entity and therefore is not subject to ch. 120. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained.

Staff of the Committee on Environmental Preservation recommends that the provision be retained.

Land Reclamation

378.901(4)(c)

Section 378.901, F.S., authorizes the department to issue life-of-the-mine permits for heavy minerals, fuller's earth, and sand mines, in lieu of separate permits under Part IV of Chapter 373 and Part IV of Chapter 378, F.S. Notwithstanding the provisions of s. 120.60(1), F.S., the department is authorized to approve or deny a life-of-the-mine permit within 135 days after receipt of the completed application, receipt of the timely requested additional information, or correction of errors or omissions.

Rationale: The Legislature established a special procedure for life-of-the-mine permits that relieves the mining operator from the requirement to obtain separate construction and operation permits for the entire life of the mining operation. The department is required to review a greater amount of information per application for each consolidated application. As a result, the department needs a longer period of time (135 versus 90 days) to approve or deny the completed permit application. The public interest is served by this exemption from the 90-day time clock; since without it, the department would be unable to process such life-of-the-mine permits.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

Land and Water Management

380.06(9)(a)3.

Chapter 380, F.S., establishes thresholds for determining whether projects must undergo review as a development-of-regional impact (DRI), and also the substantive and procedural requirements attendant that review.
Section 380.06(9), F.S., provides a DRI developer with the option to undergo *conceptual* agency DRI review for purposes of determining what permits may be necessary, whether information submissions to different agencies may be coordinated, and the like.

An application for development approval (ADA) for a DRI or for conceptual review of a DRI is first reviewed to see if it is "sufficient." See s. 380.06(10), F.S. If the original submittal is not sufficient, the regional planning council may ask for additional information. If this additional information is determined to not make the ADA sufficient, a second sufficiency round may be necessary.

Under s. 120.60(1), F.S., an application is deemed granted by default if the agency does not act upon it in ninety days. Section 380.06(9)(a)3, F.S., exempts conceptual DRI review from this ninety day limitation.

Rationale: An ADA for a DRI is a very complex document, and it often takes quite some time to assemble the data and analyses for one to be deemed sufficient. Ninety days is simply not enough time to go through one or two sufficiency rounds.

Recommendation: The Department of Community Affairs recommends that this provision should be retained for the reasons set forth immediately above.

Staff of the Committee on Community Affairs concurs with the department's recommendation to retain the exemption. The review process for a proposed development of regional impact is very complex and requires review by multiple state agencies. The review of a proposed development of regional impact may exceed 90 days, but the fact that the developer has the option of conceptual review encourages good planning on the front end of what will be a large-scale development with multijurisdictional impacts. It is also important to note the development-of-regional-impact review process was revised in ch. 2006-220, L.O.F. As this legislation was developed, there were several stakeholder meetings and the exemption from the 90-day limitation was never brought up as an issue.

380.06(23)(d)

Section 380.06(23), F.S., authorizes the state land planning agency to adopt rules relating to developments-of-regional impact (DRI).
Section 380.06(23)(d), F.S., specifically authorizes the agency to adopt as rules uniform criteria for assessing and collecting fees charged by regional planning agencies for the review of DRIs and Florida Quality Developments. One portion of this section exempts the adoption of these rules from rule challenges under s. 120.56(2), F.S., and drawout proceedings under s. 120.54(3)(c)2, F.S. These rules have been adopted and are in effect.

Rationale: As with the almost identical provision in s. 163.3177(9), F.S., this provision allows the uniform fee criteria to be adopted without the potential delay of rule challenges and drawout proceedings.

Recommendation: The Department of Community Affairs would not object to this provision being modified or removed. The department would recommend that the Florida Regional Council Association be contacted regarding any potential change.

Staff of the Committee on Community Affairs recommends that this exemption should be repealed. This exemption was likely provided to get the program in place quickly and encourage developers to participate in the program. This program is an alternative to the development-of-regional-impact review process. According to the department, 18 developments have been designated as Florida Quality Developments.

Developmental Disabilities

393.0661(3)

The statutes provide here that pending the adoption of rate methodologies pursuant to nonemergency rulemaking under s. 120.54, F.S., the Agency for Health Care Administration (AHCA), may adopt emergency rules for services or rate reductions in order to remain within appropriation. This ostensibly provides for emergency rules without having to make the findings required by s. 120.54(4)(a), F.S., and without having to comply with the time limits imposed by s. 120.54(4)(c), F.S., in order to comply with the availability of money or any directions or limitations provided in the General Appropriations Act. Rules adopted through this emergency process remain in effect until replaced by rules adopted through the normal procedures or by another emergency rule.

Rationale: The AHCA is the federally approved and state-designated single agency for Medicaid, although various arms of the program are delegated to and administered by other agencies. These exceptions to emergency rulemaking

procedures provide an expedited process for making any necessary adjustments to the program in order to stay within the budget appropriated.

Recommendation: The provision as currently drafted can never be triggered unless the agency undertakes adoption of a new rate methodology. This is unlikely to occur in the foreseeable future. If the Legislature wants the AHCA to have the ability to use this emergency rulemaking provision, the words "Pending the adoption of rate methodologies pursuant to nonemergency rulemaking under s. 120.54," should be removed. Otherwise, this emergency rulemaking authority is essentially nullified. The APD recommends that this exemption continue, in light of the rising medical costs associated with the programs and need for flexibility in adjusting them to comply with budgetary limitations.

Staff of the Committee on Children and Families concurs that the exemption should be modified and otherwise retained.

393.125(1)(c)

This provision states that a request for hearing shall be made to the agency, in writing, within 30 days' receipt of the notice of a right to hearing.

Rationale: There is no apparent rationale for this provision. Rule 28-106.111(2), F.A.C., provides that unless otherwise provided by law, hearings shall be requested in 21 days. The Medicaid hearing procedures, adopted based on federal rule requirements, provide 90 days for hearing requests, per Rule 65-2.046(1), F.A.C. The 90-day rule applies to Medicaid hearings and the 21-day rule applies to APD non-Medicaid hearings before DOAH. There does not appear to be sufficient justification for a third hearing deadline requirement.

Recommendation: The Agency for Persons with Disabilities recommends that the 30-day provision should be deleted. Furthermore, since hearing rights are already adequately provided by law and rule for both DOAH hearings and Medicaid hearings, s. 393.125(1), F.S., could be deleted. It does not clearly apply to either DOAH hearings or Medicaid hearings.

Staff of the Committee on Children and Families concurs in the recommendation.

Environmental Control

403.0872

Provides that s. 403.0872, F.S., will govern in the case of any inconsistencies between s. 403.0872 and ch. 120, F.S.

Rationale: Subsection 403.061(35) requires the Department of Environmental Protection to implement the provisions of the federal Clean Air Act, in conjunction with other duties to protect Florida's air quality. This statute establishes Florida's entire Title V air permitting process consistent with the federal requirements for such permits (draft permit subject to comment/petition, proposed permit to EPA and then final permit). To maintain the United States Environmental Protection Agency's approval of Florida's air program, this exemption from rulemaking must be maintained as it is. Failure to obtain an approved Title V program results in the imposition of penalties, such as loss of federal highway funds. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.0876(3)(b)

Description: Provides for an expedited s. 120.57, F.S., hearing at the [permit] applicant's discretion.

Rationale: The Legislature established a special procedure for the expeditious processing of certain complex permits, with the express purpose of reducing the time within which these permit applications are acted on. If the intent to issue such a permit is administratively challenged, and the normal timeframes of ch. 120, F.S., are followed, the ultimate issuance of the permit could be delayed by months. The Legislature thus created a special requirement that any administrative hearings held should be expedited in order to accelerate the permit process. As long as this special permit process continues to exist, the requirement for expedited hearings continues to serve the public interest.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.0885(3)

Applications for NPDES permits are subject to federal regulations. The Department of Environmental Protection is specifically exempted from s. 120.60, F.S.

Rationale: The exemption from s. 120.60, F.S., in s. 403.0885(3), F.S., is necessary to comply with the requirements in 40 CFR part 124 subpart A and thereby allow Florida to have an approved NPDES program. This exemption replaces the s. 120.60, F.S., time clocks for review of a permit application with time clocks established in federal regulations. It also eliminates the possibility of an applicant receiving a default permit under s. 120.60, F.S., to discharge wastewater to surface waters. The public interest is served by Florida having an approved federally NPDES program as stated in s. 403.0885(1), F.S.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.0885(4)

Requires the Department of Environmental Protection to respond in writing to any written comments regarding a pending application for a state NPDES permit and provides that any such response "shall not constitute agency action for purposes of s. 120.57 or other provisions of Chapter 120."

Rationale: The department is required to respond in writing to any written comments from the Florida Fish and Wildlife Conservation Commission (FFWCC) on a pending application for a state NPDES permit. This section does not provide an exemption from ch. 120, F.S., but is merely clarifying that such response from the Department is not considered agency action as defined under s. 120.52(2), F.S. After responding to the FFWCC comments the department must still decide whether to issue or deny the permit, which will then provide a point of entry to challenge the agency action.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.201

Section 120.542, F.S., provides for variances and waivers from agencies' rules. Section 403.201, F.S., allows the department to grant a variance from provisions in either Part I of Chapter 403, F.S., or department rules adopted thereunder. The conditions for granting these variances are different from s. 120.542, F.S.

Rationale: Section 403.201, F.S., was promulgated in 1967, and has been used many times over the years. Its conditions and ability to vary from a statutory provision are tailored to the department's program submittals to the U.S. EPA when seeking federal delegation or approval of those programs. Deletion of this exemption may jeopardize these program's delegations or approvals from the EPA.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.42(3)(b)5.b.

Meetings exempt from chapter 120, F.S., notice requirements.

Rationale: None. The provision sunsetted in 2002.

Recommendation: The Department of Environmental Protection recommends that the exemption be repealed.

Staff of the Committee on Environmental Preservation recommends that the exemption be repealed.

403.527(4)(c)

Notwithstanding the provisions of ch. 120, F.S., to the contrary, this section provides for the automatic inclusion of certain persons as parties to a site certification hearing.

Rationale: This provision is found in the Transmission Line Siting Act. All of the siting acts have unique provisions for participation as parties in certification cases. These acts address land use issues, environmental issues and broader public interest issues. Because of the many issues that must be weighed and resolved in these cases, the acts were created to allow a broader ability to participate than is allowed under ch. 120. Similar provisions are found at s. 403.508(3)(c), F.S.,

which is the relevant provision for the Power Plant Siting Act, and s. 403.9411(4)(c), F.S., which is the relevant provision under the Natural Gas Pipeline Siting Act.

The policy of broadening the ability to participate as parties without necessarily showing that the participant's substantial interests are affected was designed to accommodate interested public agencies, the public and public interest groups. The process was designed to be as open as possible, to make sure that all issues are presented to the Siting Board to enable them to make an informed determination. This provision was created to ensure the ability for such groups to participate. Thus, the public interest is still served by this provision.

Recommendation: The agency recommends that the sections relating to parties in the Siting Acts, ss. 403.527(4)(c), 403.508(3)(c) and 403.9411(4)(c), F.S., should be retained unchanged.

Staff of the Committee on Environmental Preservation recommend that the exemptions be retained unchanged.

403.722(10)

Establishes deadlines for permitting hazardous waste facilities that differ from those found in s. 120.60, F.S.

Rationale: The initial public policy purpose in creating this exemption was to ensure that state hazardous waste permitting requirements would be consistent with and equivalent to federal requirements. The State of Florida is authorized by EPA to implement a hazardous waste regulation program in lieu of the federal program. EPA provides substantial funding for the state hazardous waste program. Section 120.60(1), F.S., provides a 30-day time period to review a permit application for errors and omissions and mandates that a permit be issued by default if an agency does not act to issue or deny the permit within 90 days of receipt of a complete application. Federal regulations require a 45-day notice period for hazardous waste permits and do not allow a default permit. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.784

Provides that ch. 120, F.S., applies to the Statewide Multipurpose Hazardous Waste Facility Siting Act "except to the extent that the alternative proceedings are expressly provided [in the act]."

Rationale: The initial public policy purpose in creating Statewide Multipurpose Hazardous Waste Facility Siting Act was to balance the state need for adequate capacity for treatment, storage and disposal of hazardous waste with environmental and other public concerns. The siting of a Multipurpose Hazardous Waste Facility poses many land use, environmental, and public interest issues. The location of such a facility in a community raises a high degree of public scrutiny and concern. The Act provides a unique procedure for certification of a statewide multipurpose hazardous waste facility. The Governor and Cabinet are designated as the Siting Board for purposes of the Act. Certification is the sole license of the state and any agency necessary for locating, constructing, operating and maintaining the facility, except for permits required by a federally delegated or approved program, permits for major sources of air pollution, and permits under the National Pollutant Discharge Elimination System (NPDES). Deviations from the normal ch. 120 process are designed to accommodate the presentation and resolution of all these issues. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged. (Staff of the Committee on Environmental Preservation notes that it is anticipated that legislation will be filed to repeal this entire provision of law.)

403.787(4)(c)

Contains a provision similar to s. 403.527(4)(c), F.S., for certification hearings regarding multipurpose hazardous waste facilities.

Rationale: Section 403.787(4)(c), F.S., sets forth the persons who shall be parties to any certification hearing conducted pursuant to ss. 120.569 and 120.57(1), F.S., [see s. 403.787(2), F.S.], if any of the persons listed files a notice of intent to be a party with the administrative law judge. The persons listed include state agencies; certain public interest organizations; and substantially affected persons, notwithstanding the provisions of ch. 120, F.S., to the contrary. The initial public policy purpose in creating this exemption was to ensure that all persons with a potential interest in the siting, construction, operation and maintenance of a statewide multipurpose hazardous waste facility would have an

opportunity to be heard, even if the person could not otherwise prove the standing requirements of ch. 120.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged. (Staff of the Committee on Environmental Preservation notes that it is anticipated that legislation will be filed to repeal this entire provision of law.)

403.7895(2)

Exempts from s. 120.60(1), F.S., applications for commercial hazardous waste incinerators for which there was no permit prior to May 12, 1993.

Rationale: Section 403.7895(2), F.S., requires that a "certificate of need" be issued by the Governor and Cabinet sitting as the Stateside Multipurpose Hazardous Waste Siting Board before any hazardous waste incinerators are permitted in the State of Florida, notwithstanding the provisions of s. 120.60(1), F.S. Section 120.60(1), F.S., provides a 30-day time period to review a permit application for errors and omissions and mandates that a permit be issued by default if an agency does not act to issue or deny the permit within 90 days of receipt of a complete application. The initial public policy purpose in creating this exemption was to allow time for the certificate of need to be issued by the board and to ensure that no default permit would be issued without a certificate of need. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.8055

This provision provides a "short form" rule promulgation procedure for Department of Environmental Protection (DEP) rules which are substantively identical to Federal Regulations adopted by the U.S. Environmental Protection Agency (USEPA).

Rationale: Section 120.54(6), F.S., sets out a special rulemaking process when an agency is adopting rules substantively identical to regulations adopted pursuant to federal law. In s. 403.8055, F.S., the Legislature created a slightly

different process that the department must use when adopting rules substantively identical to regulations adopted by USEPA. The primary differences between the statutes and the purpose of these changes is as follows:

1. Both statutes require the agency to publish notice of the intent to adopt a rule at least 21 days before filing the rule. Section 403.8055, F.S., allows the public 21 days after publication for parties to file comments with the agency, while s. 120.54(6)(a), F.S., allows only 14 days for comments. Since EPA regulations tend to be extremely complex, the Legislature presumably intended to give the public more opportunity to comment to the agency than would have been allowed under ch. 120, F.S.

2. Section 403.8055(3), F.S., provides that if the substantively identical regulation upon which a DEP-adopted standard is based is stayed during a federal judicial proceeding, the DEP shall stay the terms and conditions implementing the DEP rule in any issued permit. The stay terminates automatically upon completion of the federal judicial review. There is no similar provision in s. 120.54(6), F.S. This paragraph promotes greater consistency between the way EPA and DEP rules are applied. Such consistency is usually desirable, but may be mandatory when DEP is implementing a federal program through a delegation agreement.

3. Both statutes allow any substantially affected person to file an objection to the rulemaking, which has the effect of requiring the agency to follow normal rulemaking procedures unless the objection is deemed frivolous. Section 403.8055(4), F.S., also allows certain corporations or associations to file objections, even if they are not substantially affected. Section 120.54(6)(c), F.S., defines frivolous to include objections filed when the proposed rule is in no material respect different from the requirements of the federal regulation upon which it is based. Section 403.8055, F.S., contains no such provision. The purpose of this omission is not apparent, and including this definition of frivolous would help clarify those conditions under which DEP could continue to use this rulemaking process.

4. Section 120.54(6)(d), F.S., includes a requirement that if a federal rule is declared invalid or withdrawn, revoked, repealed, remanded, or suspended then DEP must repeal its corresponding rule within 60 days. That statute also includes a requirement that if a federal rule is substantially amended, DEP must amend its rule within 180 days or the original rule is deemed repealed. Neither of these requirements are found in s. 403.8055, F.S. EPA regulations can be large and very complicated, both scientifically and legally, and 180 days may be insufficient time for an agency to amend its corresponding rule. Many federal regulations, as well as the interagency agreements between DEP and EPA, provide for deadlines within which a state with an approved or delegated program must amend its own rules, and there is no need for an arbitrary statutory limit. Moreover, if s.

120.54(6)(d), F.S., did apply, and DEP for whatever reason failed to timely amend its rule (for example, if an objection is filed and DEP is required to use the standard rulemaking process) then the entire state rule is deemed repealed and EPA could revoke its approval of the state program.

The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.815

This provision tolls the s. 120.60, F.S., 90-day period when the Department of Environmental Protection (DEP) requests publication of notice of proposed agency action. Period resumes 14 days after DEP receipt of proof of publication.

Rationale: Section 120.60, F.S., contains no requirements regarding the publication of notice of proposed agency action on permit applications. The Legislature determined that the department may, and in some cases must, require publication of notice of proposed agency action in a local newspaper before taking final action on a permit application. Because of this additional requirement, the Legislature also determined that it was appropriate to toll the 90-day time within which the department was required to take final action on permit applications. Without this exemption, the department would have to complete its review and issue its proposed agency action in far less time than is allowed other agencies in order to allow adequate time for public notice, which could result in less thorough evaluations and thus an increased possibility of environmental harm. A permit applicant could also simply delay publication of the required notice until the 90 days had passed, and would then be entitled to a default permit since the agency had not taken final action within 90 days as required by s. 120.60(1), F.S. Section 403.815, F.S., solves these problems by simply tolling the 90-day time during the time that the Department is waiting for the applicant to publish notice and the time within which substantially affected parties may challenge the proposed action. The public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.854

Section 120.542, F.S., provides for variances and waivers from agencies' rules so long as such relief is not prohibited by the federal government for the agency's implementation or retention of any federally delegated or approved program. Section 403.854, F.S., provides for variances, exemptions, and waivers for public water systems under the state's Safe Drinking Water Act. The conditions for granting these variances, exemptions, and waivers are different from s. 120.542, F.S.

Rationale: These types of relief mechanisms must be included to receive and retain EPA approval for the public water system supervisory program. Without these provisions the state may lose federal delegation.

Recommendation: The Department of Environmental Protection recommends that the exemption be retained unchanged.

Staff of the Committee on Environmental Preservation recommends that the exemption be retained unchanged.

403.9411(4)(c)

Provides for inclusion of parties in Division of Administrative Hearings' proceedings, in certain situations, notwithstanding the provisions of chapter 120, F.S., to the contrary.

Rationale: This provision is found in the Natural Gas Transmission Pipeline Siting Act. All of the siting acts have unique provisions for participation as parties in certification cases. These acts address land use issues, environmental issues and broader "public interest" issues. Because of the many issues that must be weighed and resolved in these cases, the acts were created to allow a broader ability to participate than is allowed under ch. 120. Similar provisions are found at s. 403.508(3)(c), F.S., which is the relevant provision for the Power Plant Siting Act, and s. 403.9411(4)(c), F.S., which is the relevant provision under the Natural Gas Pipeline Siting Act.

The policy of broadening the ability to participate as parties without necessarily showing that the participant's substantial interests are affected was designed to accommodate the public, and public interest groups. The process was designed to be as open as possible, to make sure that all issues are presented to the Siting Board to enable them to make an informed determination. This provision was created to ensure the ability for such groups to participate. Thus, the public interest is still served by this provision.

Recommendation: The Department of Environmental Protection recommends that the sections relating to parties in the Siting Acts, ss. 403.527(4)(c), 403.508(3)(c), and 403.9411(4)(c), F.S., should be retained unchanged.

Staff of the Committee on Environmental Preservation concurs.

Health Care Administration

408.039(5)(e)

This statute allows the Agency for Health Care Administration (AHCA) to make determinations on certificate-of-need applications within a specified timeframe without being subject to the time limitations imposed by s. 120.60(1), F.S.

Rationale: This exemption benefits the citizens of Florida by allowing AHCA additional time to make a more careful and thorough review of certificate-of-need applications so that it can make well-reasoned decisions to either grant or deny these applications.

Recommendation: The Agency for Health Care Administration recommends retaining this exemption so that it will not be forced to make rushed decisions on these applications without the benefit of additional time to thoroughly review all the facts and circumstances surrounding the applications.

Staff of the Health Care Committee concurs with the agency's rationale and recommendation to retain this exemption, without modification.

408.039(6)

Section 408.039(6), F.S., establishes a standard for judicial review of disputed certificate-of-need decisions by the Agency for Health Care Administration (AHCA). This statute appears to exempt AHCA from the normal appellate standard of review for administrative final orders in s. 120.68, F.S.

Rationale: The apparent exemption has been neutralized by case law that held that the standard of review in s. 408.039(6), F.S., is not really a different standard of review than that found in s. 120.68(7), F.S. See *Big Bend Hospice v. Agency for Health Care Administration*, 904 So.2d 610 (Fla. 1st DCA 2005). The court concluded "that section 408.039(6)(b) is simply a restatement of the standard of review set forth in section 120.68(7) generally."

Recommendation: The Agency for Health Care Administration does not have an opinion as to whether or not this exemption should be retained.

Because the court case is clear on the standard of review, staff of the Health Care Committee recommends that the statutory language should be modified to be in compliance with the court decision. Staff recommends that s. 408.039(6)(b), F.S., be repealed.

408.7056(3)

This statute exempts the Subscriber Assistance Panel proceedings from ch. 120, F.S. The function of the Subscriber Assistance Panel is to hear grievances submitted by subscribers of managed care entities that have not been resolved by the managed care entity through internal procedures to the satisfaction of the subscriber. The Subscriber Assistance Panel is located within the Agency for Health Care Administration (AHCA).

Rationale: This exemption benefits the citizens of Florida by allowing these types of cases to be resolved in a more efficient and less adversarial manner. The Subscriber Assistance Panel process provides a more personalized response and a more thorough review by multiple individuals with different expertise.

Recommendation: The Agency for Health Care Administration recommends retaining this exemption in order to maintain the efficient grievance resolution process that has been established.

Staff of the Health Care Committee concurs with the agency's rationale and recommendation to retain this exemption, without modification.

Social and Economic Assistance

409.25645(2)

The administrative order issued under this section is exempt from the hearing provisions in ch. 120, F.S.

Rationale: As required by 42 U.S.C. s. 666(c)(1)(A), s. 409.25645, F.S., authorizes the Department of Revenue, the state's Title IV-D agency, to issue administrative orders for genetic testing. The Legislature's rationale for exempting these orders from the hearing requirements of ch. 120 is expressly stated in subsection (2) of the statute which reads: "The administrative order is exempt from the hearing provisions in chapter 120, because the person to whom it is directed shall have an opportunity to object in circuit court in the event the

Department of Revenue pursues the matter by filing a petition in circuit court." Paragraph (1)(c) of the statute provides that "upon failure to appear for the genetic test, or refusal to be tested, the department shall file a petition in circuit court to establish paternity and child support." The statute provides for no other remedy or sanction if the order is not complied with. Because there are no adverse consequences to an individual who does not comply with the agency's order there is no need for an adjudicatory proceeding.

Recommendation: The Department of Revenue recommends retaining the exemption as an individual has the opportunity to object in circuit court and there is no sanction against an individual for not complying with the order.

Staff of the Committee on Children and Families concurs that the exemption should be retained.

409.285(1)

This section states that the hearing authority, the Department of Children and Families (DCF), is responsible for a final administrative decision in the name of the department, and that with regard to the department, the decision is final and binding, thus precluding appeal of that decision by the DCF. This provision currently is interpreted to apply as well to the APD, whose Medicaid hearings are presently administered by DCF hearing officers, so that the APD does not have a right of appeal as provided by the judicial review provisions at s. 120.68(1), F.S., "[a] party who is adversely affected by final agency action is entitled to judicial review."

Rationale: The DCF administers the hearings and, by law, the decision of the hearing officers is the decision of the agency. The law provides that it cannot appeal its own decisions, although this is not a federal requirement and, in fact, many states permit appeals of the hearing officer decisions by either party to the agency head or its designee.

Recommendation: This issue is under discussion at the APD. There are arguments to be considered on both sides of the question of whether or not the APD should be able to appeal DCF Hearing Officers' opinions.

409.912(39)(a)1.

This statute allows the Agency for Health Care Administration (AHCA) to post the Florida Medicaid Preferred Drug List (PDL) and updates to the PDL on the Internet without having to comply with the rulemaking provisions of s. 120.54, F.S. The PDL is a listing of prescription products selected by the Pharmaceutical & Therapeutics Committee (P&T Committee) as cost effective

choices for clinician consideration when prescribing for Medicaid recipients. The PDL is used to inform clinicians of effective products that provide favorable net costs to Medicaid. The PDL also educates clinicians about cost effective choices in prescribing for Medicaid recipients.

Rationale: The PDL benefits the citizens of Florida by allowing the AHCA to save the state millions of dollars each year by bargaining with pharmaceutical companies for supplemental rebates, which lower overall Medicaid pharmaceutical expenditures. The pharmaceutical market is so dynamic, both in terms of price and changes in the availability of certain medications, that the PDL is updated on a quarterly basis. Because of the need to update the PDL so frequently, with some negotiations continuing to the day the proposed PDL is reviewed by the P&T Committee, it would be impractical to go through the rulemaking process. If the PDL was required to be adopted by rule, it would be out-of-date by the time it went into effect. The exemption ensures that any additional rebates obtained through negotiations can be quickly implemented to maximize the cost savings to the state.

Recommendation: The Agency for Health Care Administration recommends retaining this exemption in order to continue saving the state money by being able to negotiate with pharmaceutical companies for lower-priced medications.

Staff of the Health Care Committee concurs with the agency's rationale and recommendation to retain this exemption, without modification.

409.912(39)(a)14.

This statute allows the Agency for Health Care Administration (AHCA) to post prior authorization criteria and protocol, and updates to the list of drugs contained on the Florida Medicaid Preferred Drug List that are subject to prior authorization on an Internet website without amending its rule or engaging in additional rulemaking.

Rationale: This exemption benefits the citizens of Florida by allowing the AHCA to make necessary changes to prior authorization criteria and protocol and to update the list of drugs requiring prior authorization, based on developments in the field of medicine without having to go through the rulemaking process, which could result in delays. These medical developments may include, but are not exclusive to, the approval of new medications that are more effective than traditional treatments, the approval of generic medications that reduce the cost of treatment for certain conditions, or the release of new recommendations from the U.S. Food and Drug Administration regarding the safe use of a particular class of medications. These types of developments occur on a frequent basis and this

exemption from the rulemaking process allows Medicaid recipients to benefit from the rapid publication of these changes on the agency's website.

Recommendation: The Agency for Health Care Administration recommends retaining this exemption in order to allow it to make timely updates to prior authorization criteria and protocol and updates to the list of drugs that are subject to prior authorization based on developments in the field of medicine without being delayed by the rulemaking process.

Staff of the Health Care Committee concurs with the agency's rationale and recommendation to retain this exemption, without modification.

Workers' Compensation

440.021

Workers' compensation adjudications, communications of the results of investigations by the Department of Financial Services (department) pursuant to s. 440.185(4), F.S., and penalty and interest disputes are exempt from ch. 120, F.S.

The Office of Judges of Compensation Claims (JCCs) of the Division of Administrative Hearings is responsible for adjudicating workers' compensation disputes between employers and employees. Sections 440.25 and 440.45(1), F.S., provide statutory deadlines for the adjudication of workers' compensation claims and authority for the director of the Division of Administrative Hearings to adopt rules for adjudications, respectively.

Communications of the results of investigations by the department pursuant to s. 440.185(4), F.S., which is an obsolete cross-reference, are exempt from ch. 120. The department is authorized to assess penalties on employers and carriers pursuant to an action under ch. 440, F.S. The department is authorized to impose penalties and affected parties may appeal such actions through a JCC, pursuant to s. 440.25(2)-(5), F.S., which is also obsolete language.

Rationale: Chapter 120, F.S., addresses controversies involving an individual and a governmental agency, and by contrast, workers' compensation disputes usually involve two or more private entities, and generally only involve a governmental agency if that agency is an employer involved in a workers' compensation benefit dispute. The Florida Supreme Court has recognized this distinction, noting that workers' compensation adjudications are "quasi-judicial" and not "administrative."[52] Section 440.021, F.S., provides that the First District

[52] *Scholastic Systems v. LeLoup*, 307 So.2d 166 (Fla. 1974).

Court of Appeal has jurisdiction to consider appeals from worker's compensation adjudications. Additional costs and delays could be incurred by injured workers and other stakeholders if an additional remedy or layer for the adjudication process was provided through ch. 120 rather than directly to the First District Court of Appeal. In addition, s. 120.80(1), F.S., already provides that adjudication by a JCC is not an agency for purposes of ch. 120.

The ch. 120-exemption relating to specific investigatory authority under s. 440.185(4), F.S., which is referenced in this section, is obsolete since this provision in s. 440.185, F.S., was repealed by the Legislature in 1994. Likewise, the dispute process relating to protesting a penalty or interest dispute assessed by the department is outdated since the JCCs no longer .adjudicate such disputes. Other ch. 120 provisions in ch. 440, F.S., govern interest and penalty protest by parties affected by the division actions.

Recommendation: The department recommends the provisions relating to investigations and penalty and interest protests should be repealed since these provisions are either outdated or redundant and Banking and Insurance staff concurs.

The JCCs recommend retaining the ch. 120 exemption for adjudications, which is already provided in s. 120.80(1), F.S. The JCC s recommend retaining the ch. 120 exemption in this section because any change at this point invites litigation, and could be held by the courts as an abrogation of that ch. 120 exemption, meaning the courts could hold that a repeal of s. 440.021, F.S., is intended to end the exemption, and that the ch. 120 provisions do not necessarily define or delimit the JCCs as that provision is not in ch. 440, F.S.

Staff of the Banking and Insurance Committee concurs with the JCCs.

440.13(11)(d)

The Agency for Health Care Administration (agency) is responsible for certifying medical providers that provide medical treatment to injured workers. The agency is authorized to investigate and to determine whether such providers are engaging in overutilization or improper billing practices, and complying with practice parameters and protocols established pursuant to ch. 440, F.S. The agency is authorized to impose penalties against a provider and take other administrative actions, such as decertification, for noncompliance with the provisions of ch. 440, F.S. Carriers are required to review all medical bills submitted by providers in order to identify overutilitization and billing errors, including compliance with other applicable ch. 440, F.S., provisions, and report all instances of overutilization to the agency. A carrier is authorized to engage peer review consultants to provide such services. Section 440.13, F.S., provides a

process to resolve utilization and reimbursement disputes between carriers and providers.

Section 440.13(11)(d), F.S., provides that certain actions do not constitute agency action and are exempt from the provisions of ch. 120, F.S. including referrals by a carrier or a third-party responsible for utilization reviews; a decision by the agency to refer a matter to a peer review committee for the resolution of a dispute; the establishment by a carrier or a third-party of procedures to review the provision of health care services; and the review proceedings, report, and recommendation of a peer review committee. In 2006, the Department of Financial Services and the agency entered into an interagency agreement to transfer these agency duties to the Division of Workers' Compensation within the Department of Financial Services (department).

Rationale: The actions contained in s. 440.13(11)(d), F.S., that are exempt from ch. 120 are internal procedures used by insurance carriers in their evaluation of medical treatment for injured workers and medical bills submitted by health care providers or are procedures that are part of the investigation of such services by the agency prior to an agency action, such as fines, decertification, denial of payment, and referral and review by the appropriate licensing authority, which would then be subject to ch. 120 rights.

Recommendation: The department recommends retaining the exemption

Staff of the Committee on Banking and Insurance concurs.

440.207

The Department of Financial Services (department) is required to publish an understandable guide to the workers' compensation system in Florida. The Division of Workers' Compensation within the department is responsible for publishing and updating this guide. Section 440.207, F.S., requires the guide to be "understandable," which the section defines to mean "…written at a level of readability not exceeding the eighth grade level…" The guide does not constitute rules or agency action for purposes of ch. 120, F.S.

Rationale: If the guide were subject to ch. 120, this could adversely impact the readability of the guide and the legislative intent for an understandable guide, thereby diminishing the department's ability to provide a user-friendly, accessible, and understandable educational tool in a timely manner. If this guide were subject to ch. 120 additional administrative delays and costs could be incurred attributable to revisions in the guide due to legislative changes to ch. 440, F.S. The exemption appears to merely be a clarification of current law. Agencies typically publish informational guides without these documents being subject to ch. 120.

Recommendation: The department recommends retaining the current exemption.

Staff of the Banking and Insurance Committee concurs with this recommendation.

Unemployment Compensation

443.151(4)(b)2.

Section 443.151(4)(b)2., F.S., outlines the steps an appeals referee may take after a claimant has filed an appeal of an initial determination regarding an unemployment compensation benefits claim. According to the statute, unless an appeal is untimely or withdrawn or review is initiated by the commission, an appeals referee, may only affirm, modify or reverse the determination. However, the appeals referee may only do so after mailing all parties and attorneys of record a notice of hearing at least 10 days before the date of the hearing, rather than the 14-day notice requirement in s. 120.569(2)(b), F.S.

Rationale: The unemployment compensation (UC) program operates as a federal-state partnership under the requirements of the Social Security Act (SSA). States whose laws meet the requirements of federal unemployment compensation law are eligible to receive grants from the federal government for administrative funding to operate the State's UC program. These funds are derived from the federal payroll tax on all businesses liable for unemployment tax.

Section 303(a)(1), SSA, requires that the UC law of a State provide for "[s]uch methods of administration…as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." Section 303(a)(3), SSA, requires that a state law provide for "[o]pportunity for a fair hearing before an impartial tribunal for individuals whose claims for unemployment compensation are denied." These provisions have been interpreted to require that appeals hearings are to be speedy and that benefits due the claimant should be determined in the most expeditious manner possible. Failing that, the purpose of the program would not be served.

In 20 CFR 650.3, the Secretary of Labor interprets ss. 303(a)(1) and (3), SSA, to require that a state law include provision for:

> (1) Hearing and decision for claimants who are parties to an appeal from a benefit determination to an administrative tribunal with the greatest promptness that is administratively feasible, and

> (2) Such methods of administration of the appeals process as will reasonably assure hearing and decision with the greatest promptness that is administratively feasible.

Consequently, to comply with the requirements of federal law and ensure continued administrative funding through federal grants, appeals hearings must be resolved as soon as possible to ensure that payments are made when due.

The exemption contained in s. 443.151(4)(b)2., F.S., is necessary because it allows the Agency for Workforce Innovation, Office of Appeals, to schedule hearings to be convened up to 4 days earlier than other agencies.
As a policy consideration, the "exemption" should be maintained. Federally mandated standards of administration require the Agency for Workforce Innovation (AWI) to resolve 60 percent of its appeals within 30 days of the filing of the appeal. Under these circumstances, hearings must be scheduled and convened as quickly as possible to comply with these federal requirements. Additionally, unemployment compensation hearings primarily concern the adjudication of the rights of unemployed citizens ("claimants") to receive unemployment compensation. Since these individuals may need unemployment benefits to support their families, an expeditious payment of benefits is of critical importance.

Recommendation: In view of the rationale expressed above, AWI recommends retaining the exemption provided in s. 443.151(4)(b)2., F.S.

AWI employs a 10-day notice requirement rather than the APA-sanctioned 14-day notice in order to maintain an efficient system of addressing claims. Based on the federal mandate to AWI to establish a process to efficiently and quickly resolve unemployment benefit claims, as well as the importance of delivering unemployment benefits to those in need, the staff of the committee agrees that the 10-day period assists AWI in meeting its goals. Therefore staff of the Committee on Commerce and Consumer Services recommends that the notice period be retained as currently written in s. 443.151(4)(b)2., F.S.

443.151(4)(e), F.S. (See the analysis for s. 120.80(10), F.S., hereinbefore.)

443.151(7)

This exemption provides claimants in Unemployment Compensation cases may be represented by another person; however, that representative need not be an attorney or be deemed to be a "qualified" representative by the agency as required in other administrative hearings by s. 120.62(2), F.S.

Rationale: The unemployment compensation (UC) program operates as a federal-state partnership under the requirements of the Social Security Act (SSA). States whose laws meet the requirements of federal unemployment compensation law are eligible to receive grants from the federal government for administrative funding to operate the state's UC program. These funds are derived from the federal payroll tax on all businesses liable for unemployment tax.

Section 303(a)(1), SSA, requires, in pertinent part, that the UC law of a state provide for "[s]uch methods of administration…as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due…." Section 303(a)(3), SSA, requires that a state law provide for "[o]pportunity for a fair hearing, before an impartial tribunal, for individuals whose claims for unemployment compensation are denied." These provisions appear to require that appeals hearings remain simplified so that a claimant may be able to understand the appeals procedures without having to hire an attorney to protect his or her rights.

Finally, under Section 302(a), SSA, the Secretary of Labor is required to provide to states only such amounts as are necessary for the proper and efficient administration of the state's UC law. In this regard, the funding formulas utilized for appeals functions seem to require the type of informal hearings outlined in s. 303(a)(1) and (3), F.S., which are intended to be efficient and expeditious.

Consequently, to comply with the requirements of federal law and ensure continued administrative funding through federal grants, appeals hearings must be simple as well as quick and inexpensive.

The exemption contained in s. 443.151(7), F.S., is necessary because it allows a participant in an unemployment hearing to bring a representative to a hearing without requiring that the representative be an attorney or deemed to be a "qualified" representative by the agency.

As a policy consideration, the "exemption" should be maintained. According to the Agency for Workforce Innovation (AWI), most participants in unemployment hearings cannot afford an attorney. While a party has a right to be represented in an appeal, the United States Department of Labor intends that procedures be simplified and informal so that a claimant may be able to prosecute his or her claim without the expense of obtaining legal counsel. In practice, a party will frequently be accompanied by a family member or friend to assist in the appeal.

Even if a claimant has assistance, the appeals referee, as the representative for the agency, has the task of discovering the facts and making affirmative findings. It is the duty of the referee to conduct the examination and to get all relevant

information into the record. Although the parties or their representatives will testify, the referee may not simply rely on the parties to prove their own cases without help from the official presiding over the hearing. Therefore, whether a representative is a lay person rather than an attorney would not interfere with evidence gathering and making findings in the hearing process. The exemption gives the public greater flexibility in choosing how to approach an unemployment benefits hearing, thereby further protecting claimants' due process rights.

Recommendation: In view of the rationale expressed above, AWI recommends retaining the exemption provided in s. 443.151(7), F.S.

Section 120.62(2), F.S., provides:

> Any person compelled to appear, or who appears voluntarily, before any presiding officer or agency in an investigation or in any agency proceeding has the right, at his or her own expense, to be accompanied, represented, and advised by counsel or by other *qualified representatives*. (Emphasis added)

A 2001 Florida Bar Journal article noted that "[t]he APA was intended to be user-friendly so that those affected by agency action could influence agency decisionmaking and appear before agencies without the need for an attorney." While Florida case law that directly addresses the meaning of "qualified representative," could not be found, the journal article offers some clarity.

The article mentions that a party to an administrative hearing, like a party in a circuit court hearing, may have someone else appear on his or her behalf. However, under the APA and unlike in circuit court proceedings, a party may be represented by someone other than an attorney. Importantly, the representative must be deemed *qualified* to act as a representative, a determination made by the presiding judge. According to the article,

> [i]f a party wishes to be represented by a qualified representative, the administrative law judge must query the representative to be sure that he or she is capable of representing the party's rights and interests. While at least a modicum of knowledge of the applicable state procedural laws is required, the nature of the proceeding and complexity of the matter to be adjudicated dictates the qualifications required.[53]

Therefore, whether an individual is qualified is a question for the judge.

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[53] Mary Smallwood and Margaret-Ray Kemper, *A Comparison of the APA and Circuit Court Procedures*, 75-JAN FLBJ 54 (2001).

Section 443.151(7), F.S., and Rule 60BB-5.008, F.A.C., permit UC claimants to avoid this inquiry altogether if they choose to be represented by parties other than themselves. In a UC hearing, a person only needs to be *authorized* by the claimant to act as a representative. The appeals referee is not explicitly required to make an inquiry into qualifications of the representative, thereby giving claimants the flexibility to choose whomever they wish as representatives.

According to the AWI, the exemption from the APA helps claimants who may be unfamiliar with the judicial process navigate the UC system by permitting representation by people with whom the claimant may feel comfortable. Since administrative proceedings are intended to be user-friendly, the agency explanation appears rationally based.

In addition, given the federal directive that state agencies administer their UC programs efficiently in order to continue to receive funding, the Legislature should maintain the exemption.

For the reasons stated above, staff of the Committee on Commerce and Consumer Services recommends that the exemption be retained.

Workforce Innovation

445.004

Section 445.004, F.S., outlines the creation, purpose, board membership, board duties and powers of Workforce Florida, Inc. (WFI). That statutory provision also provides that WFI will be organized as a not for profit corporation, "shall not be a unit or entity of state government,"[54] and shall be exempt from chs. 120, the Administrative Procedures Act (APA), and 287, F.S. (state procurement chapter). The exemption language was added to the statute in 2005 by s. 3, ch. 2005-255, L.O.F. (SB 1650).

Rationale: WFI was created by the Workforce Innovation Act, s. 1, ch. 2000-165, L.O.F., which reorganized Florida's labor system. According to a report published by the Select Committee on Workforce Innovation,[55] the entity responsible for recommending the reorganization, the Legislature intended WFI to "operate as an efficient, flexible, productive private corporation with limited overhead."[56] In order to accomplish this objective, the Legislature specifically stated that WFI "shall not be a unit or entity of state

[54] Section 445.004(1), F.S.
[55] The Committee consisted of 12 senators.
[56] Florida Senate, Select Committee on Workforce Innovation, *Workforce Innovation Act or 2000*, March 2000.

government"[57] and, although housed within the Agency for Workforce Innovation (AWI), WFI would not be "subject to [the] control supervision or direction"[58] of AWI.

The Legislature recently clarified its intention by inserting language specifically stating that WFI is exempt from ch. 120.

Recommendation: The General Counsel's office for WFI indicates that the Legislature never intended to make WFI a state entity that would be subject to ch. 120 and, therefore, the exemption should be retained to comport with this original legislative intent.

Staff of the Committee on Commerce and Consumer Services recommends that the exemption be retained in order to preserve the original intent behind the creation of WFI—to promote efficiency, flexibility, and productivity and to limit overhead in setting policy for Florida's labor and employment system. Complying with the APA may impede WFI's ability to make policy in an efficient, cost-effective manner.

Labor Organizations

447.207(6)

Any Public Employees Relations Commission (PERC) statement of general applicability that interprets, implements, or prescribes law or policy, made in the course of adjudicating ss. 447.307 or 447.503, F.S., case shall not constitute a rule under s. 120.52, F.S.

Rationale: According to the Public Employee Relations Commission, this exemption is necessary to enable PERC to fashion labor law or policy in adjudicating cases without having to defend its decisions in rule challenge proceedings before DOAH. Otherwise, PERC's final agency action would arguably constitute a rule subject to challenge in a DOAH proceeding. See s. 120.56, F.S., 2005.

Recommendation: PERC recommends retention of the exemption.

Staff of the Committee on Governmental Oversight and Productivity recommends retention of the exemption.

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[57] Section 445.004(1), F.S.
[58] *Id.*

447.207(7)

Disposition of a petition by the Public Employees Relations Commission (PERC) does not constitute a rule under s. 120.52, F.S.

Rationale: This exemption is similar to the exemption in s. 447.207(6), F.S., except that it specifically addresses PERC final agency action in resolving petitions for declaratory statements. It again insulates PERC from a rule challenge by a party who disagrees with PERC's disposition of a petition and makes clear that PERC's decision is final agency action which may be challenged by appeal to the district courts in the same fashion as a declaratory judgment opinion rendered by a circuit court.

Recommendation: PERC recommends retention of the exemption.

Staff of the Committee on Governmental Oversight and Productivity recommends retention of the exemption.

447.207(10)

Appeals to the commission, under s. 447.207(8) or (9), F.S., shall be the exclusive review notwithstanding chapter 120, F.S.

Rationale: According to the Public Employee Relations Commission (PERC), the Legislature has bestowed jurisdiction upon PERC to adjudicate cases arising under these statutory sections because they are all labor and employment law related and because of PERC's history of promptly adjudicating cases under its jurisdiction. In 1986, PERC was vested with jurisdiction of State Career Service System cases pending before the former Career Service Commission. In less than a year, PERC cleaned up a massive backlog of cases and was conducting hearings within 30 days of a filed disciplinary appeal.

Recommendation: PERC recommends retention of the exemption.

Staff of the Committee on Governmental Oversight and Productivity recommends retention of the exemption.

447.208(1)

Provides alternative timing and procedures to chapter 120, F.S., and states that the s. 447.208, F.S., procedures will govern in the event of a conflict.

Rationale: This provision requires a hearing within 30 days of the filing of an appeal, unless an extension is granted for good cause shown, and the granting of discovery only upon a showing of extraordinary circumstances, which are specific

exemptions from ch 120, F.S. This exemption is a further reflection of the legislative desire that these employment law matters be handled expeditiously in order to serve the public policy articulated in s. 447.201, F.S.

Recommendation: PERC recommends retention of the exemption.

Staff of the Committee on Governmental Oversight and Productivity recommends retention of the exemption.

447.503

Provides procedures for disputes regarding unfair labor practices which procedures shall govern in the event of conflicting procedures in chapter 120. F.S.

Rationale: According to the Public Employee Relations Commission (PERC), as stated in the first sentence of this statute, "it is the intent of the Legislature that the commission act as expeditiously as possible to settle disputes regarding unfair labor practice charges." The provisions of this section are designed to facilitate that intent, again, to serve s. 447.201, F.S., policy.

Recommendation: PERC recommends retention of the exemption.

Staff of the Committee on Governmental Oversight and Productivity recommends retention of the exemption.

447.5035

This provision provides an exemption from s. 120.69(1)(b)1., F.S., notice requirements.

Rationale: According to the Public Employee Relations Commission (PERC), this exemption allows state residents who have a substantial interest in a PERC order to petition the circuit court for enforcement of the order without having to wait 60 days from when the resident notifies the agency head, the Attorney General, and the alleged violator of the agency action, of the agency action that has been violated. Again, although PERC is an agency under the executive branch of government, it is quasi-judicial in nature and its only business is the adjudication of petitions, charges, disciplinary appeals, and complaints similar to DOAH and the courts. PERC's final orders provide the parties with notice of what remedy PERC is awarding and who is to provide it. No separate notice to a noncomplying party or to the Attorney General is necessary.

Recommendation: PERC recommends retention of the exemption.

Staff of the Committee on Governmental Oversight and Productivity recommends retention of the exemption.

Business and Professional Regulation: General Provisions

455.2235(4)

Section 455.2235, F.S., provides that each board within the Department of Business and Professional Regulation, or the department when there is no board, "shall adopt rules to designate which violations of the applicable professional practice act are appropriate for mediation." Section 455.2235(4), F.S. provides that each licensee may use the mediation process only three times without the approval of the department. The department's decision is not considered final agency action for purposes of chapter 120, F.S.

Rationale: The department responded that "the number of complaints submitted to the Department against the professions regulated under chapter 455 has increased in the last two years and mediation has allowed the Department to resolve these complaints without the need for further investigation and legal prosecution. In addition the Office of Program Policy Analysis & Government Accountability (OPPAGA) encouraged greater use of mediation in Report No. 05-15.[59] Mediation gives the division the flexibility to deal with these issues to the complainant's satisfaction. Mediation is an informal process that occurs prior to a probable cause hearing when nothing is subject to public disclosure. In addition, the licensee's due process rights are not lost because if the Department chooses to prosecute the licensee still has remedies under chapter 120. The main factor in the decision is the safety of the public and the licensee's willingness to work with the department and quickly resolve the issue. Once a licensee is determined to be an ongoing threat or fails to respond to the complaints, his subsequent complaints will be fully investigated pursuant to section 455.225, Florida Statutes."

Recommendation: The department "unequivocally recommends that this exemption remain because of the benefits it provides both parties."

Staff of the Committee on Regulated Industries recommends retaining the exemption. While the department's rationale primarily addresses the impact on mediation, allowing a licensee to challenge the department's decision on how many times a licensee has utilized mediation would defeat the time saving purpose of mediating these disputes. Once a licensee has had more than three actions against him or her for violating their practice acts, the fact finding process under ss. 120.569 and 120.57, F.S., would be available to the licensee. The licensee's

[59] *Greater Use of Alternative Resolution Could Aid Consumer Protection*, OPPAGA Report No. 05-15, March 2005.

due process rights are preserved under the formal hearing process of s. 120.57(1), F.S. The licensee may also request an informal hearing under s. 120.57(2), F.S.

455.225(4)

Section 455.225(4), F.S., provides an exemption from the notice requirements of s. 120.525, F.S., for probable cause panels. Section 120.525, F.S., requires that each agency give notice of public meetings, hearings, and workshops in the Florida Administrative Weekly at least seven days before the event.

Rationale: The Department of Business and Professional Regulation responded that "the rationale behind the exemption contained in section 455.225(4), Florida Statutes, is that, unless probable cause is found, the matters considered before the probable cause panel remain confidential. The department's investigative files and the proceedings of the panel are exempt from public disclosure under chapters 119 and 286, Florida Statutes, respectively. The transcript of the panel, the reports and investigative information only become public record 10 days after probable cause has been found. If no probable cause is found, then a case remains confidential. Accordingly, probable cause panel meetings are exempt from the notice and publication requirements in section 120.525, Florida Statutes."

Recommendation: The department "unequivocally recommends that this exemption be retained as it is consistent with the public disclosure exemptions for probable cause proceedings and the due process considerations supporting those exemptions."

Staff of the Committee on Regulated Industries concurs with retaining the exemption. These proceedings are exempt from s. 286.011, F.S., so the hearings are not open to the public.

Health Professions and Occupations: General Provisions

456.073(4)

Section 120.525, F.S., requires each agency to give notice of public meetings, hearings, and workshops by publication in the Florida Administrative Weekly not less than 7 days before the event. The notice must include a statement of the general subject matter to be considered. The exemption to s. 120.525, F.S., contained in s. 456.073(4), F.S., authorizes the Department of Health and health care profession boards to waive publication of any notice of the proceedings of a probable cause panel of the department or boards in the Florida Administrative Weekly.

Rationale: The waiver of publication of notice for such proceedings is consistent with the confidentiality that the Legislature has conferred upon the disciplinary process of health care professions regulated by the Department of Health and boards. Section 456.073, F.S., specifies that all proceedings of a probable cause panel of the department or a board are exempt from the requirements of the Public Meetings Law until 10 days after probable cause has been found to exist by the panel or until the subject of the investigation waives his or her privilege of confidentiality.[60] Any case that is dismissed prior to a finding of probable cause is confidential and exempt from the Public Records Law.[61] A disciplinary complaint and all information obtained pursuant to an investigation by the Department of Health are confidential and exempt from the Public Records Law until 10 days after probable cause has been found or until the regulated professional or subject of the investigation waives his or her privilege of confidentiality, whichever occurs first.[62] When probable cause has been found and the complaint and related information is public, any subsequent probable cause panel proceeding convened to reconsider the original finding of probable cause is open to the public and a notice is placed in the Florida Administrative Weekly.

The exemption to s. 120.525, F.S., is also consistent with s. 120.57, F.S., which specifies additional procedures for disputes between agencies and persons under the Administrative Procedure Act. Subsection 120.57(5), F.S., provides that the section does not apply to agency investigations preliminary to agency action. An agency's actions are preliminary and it is still investigating an allegation of professional misconduct until it finds that probable cause exists.

Recommendation: The Department of Health recommends retaining the exemption in s. 456.073(4), F.S., because it is consistent with a legislative policy to preserve the confidentiality of the disciplinary process used for health care professions until a finding of probable cause has been made for a complaint.

Staff of the Health Care Committee concurs with the Department of Health's recommendation to retain the exemption in s. 456.073(4), F.S. However, committee staff would additionally recommend requiring public notice under s. 120.57, F.S., for any probable cause panel proceedings convened to reconsider the original finding of probable cause or any probable cause panel proceedings in which the subject of the complaint waives confidentiality, because the complaint and related information are already available to the public at that point in time.

[60] See s. 456.073(4), F.S.
[61] See s. 456.073(2), F.S.
[62] See s. 456.073(10), F.S.

Medical Practice

458.345(5)

Section 458.345, F.S., specifies requirements for the registration of resident physicians, interns, and fellows in fellowship training with the Board of Medicine. Resident physicians, interns, and fellows are explicitly subject to the provisions in s. 458.331, F.S., relating to grounds for which such practitioners may be disciplined by the Board of Medicine. Section 458.345(5), F.S., provides an exemption to the definitions in chapter 120, F.S., that are codified in s. 120.52, F.S. Section 458.345(5), F.S., provides that notwithstanding any provision of s. 458.345, F.S., or s. 120.52, F.S., to the contrary, any person who is registered as a resident physician, intern, or fellow is subject to s. 458.331, F.S.

Rationale: Section 120.52, F.S., specifies definitions for purposes of the Administrative Procedure Act. It defines "license" to mean a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act. "Licensing" is defined by s. 120.52, F.S., to mean the agency process respecting the issuance, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license or imposition of terms for the exercise of a license.

The exemption to s. 120.52, F.S., in s. 458.345, F.S., was enacted in 1997 when resident physicians, interns, and fellows were first explicitly made subject to provisions relating to grounds for which such practitioners may be disciplined by the Board of Medicine. The exemption to s. 120.52, F.S., was enacted, in part, to address any legal arguments that could be made by any resident physicians who were already registered and who were unaware that as registrants they could be disciplined by the Board of Medicine. Today, the need for the exemption from s. 120.52, F.S., is unclear and appears to directly contradict the definition of "license" as used in s. 120.52, F.S. Elimination of the exemption from s. 120.52, F.S., would be consistent with and complement the Board of Medicine's authority to regulate resident physicians who are registered under ch. 458, F.S.

Recommendation: The Department of Health recommends eliminating the exemption from s. 120.52, F.S., because existing statutory language is adequate to remove any doubt that individuals "registered" under s. 458.345(5), F.S., are subject to discipline. The Department of Health also argues that the "registration" held by such individuals constitutes a "license" for purposes of regulatory proceedings subject to ch. 120 relating to the Administrative Procedure Act, ch. 456, F.S., relating to the general regulatory provisions for health care professions, and ch. 458, F.S., relating to the medical practice act.

Staff of the Health Care Committee recommends eliminating the exemption from s. 120.52, F.S., in s. 458.345(5), F.S.

Osteopathic Medicine

459.021(8)

Section 459.021, F.S., specifies requirements for the registration of resident physicians, interns, and fellows in fellowship training with the Board of Osteopathic Medicine. Resident physicians, interns, and fellows are explicitly subject to the provisions in s. 459.015, F.S., relating to grounds for which such practitioners may be disciplined by the Board of Osteopathic Medicine. Section 459.021(8), F.S., provides an exemption to the definitions in chapter 120, F.S., that are codified in s. 120.52, F.S. Section 459.021(8), F.S., provides that notwithstanding any provision of s. 459.021, F.S., or s. 120.52, F.S., to the contrary, any person who is registered as a resident physician, intern, or fellow is subject to s. 459.015, F.S.

Rationale: Section 120.52, F.S., specifies definitions for purposes of the Administrative Procedure Act. It defines “license” to mean a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act. “Licensing” is defined by s. 120.52, F.S., to mean the agency process respecting the issuance, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license or imposition of terms for the exercise of a license.

The exemption to s. 120.52, F.S., in s. 459.021(8), F.S., was enacted in 1997 when resident physicians, interns, and fellows were first explicitly made subject to provisions relating to grounds for which such practitioners may be disciplined by the Board of Osteopathic Medicine. The exemption to s. 120.52, F.S., was enacted, in part, to address any legal arguments that could be made by any resident physicians who were already registered and who were unaware that as registrants they could disciplined by the Board of Osteopathic Medicine. Today, the need for the exemption from s. 120.52, F.S., is unclear and appears to directly contradict the definitions of “license” and “licensing” as used in s. 120.52, F.S. Elimination of the exemption from s. 120.52, F.S., would be consistent with and complement the Board of Osteopathic Medicine ’s authority to regulate resident physicians who are registered under ch. 459, F.S.

Recommendation: The Department of Health recommends eliminating the exemption from s. 120.52, F.S., because existing statutory language is adequate to remove any doubt that individuals “registered” under s. 459.021(8), F.S., are subject to discipline. The Department of Health also argues that the “registration”

held by such individuals constitutes a "license" for purposes of regulatory proceedings subject to ch. 120, F.S., relating to the Administrative Procedure Act, ch. 456, F.S., relating to the general regulatory provisions for professions, and ch. 459, F.S., relating to the osteopathic medical practice act.

Staff of the Health Care Committee recommends eliminating the exemption from s. 120.52, F.S., in s. 459.021(8), F.S.

Funeral, Cemetery, and Consumer Services

497.153(9)(a)-(c)

The following determinations shall not entitle any person to proceedings under chapter 120, F.S.:

> (a) A determination by the Department of Financial Services to exercise its authority under this chapter to investigate, financially examine, or inspect any person or entity; or a determination by the department concerning how to conduct such investigation, financial examination, or inspection; or a determination by the department concerning the content of any report of investigation, financial examination, or inspection.
>
> (b) A determination by the department that there is reasonable cause to believe that a licensee under this chapter is subject to disciplinary action under this chapter and that the matter should be presented to a probable cause panel of the board, or that the licensee is not eligible for a citation pursuant to criteria established by the board.
>
> (c) A determination by a probable cause panel of the board that probable cause does or does not exist, or a determination by the department under paragraph (3)(b).

Rationale: The Department of Financial Services responded that "section 497.103(2)(a), Florida Statutes, grants the department the authority to protect the public health, safety and welfare by investigating, inspecting, and examining death care industry licensees regulated under chapter 497, Florida Statutes. If it is concluded after investigation, inspection or examination that there is reasonable cause to believe there is a statutory violation and the licensee is not eligible for a citation, the matter is referred to a probable cause panel of the Board of Funeral, Cemetery and Consumer Services for determination within 30 days. If the probable cause panel does not act within the prescribed time period, or it finds no probable cause, the department may determine on its own that probable cause exists. If there is a finding of probable cause, the department files an administrative complaint against the licensee."

"The above processes are exempt from chapter 120, Florida Statutes, until the administrative complaint is filed by the department. The exemption from chapter 120, Florida Statutes, allows the department to conduct an efficient and thorough investigation, inspection or examination, and allows the probable cause panel to make an expedited decision as to cause without unnecessary delay or hindrance. This accommodates the need for the department to protect the public from possible violations without unnecessary delay. The exemption also allows the department to make an expedited decision whether to issue a citation in lieu of further disciplinary proceedings for those minor violations that do not present a serious threat to health, safety and welfare."

"If it is concluded after investigation, inspection, examination, or review by the probable cause panel that there is no violation, then the matter is closed and there is no need for the protections afforded by chapter 120, Florida Statutes. If it is concluded that there is probable cause, the protections afforded under chapter 120, Florida Statutes, are available to the licensee with the filing of an administrative complaint. Since all investigations, inspections and examinations are also confidential and exempt from public disclosure under section 497.172, Florida Statutes, the confidentiality interests of the licensee are protected during the time of the investigation and until such time as the licensee can challenge the action under chapter 120, Florida Statutes."

Recommendation: The department "recommends retaining these exemptions. They are vital to the department's efforts to conduct thorough and efficient investigations, inspections and examinations, thereby protecting the interests of the public."

Staff of the Committee on Regulated Industries concurs in the department's recommendation for s. 497.153(9)(b) and (c), F.S., for the same reasons. Committee staff recommends that subsection (a) of s. 497.153(9), F.S., be removed as staff cannot discern any situation where such action could be challenged under ch. 120, F.S. The department also did not provide any rationale for retaining the exemption. The department's rationale addressed the exemptions relating to probable cause panels.

497.153(9)(d)

Determinations by the Department of Financial Services not to offer any settlement to a licensee concerning any disciplinary matter does not entitle any person to proceedings under chapter 120, F.S.

Rationale: The department responded that "if the department and a licensee decide to resolve a pending disciplinary matter by settlement, the parties enter into a voluntary consent agreement. By resolving the matter in this way, the parties

seek to avoid the expense and time associated with a full administrative hearing. The department resolves the majority of its disciplinary actions through settlement."

"In some cases where the violations are particularly serious, the department may decide that it is not in the best interests of the public to offer a settlement for discipline less than what the statutes and rules allow. In those matters, the department will go forward with its prosecution of the case, and the licensee will be afforded all of the protections under chapter 120."

Recommendation: The department "recommends that this exemption be retained. It is vital to the department's ability to enforce compliance with the disciplinary statutes and rules, especially in cases where the violations are serious."

Staff of the Committee on Regulated Industries does not concur with the department's recommendations. Committee staff recommends that subsection (d) of s. 497.153(9), F.S., be removed as staff cannot discern any situation where such action could be challenged under ch. 120, F.S.

Consumer Protection

501.207(2)

Section 501.207(2), F.S., requires the agency head of the enforcing authority, the Department of Legal Affairs of the Attorney General's Office, to determine whether an enforcement action would serve the public interest before an action may be filed. That statutory provision also requires that such determination be made in writing and will not be subject to the provisions of ch 120, F.S. This is the initial step in a process designed to terminate a deceptive or unfair trade practice that violates s. 501.204, F.S. (defines unlawful acts and practices under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)).

Rationale: The determination of public interest, which replaced a determination of probable cause through the Division of Administrative Hearings, is not subject to the provisions of ch. 120, F.S., because the department is required, under such circumstances, to act quickly to prevent further, and possibly irreparable, harm to consumers.

Recommendation: The exemption should be retained to enable the department to act swiftly to protect the public. The agency states that there are sufficient safeguards within the traditional judicial process to protect a defendant who may become involved in eventual agency action.

The exemption was created in 1985 by HB 223 (ch. 85-3, L.O.F.). The related staff analysis offers the following rationale this provision:

> Eliminating the requirement to determine probable cause pursuant to an administrative hearing relieves the enforcing authority of litigating in multiple forums, thereby decreasing the litigants' expense and the risk of confusing rulings.[63]

Furthermore, the due process rights of the defendants would be preserved:

> [B]efore bringing certain actions, an enforcing authority shall conduct an investigation, notify the parties being investigated of the substance of the alleged violation, and afford such parties an opportunity to respond. In addition, the head of the enforcing authority shall determine in writing that such action serves the public interest.[64]

Based on this rationale and the agency's stated objective to move quickly to protect the public interest, staff of the Committee on Commerce and Consumer Services Committee recommends that the exemption be retained.

Sale of Liquefied Petroleum Gas

527.23 and 120.80(2)(a)

Chapter 527, Florida Statutes, under Section 527.21(8) of the Florida Propane Gas Education, Safety, and Research Act (Act), defines a marketing order as "an order issued by the department prescribing rules governing the distribution, or handling in any manner, of propane gas in the state during any specified period or periods." The purpose of the marketing order is to (a) allow for the establishment of plans and programs for advertising, sales promotion, and education to maintain present markets or to create new or larger markets for propane gas produced or marketed in Florida; (b) make provision for carrying on research studies, the expenditure of moneys for that purpose, and for industry assessments to fund the activities for the Council; (c) allow for the Department to receive recommendations from the Florida Propane Gas, Education, Safety, and Research Council established by the Act; and (d) select appropriate research projects based on recommendations of the Council.

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[63] Staff Analysis, HB 223 (1985), p.4

[64] Staff Analysis, SB 154 (1985), p. 5. (Note: This analysis states that it is a House of Representatives analysis, but it uses SB 154 in its title. It discusses HB 223 as a companion bill; moreover, a separate analysis exists for HB 223 and is referenced in the previous footnote.) It is unclear whether the title of the analysis is correct.

Rationale: The rule exemption applicable to market orders provided by Section 120.80(2), F.S., is essential to the effectiveness of the market order. Subjecting the market order to the rules process would make the market order unresponsive to the needs of the propane gas industry and would potentially impair marketing of the product, selection of appropriate research projects and Act funding. Chapter 527, Florida Statutes, provides the process for establishing market orders and allows for rulemaking to facilitate the administration of the market order as well as the collecting, reporting, and the payment of assessments collected under this Act.

The Legislature has included specific statutory safeguards for the implementation of the marketing orders. For example, any marketing order must receive approval by referendum ballot approval of persons who represent two-thirds of the total gallonage of odorized propane gas voting in the retail marketer class. After due notice and hearing, the Department must make a finding that the market order will tend to accomplish the objectives and purposes of the Florida Propane Gas Education, Safety, and Research Act.

Additionally, the process for judicial review provides constitutional safeguards. The exemption from Chapter 120 is limited in scope (only for the adoption of the marketing order) and (the marketing order recognizes the need of the Department (and propane gas producers)) to address propane gas marketing issues, industry research, and consumer awareness.

Recommendation: The Department of Agriculture and Consumer Services recommends that this exemption be retained.

Staff of the Committee on Agriculture concurs that the exemption should be retained.

Weights, Measures, and Standards

531.40

Section 531.40, F.S., authorizes the Department of Agriculture and Consumer Services (DACS) to adopt, by reference, the nationally established requirements for commercial weighing and measures published in National Institute of Standards and Technology Handbook 44. Such requirements are the national standards by which manufacturers design commercial devices and the requirements established for users of the devices to assure accurate transactions.

Rationale: The DACS participates in the development of requirements established in the handbook through its participation and voting in the national

Conference on Weights and Measures, but cannot change or alter those requirements otherwise. The handbook establishes uniform standards for commercial devices that afford the greatest degree of protection to the public without requiring device manufacturers to incur unreasonable costs related to having to meet multiple standards from various jurisdictions. One uniform set of standards for commercial devices facilitates interstate and international commerce. Deviating from those standards would make it cost prohibitive for manufacturers to design devices specifically for one jurisdiction, placing an undue financial burden on Florida businesses and ultimately consumers by requiring them to locate devices that meet unique, jurisdiction specific requirements.

Recommendation: The Department of Agriculture and Consumer Services recommends that this exemption be retained.

Staff of the Committee on Agriculture concurs that the exemption should be retained.

Secondhand Dealers and Secondary Metals Recyclers

538.11

Authorizes the Department of Revenue to adopt emergency rules to implement chapter 538, F.S. Such rules remain effective for 6 months. Other rules which implement this chapter shall not be subject to s. 120.56(2), F.S., challenge or s. 120.54(3)(c)2., F.S., drawout, but, once adopted, are subject to s. 120.56, F.S., challenge. Such rules are effective upon filing notwithstanding s. 120.54(3)(e)6., F.S.

Rationale: This exemption provided the department with emergency rule authority when registration requirements for these businesses were assigned to the department, to allow for orderly implementation of the law.

Recommendation: the Department of Revenue recommends that the exemption can be repealed, as need for emergency rule authority no longer exists.

Staff of the Committee on Government Efficiency Appropriations concurs that the exemption can be repealed.

Pugilistic Exhibitions

548.07

Section 548.07, F.S., provides that, notwithstanding the provisions of chapter 120, F.S., any member of the Florida State Boxing Commission, established in s. 548.003, F.S., may suspend any license or permit of any person charged with violating the provisions of chapter 548, F.S., if such action is necessary to protect the public and the best interests of the sport of boxing. The commission member may do that on his or her own motion or upon a verified written complaint. The suspension is effective until final determination by the commission at a hearing held within 10 days after the suspension.

Rationale: The Department of Business and Professional Regulation responded that "the purpose of this section is to allow a commission member on an emergency basis to temporarily suspend a licensee. For example, in certain cases a commissioner may have to suspend a participant during a boxing match. There are certain acts that may be committed during a boxing match that may warrant an immediate temporary suspension of the license. If a temporary suspension is given then the commission is required to hold a hearing within 10 days. This hearing is not exempt from the provisions of chapter 120."

Recommendation: The department "unequivocally recommends that this exemption remain in place due to the nature of the sport. The temporary suspension provides adequate protections to boxers that ensure [that] their health, safety, and welfare is protected."

According to the department, the hearings are not exempt from the provisions of ch. 120, F.S. Staff of the Committee on Regulated Industries recommends that s. 548.07, F.S., be amended to clarify that these post-suspension hearings are subject to the provisions of ch. 120. Committee staff also recommends that s. 548.07, F.S., be amended to provide that a license may be suspended to protect the health, safety, and welfare of the public and the participants, rather than "the public welfare and best interests of the sport."

548.073

Section 548.073, F.S., allows any member of the Florida State Boxing Commission to conduct a hearing under chapter 548, F.S. A majority of the members of the commission must examine the record and approve the decision before the case is adjudicated.

Rationale: The department responded that "this is not an exemption from chapter 120, but rather an exception to the provision in that chapter requiring all

formal professional regulation hearings to be held before an administrative law judge."

Recommendation: The department "believes that this provision should be evaluated for removal because we are unable to determine a rationale for it."

Staff of the Committee on Regulated Industries recommends that this exemption be removed. There is no justification to treat the Florida State Boxing Commission differently than other boards within the Department of Business and Professional Regulation or other commissions subject to ch. 120.

Pari-Mutuel Wagering

550.054(1)

Section 550.054(1), F.S., provides an exemption to the 90 day-licensing requirement in s. 120.60, F.S. The section provides that the Division of Pari-mutuel Wagering within the Department of Business and Professional Regulation shall grant or deny a pari-mutuel permit application within 120 days.

Rationale: The department responded that "this exemption is necessary due to the need to conduct a more thorough, and therefore, more time consuming, investigation into the applicant. The need for this enlarged period of time is growing more prevalent with the introduction of multi-national corporations that are entering the pari-mutuel wagering industry in Florida. As part of the evaluation of an application to be a pari-mutuel wagering permit holder, the Division must investigate the entire corporation and then make a determination as to whether or not the applicant is of good moral character."

Recommendation: The department "unequivocally recommends keeping this exemption. As stated above, the necessary background check will likely encompass more than the 90 days required in section 120.60, Florida Statutes."

Staff of the Committee on Regulated Industries concurs in the department recommendation to retain this exemption. The need for a thorough investigation was increased with the passage of the ch. 2005-362, L.O.F., relating to slot machine gaming. That legislation requires extensive background checks and currently applies to the pari-mutuel facilities in Broward County. If the voters approve, it could also apply to pari-mutuel facilities in Miami-Dade County. Dania Jai Alai in Broward County was recently purchased by a national gaming corporation, Boyd Gaming, Inc., that was not currently licensed as a pari-mutuel facility in Florida necessitating licensing procedures. It is very likely that other pari-mutuel facilities authorized for slot machine gaming could be purchased by other national gaming corporations.

550.2415(3)(b)

The Division of Pari-mutuel Wagering in the Department of Business and Professional regulation is authorized, notwithstanding the provisions of chapter 120, F.S., to suspend the occupational licensee of a licensee who is responsible for the condition of a race animal. The division may summarily suspend the license if the division's laboratory reports the presence of a banned substance in the animal's blood, urine, saliva, or other bodily fluid either before or after a race.

Rationale: The department responded that "the need to protect the racing animals and integrity of the sport require that certain types of violations of chapter 550 be handled as expeditiously as possible. Requiring the legal findings and compliance with requirements for an emergency suspension under section 120.60(6), Florida Statutes, would subject animals to potential mistreatment and affect the integrity of race results."

Recommendation: The department "unequivocally recommends keeping this exemption."

Staff of the Committee on Regulated Industries concurs in the department's recommendations for the same reasons given by the department in its rationale.

Beverage Law: Administration

561.19(4)

Section 561.19(4), F.S., provides that the issuance of a beverage license, which is issued on the quota system pursuant to the population of the county of issuance, shall be issued within 180 days rather than the 90 days required by s. 120.60, F.S. The licenses are drawn using a double random selection by public drawing when the number of applicants exceeds the number of quota licenses available.[65] If the number of applicants does not exceed the number of licenses available, then the drawing is not held.[66]

Rationale: The department responded that "after the drawing occurs, the provision sets forth timeframes for the issuance of the license that allows an applicant included in the drawing (pool) but who is not issued a license the opportunity to challenge the denial on limited grounds. As there are a limited number of licenses to be issued, a challenge to the selection process or the

[65] Section 561.19(2), F.S.
[66] Section 561.19(3), F.S.

qualifications of the selected applicant must be resolved before the selected applicant is issued the license. Typically, the procedures authorized by sections 120.569 and 120.57, F.S., are not complete within 90 days. The statute authorizes 180 days as an exemption to the section 120.60, Florida Statutes, timeframe to accommodate the hearing process."

Recommendation: The department "unequivocally recommends keeping the exemption. An applicant [that is] not selected is entitled to an administrative hearing pursuant to chapter 120 for review of the selection process and the qualification of the selected applicant. As the number of licenses to be issued is limited, a license cannot be issued until the hearing is concluded and is greater than 90 days to issue a license pursuant to section 120.60, Florida Statutes."

Staff of the Committee on Regulated Industries concurs in the department's recommendation. Due to the nature of the license, additional time to assure that the applicant is qualified for licensure is essential.

581.1845(5)(d)

The Department of Agriculture and Consumer Services is directed by statute to develop a process for resolving disputes relating to compensation of homeowners for the removal of trees in the effort to eradicate citrus canker. The exemption to the rules of chapter 120, F.S., allows for the decision made by the Department of Agriculture and Consumer Services to be final.

Rationale: The citrus canker compensation program (Shade Dade or Shade Florida) provides funding to homeowners whose trees have been removed under a joint federal/state eradication program. The joint federal/state program is continued in statute through January 1, 2008. In order to allow for uninterrupted compensation consideration to be provided under the requirements of the joint federal/state program through the end of the statutory period, this exemption should be retained.

Recommendation: The Department of Agriculture and Consumer Services recommends that this exemption be retained.

Staff of the Committee on Agriculture concurs that the exemption should be retained.

Florida Citrus Code

601.152(5)(a) and 120.80(2)(a)

A special marketing order adopted by a super-majority of the Florida Citrus Commission – after statutorily required notice and being approved by 67 percent of the citrus handlers making up not less than 51 percent of the total volume of citrus involved in the special marketing order – is exempt from the administrative procedure requirements of ch. 120, F.S.. The statute provides a specific judicial remedy to challenge the marketing order in the District Courts of Appeal.

Rationale: In order to respond quickly and nimbly to various market conditions, the Legislature has authorized the Department of Citrus to issue special marketing orders so that the Department can conduct advertising or undertake product research in order to protect product demand.

The Legislature has included specific statutory safeguards, which are **more stringent** than ch. 120, F.S., administrative processes, for the implementation of such special marketing orders. For example, any special marketing order must receive a super-majority vote of the Florida Citrus Commission at a specially noticed meeting and such marketing orders must be adopted by a referendum of handlers who will pay the assessment for any such special marketing.

The act provides specific criteria allowing review of the special marketing order decision by an appellate court.

Only the adoption of a special marketing order, and not department determination of the fees assessed pursuant to a marketing order, are exempt from ch. 120.

The exemption is justified for several reasons: (a) the statutory safeguards in place are far greater than available under ch. 120; (b) because the special marketing orders contemplated by the statute are quasi-legislative in nature (i.e. akin to policy-making, rather than purely executive/administrative, functions), ch. 120 review would not be appropriate; (c) the process for judicial review provides sufficient constitutional safeguards; (d) the exemption from ch. 120 is limited in scope (only the adoption of the marketing order, as opposed to fees assessed under the marketing order, are exempt from ch. 120 review); and (e) the exemption recognizes the need of the department (and its citrus constituencies) to quickly address potentially volatile market conditions not contemplated in the regular planning/budget cycle of the department.

Recommendation: The Department of Citrus recommends that this exemption be retained.

Staff of the Committee on Agriculture concurs that the exemption should be retained.

601.90(3)

Emergency orders relating to freeze-damaged citrus fruit are effective upon adoption, the provisions of chapter 120 to the contrary notwithstanding.

Rationale: In the event of citrus freeze, it is necessary to prevent citrus from entering into fresh channels if such fruit is deemed by the Citrus Commission to have internal damage deleterious to the reputation for superiority and quality of Florida citrus.

Recommendation: The Department of Citrus recommends that this exemption be retained.

Staff of the Committee on Agriculture concurs that the exemption should be retained.

601.901(2)

An emergency order of the Citrus Commission governing freeze-damaged fruit for processing is exempt from the provisions of ch. 120, F.S., governing expiration of emergency rules or orders.

Rationale: The harvesting of certain citrus fruit varieties (for instance, grapefruit) may last from November through May. This period is longer than the typical 90-day expiration of emergency rules under ch. 120. If a freeze occurs in December, it is desirable that an order governing the allowable level of freeze-damaged products endure for the duration of the processing season, and not expire prior to the end of the season. Such certainty fosters uniformity and efficiency in the harvesting and processing of freeze-damaged fruit.

Recommendation: The Department of Citrus recommends that this exemption be retained.

Staff of the Committee on Agriculture concurs that the exemption should be retained.

Insurance Code: Administration and General Provisions

624.155(3)(c)

Section 624.155, F.S., allows a person to bring a civil action against an insurer when such person is damaged by the insurer based on a violation of a specified statutory provision or the commission of an enumerated act. As a condition precedent to bringing such action, the Department of Financial Services

(DFS or department) and the insurer must be given 60 days' written notice of the violation. The statute authorizes the DFS to develop a form for the notice and sets forth five criteria which must be provided in the notice form.[67] The DFS may return a notice (within 20 days of receipt), if it does not contain the requisite information.[68] The determination by the DFS to return the notice for lack of specificity is exempt from the requirements of ch. 120, F.S., under s. 624.155(3)(c), F.S.

According to DFS officials, the department receives and reviews approximately 11,000 notices a year and about 8 percent of the notices (approximately 880 notices) are returned because the specific information required by this section is not provided. These officials state that they provide instructions to individuals on how to correct notice deficiencies and once corrected, such notices are subsequently accepted.

Rationale: This exemption allows the DFS to comply with its statutorily mandated purpose of reviewing pre-litigation notices for compliance with the civil remedy law. This exemption allows DFS to act timely and decisively to insure that sufficient notice is provided insurers and the department as to proposed civil actions. Including the notice requirements of s. 624.155(3)(c), F.S., under ch. 120 would not serve a valid public policy purpose according to department officials since the notice process is ministerial in nature. Such an action would result in time delays and additional costs to individuals, according to the DFS. Based on the outlined process, there is generally no dispute regarding the department's actions in this area, and thus there is no public policy purpose served by subjecting this process to the administrative procedures law.

Recommendation: The department recommends that this exemption should remain in force to protect the interests of the citizens of the state.

Staff of the Committee on Banking and Insurance concurs with the department's recommendation.

[67] Rule 10-363 (DFS), F.A.C.
[68] If the DFS returns the notice for lack of specificity, the 60-day time period does not begin until a proper notice is filed.

624.437(4)(d)

Sections 624.436 through 624.446, F.S., provide the administrative framework for the Office of Insurance Regulation (OIR or office) to regulate nonprofit Multiple-Employer Welfare Arrangements (MEWAs).[69] All MEWAs, as well as other entities offering insurance, must obtain a certificate of authority from the office to operate in Florida. An entity failing to hold a certificate of authority while operating as a MEWA is subject to the cease and desist penalty powers of the office, specified fines and criminal penalties. In addition to these enforcement provisions, s. 624.437(4)(d), F.S., empowers the OIR to seek immediate injunctive relief from a court when a MEWA is operated by any person or entity that has not obtained a certificate of authority or has engaged in any activity prohibited by the Florida Insurance Code.

The office's authority to seek both temporary and permanent injunctive relief shall not be conditioned on having conducted any proceeding pursuant to ch. 120, F.S. The authority vested in the office by virtue of the operation of this provision does not reduce any other enforcement remedy or power to seek injunctive relief that may otherwise be available to the office.

Rationale: According to officials with the OIR, the ch. 120 exemption is necessary because it allows the office to protect the welfare of the members of unauthorized[70] MEWAs by immediately seeking judicial injunctive relief without resorting to cumbersome and time consuming administrative proceedings prior to filing for such relief. The office has the burden of proving to a circuit court that the injunction is necessary. The court's exercise of jurisdiction adequately protects the interests of all affected parties, according to these officials.

The unlicensed or illegal activity of MEWAs can result in great financial harm to its members. By the time ch. 120 administrative proceedings can be concluded, the individuals or entities controlling the MEWA may have absconded with millions of dollars. The immediate injunctive relief afforded under this provision protects MEWA members from further harm. From September 2003 to January 2005, more than 4,500 Florida consumers lost approximately $18 million in unpaid claims in all lines of business from unauthorized entities.

If a MEWA was operating without a certificate of authority, its members would subsequently find that there really is no insurance and that they may be responsible for insurance claims. The ch. 120 exemption allows the office to act

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[69] A multiple-employer welfare arrangement means an employee welfare benefit plan or other arrangement which is established or maintained for the purpose of offering or providing health insurance benefits (described in s. 624.33, F.S.) other than life insurance benefits, to employees of two or more employers, or to their beneficiaries.

[70] Insurance entities that have not obtained the required certificate of authority are called "unauthorized" entities.

swiftly so that MEWAs members are protected. This injunctive relief authority is provided to the OIR under other sections of the Insurance Code.[71]

Recommendation: The office recommends maintaining this provision to protect the welfare of MEWA members. It is utilized only when needed to protect such members from actions involving unauthorized MEWAs or the illegal activities of such entities.

Staff of the Committee on Banking and Insurance concurs with the office's recommendation.

624.464(2)(c)

Sections 624.460 through 624.488, F.S., provide the administrative framework for the Office of Insurance Regulation (OIR or office) to regulate commercial self-insurance funds.[72] All such funds, as well as any entity offering insurance, must obtain a certificate of authority from the office to operate in Florida. An entity failing to hold a certificate of authority while operating as a commercial self-insurance fund is subject to the cease and desist penalty powers of the office and subject to specified fines. In addition to these enforcement provisions, s. 624.464(2)(c), F.S., empowers the OIR to seek immediate injunctive relief from a court when a commercial self-insurance fund is operated by any person or entity that has not obtained a certificate of authority or has engaged in any activity prohibited by the Florida Insurance Code.

The office's authority to seek both temporary and permanent injunctive relief shall not be conditioned on having conducted any proceeding pursuant to ch. 120, F.S. The authority vested in the office by virtue of the operation of this provision does not reduce any other enforcement remedy or power to seek injunctive relief that may otherwise be available to the office.

Rationale: Representatives with the OIR state that the ch. 120 exemption is necessary because it allows the office to protect the welfare of the members of unauthorized[73] self- insurance funds by immediately seeking judicial injunctive relief without resorting to cumbersome and time consuming administrative proceedings prior to filing for such relief. The office has the burden of proving to a circuit court that the injunction is necessary. The court's exercise of jurisdiction

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[71] Sections 624.(2)(c) (commercial self-insurance funds) and 641.281(health maintenance organizations), F.S.

[72] Any group of persons may form a commercial self-insurance fund for the purpose of pooling and spreading liabilities of its group members in any commercial property or casualty risk or surety insurance.

[73] Insurance entities which have not obtained the required certificate of authority are called "unauthorized" entities.

adequately protects the interests of all affected parties, according to these representatives.

The unlicensed or illegal activity of commercial self-insurance funds can result in great financial harm to the fund's members. By the time ch. 120 administrative proceedings can be concluded, the individuals or entities controlling the fund may have absconded with millions of dollars. The immediate injunctive relief afforded under this provision protects fund members from further harm. From September 2003 to January 2005, more than 4,500 Florida consumers lost approximately $18 million in unpaid claims in all lines of business from unauthorized entities.

If a commercial self-insurance fund was operating without a certificate of authority, its members would subsequently find that there really is no insurance and that they may be responsible for insurance claims. The ch. 120 exemption allows the office to act swiftly so that a fund's members are protected. This injunctive relief authority is provided to the OIR under other sections of the Insurance Code.[74]

Recommendation: The office recommends maintaining this provision to protect the welfare of fund members. It is utilized only when needed to protect such members from actions involving unauthorized commercial self-insurance funds or the illegal activities of such funds.

Staff of the Committee on Banking and Insurance concurs with the office's recommendation.

Insurance Rates and Contracts

627.311(5)(i)

Section 627.311(5), F.S., provides that the decisions of the board of governors of the Florida Workers' Compensation Joint Underwriting Association, Inc., (JUA) do not constitute final agency action and are not subject to ch. 120, F.S. The JUA is a quasi-governmental entity, created under s. 627.311(5), F.S., to act as the insurer of last resort or residual market for employers unable to secure workers' compensation insurance coverage in the private market.

Rationale: In 2002, the First District Court of Appeal held that another residual market, the Florida Windstorm Underwriting Association (association),

[74] Sections 624.437(4)(d) (multiple-employer welfare arrangements) and 641.281(health maintenance organizations), F.S.

was not an agency or board subject to the APA.[75] The court also found that the Legislature intended that only entities performing traditional governmental functions would be subject to the Act. Although the court noted that the association performs certain public functions, those functions are not traditional governmental functions. The exemption provided in the statute for the JUA is simply a clarification of current law.

The decisions of the board of governors of the JUA are comparable to decisions of insurers in the private market that are not generally subject to regulatory approval or disapproval. With respect to all such decisions, an aggrieved party has the same judicial and quasi-judicial remedies as are available to a party aggrieved by the decision of a private insurer.

Recommendation: The JUA recommends that the current ch. 120 exemption be retained.

Staff of the Committee on Banking and Insurance concurs.

627.351(5)(e)

The statute containing this exemption is the authorizing statute for the recently implemented Property and Casualty (commercial) joint underwriting association (JUA). A risk underwriting committee of the JUA reviews risks rejected by the voluntary market for which application is made for insurance through the joint underwriting plan. The committee is composed of three members experienced in evaluating insurance risks. The committee uses the criteria and procedures contained in the joint underwriting plan approved by the Office of Insurance Regulation (OIR) to determine whether an individual risk is so hazardous as to be uninsurable. The acceptance or rejection of a risk by the underwriting committee is construed as the private placement of insurance, and the provisions of ch. 120, F.S., do not apply.

Rationale: Representatives from the OIR state that this JUA is a quasi-governmental entity that issues insurance policies that also acts in a manner similar to a private insurance company. JUA's are insurers of last resort and are essentially business entities that are not generally subject to the provisions of the APA. It is intended that the JUA's decision of insurability be a final decision. If every acceptance of risk was subject to a challenge by an insurer or other affected person, the process of issuing insurance policies would be adversely affected. Subjecting these decisions to administrative challenge may delay individuals from obtaining coverage, when by law other coverage is available. With the current state of the property insurance market this could create substantial economic harm to the public.

[75] 813 So.2d 981 (Fla 1st DCA 2002).

Recommendation: Representatives from the OIR state that the exemption should be retained.

Staff of the Banking and Insurance Committee concurs in the recommendation.

627.351(6)(c)8.

The plan of operation for Citizens Property Insurance Company (Citizens) must provide objective criteria and procedures to be uniformly applied to all applicants in determining whether an individual risk is so hazardous that it is uninsurable. In making a determination of whether a risk is uninsurable, Citizens must consider whether the likelihood of a loss for the individual risk is substantially higher than for other risks of the same class, and whether the uncertainty associated with the individual risk is such that an appropriate premium cannot be determined. The acceptance or rejection of a risk by Citizens is construed as the private placement of insurance, and the provisions of ch. 120, F.S., do not apply.

Rationale: Representatives from the OIR state that Citizens is a quasi-governmental entity that issues insurance policies that also acts in a manner similar to a private insurance company. Citizens is an insurer of last resort and is essentially a business entity that is not generally subject to the provisions of the APA. It is intended that a decision by Citizens of insurability be a final decision. If every acceptance of risk was subject to a challenge by an insurer or other affected person, the process of issuing insurance policies would be adversely affected. Subjecting these decisions to administrative challenge may delay individuals from obtaining coverage, when by law other coverage is available. With the current state of the property insurance market this could create substantial economic harm to the public.

Recommendation: Representatives from the OIR state that the exemption should be retained.

Staff of the Committee on Banking and Insurance concurs.

627.728(8)(a)

When an insurer cancels a policyholder’s automobile insurance policy, the insurer must send a notice of cancellation to the policyholder at least 45 days prior to the effective date of the cancellation—unless cancellation is for non-payment of premium, in which case 10 days notice is required. The policyholder may appeal the cancellation with the Office of Insurance Regulation (OIR), if the appeal is

filed within 20 days of the effective date of the cancellation. The appeal proceedings pursuant to this subsection are not subject to ch. 120, F.S.

Rationale: Representatives from the OIR state that the expedited appeal procedure is of a benefit to insureds who will need sufficient time to obtain alternate auto coverage if the policy cancellation is upheld. It is asserted that given the large numbers of cancellations that occur each year, a full ch. 120 hearing would overwhelm the staff of the OIR. Additionally, representatives from the OIR opined that the Administrative Procedure Act is not directly implicated because the office acts as an advisor and mediator of the dispute between two private actors in the appeal procedure. The statute indicates that "a hearing" is to be made available to the parties, but that in practice the dispute generally involves a complaint by the insured and a response via letter from the insurer that states its rationale for having cancelled the policy. If the rationale is not prohibited by Florida law, the ruling is in favor of the insured; if the rationale is prohibited, then the ruling is likely in favor of the policyholder.

Recommendation: Representatives from the OIR state that the exemption should be retained.

Staff of the Banking and Insurance Committee recommends that either the exemption be modified to reflect the current appeals process as conducted by the OIR, or that the appeals process more accurately reflect the statutory scheme.

Stock and Mutual Insurers

628.4615(6)(a)

The Office of Insurance Regulation (OIR or office) is responsible for the regulation of "specialty insurers," as this term is defined in s. 628.4615(2), F.S. Subsection (2) delineates the conditions to acquire a controlling interest of a specialty insurer.

According to representatives of the OIR, the office is required to approve or disapprove an application for acquisition within 90 days, pursuant to ch. 120, F.S. If an application is not approved or denied within 90 days, it is deemed approved. In addition, this provision allows OIR to immediately disapprove the proposed acquisition if it finds that the applicant poses an immediate danger to the public health, safety, and welfare of the insured.

Pursuant to s. 628.4615(6)(a), F.S., the office may on its own initiate, or, if requested to do so in writing by a substantially affected person, conduct a proceeding to consider the appropriateness of the proposed filing. Time periods for purposes of ch. 120 shall be tolled during the pendency of the proceeding.

Rationale: This exemption recognizes that the time frame to approve or disapprove an application for acquisition is not practical or feasible in the event a proceeding (public hearing) is requested to review the filing. In order to protect the public welfare, extensive background and financial investigations must be conducted by OIR staff. Applicants are not adversely affected by the tolling process since they are permitted to continue with all other aspects of the acquisition process. The ch. 120 exemption allows the office sufficient time to protect the public by scrutinizing the details of the application and making sure the acquisition is fiscally sound.

Recommendation: The OIR recommends maintaining this exemption.

Staff of the Senate Banking and Insurance Committee concurs.

Health Care Service Programs

641.281(3)

This section provides that the Department of Financial Services (DFS or department) and the Office of Insurance Regulation's (OIR) may seek injunctive relief, in addition to penalties and other enforcement provisions, without having conducted any chapter 120, F.S., proceeding. The DFS and OIR are authorized to seek such temporary and permanent injunctive relief when: (1) a health maintenance organization is being operated by any person or entity without a subsisting certificate of authority; (2) any person, entity, or health maintenance organization has engaged in any activity prohibited by this part or any rule adopted; or (3) any health maintenance organization, person, or entity is renewing, issuing, or delivering a health maintenance contract or contracts without a subsisting certificate of authority.

Rationale: The exemption protects the welfare of the public because it allows the agencies to respond quickly when there is reason to believe a licensed or unlicensed entity's action will harm the public, including policyholders. This exemption allows the agencies to immediately seek judicial relief without resorting to administrative proceedings prior to filing injunctive relief. If this exemption did not exist, considerable time delays associated with administrative proceedings could result in an entity collecting premiums from policyholders and refusing to or unwilling to pay claims, ultimately resulting in financial hardship for policyholders left with unpaid medical bills. The current judicial process affords adequate due process to affected parties.

Recommendation: The department and the OIR recommend maintaining the ch. 120 exemption provision.

Staff of the Committee on Banking and Insurance concurs with this recommendation.

Continuing Care Contracts

651.023(4)

Notwithstanding any provision of ch. 120, F.S., no person, other than the continuing care provider, the escrow agent, and the office, shall have a substantial interest in any Office of Insurance Regulation (OIR) decision regarding release of escrow funds in any proceedings under chapter 120 or this chapter regarding release of escrow funds.

Rationale: The OIR is responsible for licensure and regulation of continuing care contracts (CCC) pursuant to s. 651.023(4), F.S. A continuing care contract is defined as a long term contract for shelter and either nursing care or personal services. This statute prescribes conditions or requirements that must be met prior to the office issuing a certificate of authority. These include the presentation of a feasibility study, prepared by an independent consultant, a complete audited financial statement, and proof that the applicant has complied with the escrow requirements of s. 651.023(3), F.S.

An owner or provider of a CCC is entitled to secure release of escrow funds if criteria of s. 651.023(4), F.S., are met. This subsection also provides that no person, other than the provider, the escrow agent, and the OIR, shall have a substantial interest regarding the release of escrow funds in any proceedings under ch. 120.

Without this exemption, continuing care residents might be considered persons who have a substantial interest in the proceeding, and who could initiate a ch. 120 hearing, which could jeopardize or delay the financing plan of a provider. Such administrative delays could create significant financial disincentives for providers to enter the Florida market. This ultimately would have an adverse impact on the affordability and availability of CCC's for Florida residents.

Recommendation: The OIR recommends maintaining this exemption.

Staff of the Senate Banking and Insurance Committee concurs.

Financial Institutions Generally

655.4185

The statute provides the Office of Financial Regulation (OFR) with authority to take emergency action—notwithstanding the provisions of ch. 120, F.S., or the financial institution codes—when the OFR or the appropriate federal regulatory agency makes a finding that immediate action is necessary to prevent the probable failure of a failing financial entity. A finding by the OFR that immediate action is necessary to prevent the probable failure of a financial institution must be based upon reports furnished to it by a state or federal financial institution examiner or upon other evidence from which it is reasonable to conclude that the financial institution is insolvent or threatened with insolvency. If the financial institution's deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, the OFR must have the concurrence of the appropriate federal regulatory agency in order to issue the emergency order. The emergency order may authorize the merger of a failing financial entity with an appropriate state financial entity, the acquisition of the failing financial entity by an appropriate state financial entity, the conversion of the failing financial entity into a state financial entity, or the chartering of a new state financial entity to acquire the failing financial entity. Under the statute, stockholders of a failing financial institution that is acquired by another financial institution are entitled to the same procedural rights and to compensation for the remaining value of their shares as is provided for dissenters in s. 658.44, F.S., except that they have no right to vote against the transaction.

Rationale: Representatives from the OFR state that the exemption allows the office to act promptly to protect the public interest when a state financial institution becomes insolvent by allowing the failing financial institution to merge with a healthy financial institution. The facilitation of a quick resolution is necessary to prevent the closure of a financial institution, even if only for a short period of time, which would undermine consumer confidence in the particular financial institution and the financial institution system in general. Staff notes that the exemption contained in s. 655.4185, F.S., is somewhat duplicative of the authority that each agency has to issue an immediate final order (s. 120.569(1)(n), F.S.) when the agency finds that an immediate danger to the public health, safety, or welfare requires such action, and sets forth in writing the facts underlying the order. However, the provisions of s. 655.4185, F.S., set forth specific grounds for the creation of an emergency order, and specify the actions that the OFR is permitted to take that are directly applicable to the regulation of financial institutions.

Recommendation: Representatives from the OFR state that the exemption should be retained.

Staff of the Banking and Insurance Committee concurs.

Credit Unions

657.065(4)

Section 657.065, F.S., authorizes the Office of Financial Regulation (OFR or office) to approve or disapprove merger plans between state credit unions, or merger plans between certain federal and state credit unions, based on statutory criteria. If the OFR disapproves a merger plan, it must state its objections in its merger denial, and ch. 120, F.S., notwithstanding, give the subject credit unions an opportunity to amend the merger plan to eliminate OFRs objections (s. 657.065(4), F.S.).

The OFR has 90 days to approve or deny a credit union merger under ch. 120; however, under s. 120.80(3)(a)4, F.S., if such merger involves a foreign national (i.e., as a board member), the office has 1 year to approve or deny the merger, or 30 days after conclusion of a public hearing on the merger application, whichever is later.

Rationale: According to OFR officials, when the OFR disapproves a credit union merger, it states its objections and works informally with the subject credit unions to resolve these issues so that the proposed merger can be approved. These officials assert that if the ch. 120 exemption was not in effect, the office would have to issue a notice of intent to deny a particular merger because such plans could not be amended or corrected during the OFR review period. This would result in increased costs and time delays for the merger applicants. Such action would also impede the opportunity for credit unions to effectively serve the needs of their members or remain competitive with each other, with other financial institutions in this state and in other states.

The OFR representatives also state that they must work closely with the National Credit Union Administration which generally reviews corresponding merger applications in its capacity as the insurer of credit union deposits under the Federal Deposit Insurance Corporation (FDIC) program. Therefore, it is important for the office to have the flexibility to work with credit unions on their merger applications.

In the past six years, the office has approved 20 credit union mergers and has requested some of the credit unions to amend their merger plans in order to correct deficiencies. The OFR has not disapproved any credit union merger in this six year period.

Recommendation: OFR representatives state that the ch. 120 exemption should remain in force to provide OFR with necessary flexibility to resolve issues with credit union merger applicants so that these transactions can be approved which would be beneficial to both the applicants and their members.

Staff of the Senate Banking and Insurance Committee concurs with the office's recommendation.

657.065(6)

Section 657.065, F.S., authorizes the Office of Financial Regulation (OFR or office) to approve or disapprove merger plans between state credit unions, or merger plans between certain federal and state credit unions, based on statutory criteria. After the OFR approves a merger, the membership of the merging credit union must vote on the merger at a meeting duly called for that purpose.[76] Notwithstanding ch. 120, F.S., a credit union may merge without the vote of the membership when the OFR determines that the credit union is in "danger of insolvency or that the credit union is significantly undercapitalized, as defined in s. 216, the Federal Credit Union Act, codified at 12 U.S.C. s. 1790d[77] and the merger will enable the credit union to avoid liquidation." (s. 657.065(6), F.S.)

Rationale: According to OFR representatives, the ch. 120 exemption allows the OFR to act promptly to protect the credit unions involved in a proposed merger and their members. This provision is seldom used and the office has authorized the merger of just two credit unions under this section within the past six years. The provision is utilized when a credit union is about to become insolvent or is undercapitalized and the office authorizes the merger (without the vote of the members) by allowing the subject credit union to merge with a financially healthy institution.

These representatives emphasize that an insolvent or undercapitalized credit union would likely be closed and liquidated, thereby depriving its customer base

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[76] The final order to approve a credit union merger plan is subject to approval by the merging credit union membership who vote on the merger at a meeting duly called for that purpose. The approval and evidence thereof must be submitted to the OFR within 6 months after the office approves the merger, otherwise the merger plan is deemed revoked and terminated. However, the office on its own motion, or at the request of the merging credit unions for good cause, may extend the time period for 6 months.

[77] The term "significantly undercapitalized" is defined under the Act to mean a credit union that has a net worth ratio of less than 4 percent; or if it has a net worth ratio of less than 5 percent, and it a) fails to submit an acceptable net worth restoration plan or b) materially fails to implement a net worth restoration plan accepted by the Board. The terms "imminently insolvent" and "insolvent" are defined under s. 655.055(1)(k) and (l), F.S., respectively.

of needed access to a financial institution. Such action could have an adverse impact on the National Credit Union Share Insurance Fund if a credit union had to be liquidated, thus placing uninsured deposits in jeopardy, and possibly resulting in undermining the consumer confidence in the credit union system. Taking prompt action to approve a merger also avoids any harm to the credit union's reputation.

By retaining this ch. 120 exemption, the OFR will be able to meet its statutory mandate to promote the safe and sound conduct of credit unions, conserve their assets, and maintain public confidence in such financial institutions. Furthermore, retaining this exemption will enable OFR to promote the opportunity for credit unions to continue to serve the convenience and needs of their members.

Recommendation: The OFR recommends retaining this exemption.

Staff of the Senate Banking and Insurance Committee concurs with this recommendation.

Banks and Trust Companies

658.2953(12)(b)

The statute provides the Office of Financial Regulation (OFR) with authority to take emergency action—notwithstanding the provisions of ch. 120, F.S., or the financial institution codes—when the OFR or the appropriate federal regulatory agency makes a finding that immediate action is necessary to prevent the probable failure of a failing financial entity. A finding by the OFR that immediate action is necessary to prevent the probable failure of a financial institution must be based upon reports furnished to it by state or federal financial institution examiner or upon other evidence from which it is reasonable to conclude that the financial institution is insolvent or threatened with insolvency.

Rationale: Representatives from the OFR state that the exemption allows the office to act promptly to protect the public interest when a state financial institution becomes insolvent by allowing the failing financial institution to merge with a healthy financial institution. The facilitation of a quick resolution is necessary to prevent the closure of a financial institution, even if only for a short period of time, which would undermine consumer confidence in the particular financial institution and the financial institution system in general. Staff notes that the exemption contained in s. 65.2953(12)(b), F.S., is somewhat duplicative of the authority that each agency has to issue an immediate final order (s. 120.569(1)(n), F.S.) when the agency finds that an immediate danger to the public health, safety, or welfare requires such action, and sets forth in writing the facts underlying the order. However, the provisions of s. 65.2953(12)(b), F.S., set forth specific

grounds for the creation of an emergency order, and specify the actions that the OFR is permitted to take that are directly applicable to the regulation of financial institutions.

Recommendation: Representatives of the OFR recommend that this exemption be retained.

Staff of the Senate Banking and Insurance Committee concurs.

658.43(3)

Pursuant to s. 658.43(3), F.S., the Office of Financial Regulation (OFR) is authorized to approve or disapprove merger plans between constituent banks or trust companies, based upon statutory criteria. If the OFR disapproves a merger plan, it must state its objections, and notwithstanding ch. 120, F.S., give an opportunity to the constituent banks, trust companies, or banks and trust companies to amend the merger plan to obviate OFR's objections.

The OFR has 90 days to approve or deny a credit union merger under ch. 120; however, under s. 120.80(3)(a)4, F.S., if such merger involves a foreign national (i.e., as a board member), the office has 1 year to approve or deny the merger, or 30 days after conclusion of a public hearing on the merger application, whichever is later.

Rationale: According to OFR officials, when the OFR disapproves a bank or trust company merger, it states its objections and works informally with the constituent banks or trust companies to resolve these issues so that the proposed merger can be approved. These officials assert that if the ch. 120 exemption was not in effect, the OFR would have to issue a notice of intent to deny a particular merger because such plans could not be amended or corrected during the OFR's review period. This would result in increased costs and time delays for the merger applicants. Such action would also impede the opportunity for banks and trust companies to effectively serve the needs of their members or remain competitive with each other, or with other financial institutions in this state and in other states.

Recommendation: Representatives of the OFR recommend that this exemption be retained.

Staff of the Senate Banking and Insurance Committee concurs.

Associations

665.0335(2)

An association (also known as a “thrift”) is a financial institution that accepts deposits primarily from individuals and channels its funds primarily into residential mortgage loans. The association encourages thrifty financial practices by paying interest dividends on savings. When a state or federal association is in impaired condition or in imminent danger of becoming impaired, the Office of Financial Regulation (OFR) may issue certain emergency orders to protect the interests of depositors, reduce potential claims against the insurance fund, or prevent the failure of the association. The emergency orders may be made notwithstanding the provisions of chapter 120, F.S. The emergency orders that the OFR promulgates may convert the association from a state to a federal charter (or vice-versa); reorganize, merge, or consolidate the association with another association; convert the association into a capital stock association; or authorize a state or federal association to acquire the assets of and assume the liabilities of the failing association.

Rationale: There has not been a state-chartered association under ch. 665, F.S., in Florida since August 31, 2003, when the last remaining such entity was acquired by a national trust company. As such, the entire statutory scheme contained in ch. 665, F.S., may be anachronistic and unnecessary. Representatives from the OFR state that the exemption allows the office to quickly merge a troubled association with a healthy financial institution, rather than close and liquidate the association. The closing of the association would have an adverse impact on the Federal Deposit Insurance Fund, harm consumers, and undermine consumer confidence.

Recommendation: Representatives from the OFR state that the exemption should be retained.

Staff of the Banking and Insurance Committee recommends that the Legislature investigate whether ch. 665, F.S., has continuing relevance, or whether it should be repealed or modified.

Motor Vehicle Sales Warranties

681.1095(11)

Section 681.1095, F.S., establishes a compulsory arbitration procedure whereby consumers with new motor vehicles which have substantial defects not corrected by manufacturers within a reasonable number of attempts can obtain refund or replacement relief. Consumers are required to submit to arbitration as a precondition to seeking relief under the Lemon Law in circuit court. Motor vehicle manufacturers are compelled to submit to arbitration when the consumer requests it and the claim is eligible.

Rationale: The public policy is to provide a fair, free and expeditious alternative dispute resolution process (arbitration) for consumers with defective new motor vehicles (cars and light trucks). These disputes are between consumers and motor vehicle manufacturers and do not involve agency action in the usual sense. The agency provides the dispute resolution mechanism. Arbitration hearings are held by panels of three members of the New Motor Vehicle Arbitration Board, who are citizens appointed by the Attorney General. Members of the board do not have to be attorneys; however, at least one member must be a person with automotive technical expertise. The arbitration process is informal and user-friendly for consumers, without the technical rules of evidence and procedure as are found in ch.120, F.S., proceedings, and is designed to encourage consumer and manufacturer participation without the need for legal counsel. This type of informal dispute resolution would not be accomplished using the formal hearing process of ch. 120.

Recommendation: The Department of Legal Affairs recommends that the exemption be retained.

Staff of the Committee on Transportation recommends the exemption be retained.

681.1097(1)

Section 681.1097, F.S., allows recreation vehicle manufacturers to provide a compulsory mediation and arbitration process for the resolution of disputes between consumers who purchase new recreation vehicles and the recreation vehicle manufacturers. This is an industry-sponsored program and is not established within any government agency. The Department of Legal Affairs has the authority to determine whether such a program is qualified to operate, and has continuing authority to monitor a qualified program and revoke qualification if the statutory requirements are not met. The qualification process, which is the only agency action connected with this private program, is not exempt from chapter120, F.S. Only the proceedings of the private program, and the recourse to be pursued by parties who are dissatisfied with its decisions, are exempt from ch. 120.

Rationale: The RV mediation and arbitration program is not conducted by a government agency and is not paid for by public funds, but is funded by the recreation vehicle industry, much like the manufacturer-sponsored informal dispute settlement mechanisms established in s. 681.108, F.S. The sponsoring manufacturers determine whether they will offer such a program and contract with the administrator. The Department of Legal Affairs then determines whether the program complies with the statutory requirements. The agency oversight function is subject to the provisions of ch. 120.

Recommendation: The Department of Legal Affairs recommends that the exemption be retained.

Staff of the Committee on Transportation recommends the exemption be retained.

Discrimination in the Treatment of Persons; Minority Representation

760.11(2)

Section 760.11(2), F.S., allows the Florida Commission on Human Relations (the commission) to refer its investigation of a complaint to another state or federal agency having concurrent jurisdiction. Specifically, s. 760.11(2), F.S., states that the written referral itself does not constitute "agency action" within the meaning of s. 120.52, F.S.,[78] which requires that procedures delineated by chapter 120, F.S., the Administrative Procedures Act (APA), be followed.

Rationale: The process of investigating a complaint is outlined by ch. 120, F.S. However, the decision to refer is usually dictated by contract or other agreement with another agency. Referring a complaint may also be part of the normal processing of complaints by the commission to ensure that duplication of effort does not occur. If such referrals were deemed agency action requiring public notice and appellate review under ch.120 the process of reviewing and adjudicating petitions would be slowed, particularly if similar action were taken on the same complaint by more than one state entity.

Recommendation: The commission recommends that the exemption be retained. The agency indicates that no public purpose would be served by making referrals to another agency that has concurrent jurisdiction subject to the APA.

Staff of the Committee on Commerce and Consumer Services recommends that the exemption be retained. Permitting the commission to refer complaints to agencies that have concurrent jurisdiction promotes government efficiency and avoids waste.

[78] Section 120.52(2), F.S., defines "agency action" as "the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue and order." The term also includes any denial of a request made under s. 120.54(7), F.S. (related to petitions to initiate rulemaking).

Drug Abuse Prevention and Control

893.035

Before the Attorney General (AG) can initiate rule proceedings to add, transfer, or remove a controlled substance from the controlled substance schedules, it must request a medical/scientific evaluation and recommended classification of the substance from the Department of Health (DOH) and the Florida Department of Law Enforcement (FDLE). The agencies' evaluations/classifications are not subject to ch. 120, F.S. (s. 893.035(5), F.S.)

Rationale: The exemption allows for expeditious rulemaking by the AG to respond to new drug threats and newly discovered medical uses for current controlled substances. Rule challenge proceedings appear to adequately protect due process and other interests of affected persons. Similar proceedings against the DOH and the FDLE, before the AG even initiates rulemaking, could detract from the statute's ameliorative effect and unnecessarily expend agency resources for no obvious benefit.

Recommendation: The agencies recommend retention of the exemption. Rationales provided for retaining the exemption include that it serves the public policy purpose (previously described) and the DOH and the FDLE merely have a consulting role in the AG’s rulemaking.

Staff of the Committee on Criminal Justice recommends that the current exemption be retained because it allows the AG to expeditiously respond to new drug threats and newly discovered medical uses for current controlled substances. The DOH and the FDLE merely have a consulting role in the AG's rulemaking.

893.035(7)(b)

Paragraph (7)(b) of s. 893.035(5), F.S., allows for the AG's emergency rules regarding the scheduling of substances in the controlled substance schedules to remain in effect rather than expire in 90 days pursuant to s. 120.54(4)(c), F.S.

Rationale: The purpose of the exemption is to protect the public from substances believed to have a potential for abuse until the Legislature can determine whether the emergency rule scheduling should be statutorily codified, thereby providing law enforcement with a legal basis to take action against those who sell, use, or manufacture these substances and allowing the Department of Health to provide enforcement through disciplinary processes.

Recommendation: The AG recommends retention of the current exemption because it has been successfully used to achieve the public policy purpose.

Staff of the Committee on Criminal Justice recommends that the current exemption be retained because it allows the AG's emergency rules regarding the scheduling of substances as controlled substances to continue in effect until statutory codification, thereby providing law enforcement with a legal basis to take action against those who sell, use, or manufacture the substances and allowing the Department of Health to provide enforcement through disciplinary processes.

State Correctional System

944.095(9)

Actions taken by the department or the Governor and Cabinet on the prison site acquisition process described in law are exempt from ch. 120, F.S. This exemption was created in 1983 at a time when bed space demands were escalating. The exemption assists the Department of Corrections and the Governor and Cabinet in completing the land acquisition process in a timely and efficient manner – absent rule challenges - in order to quickly site prisons to meet the need for additional prison beds. This exemption allows the process to continue even if the state does not have title to the land, for example. Without the exemption, the land acquisition process would be much more lengthy and tedious.

Rationale: The exemption expedites the land acquisition process which lessens the time needed to site a new prison.

Recommendation: The Department of Corrections recommends the retention of the exemption without modification. The rationale for its recommendation is that the exemption provides the agency with a reasonable project schedule from land acquisition to completion of construction.

Staff of the Committee on Criminal Justice recommends the retention of the exemption without modification. Public safety is endangered if insufficient prison beds permit early release. An expedited site and acquisition process helps get new prison beds built faster and helps the state be more responsive in the event that there is an unexpected rise in the need for new beds.

Student and Parental Rights and Educational Choices

1002.33(6)(c)

Section 1002.33, F.S., authorizes district school boards and state universities to sponsor charter schools. A charter school applicant is required to submit application to the district school board with appropriate jurisdiction. The district

school board then approves or denies an application by majority vote. In the event of a denial or a failure to act on an application, a charter school applicant is authorized to appeal the district school board's decision to the State Board of Education (SBE) within a certain timeframe. Upon review, the SBE is required to issue a written decision to the district school board that indicates approval or denial of the application. The exemption provides that the SBE decision is not subject to any provisions of chapter 120, F.S.

Rationale: According to the Department of Education, the exemption is still necessary to avoid a duplicative review. The SBE is acting in a quasi-judicial role. It makes a recommendation to approve/deny the district's decision and remands for implementation. Any APA review would be duplicative of the SBE review.

Recommendation: The DOE recommends retention of the exemption.

To the extent that the SBE is acting in a quasi-judicial role, staff of the Committee on Education recommends modification of the exemption to require that the SBE decision include findings of fact, similar to what an administrative law judge would provide.

1002.33(6)(f)2.

Section 1002.33(6)(f)2., F.S., provides that the role of the Charter School Appeal Commission (Commission) is to conduct unbiased review of appeals by charter school applicants whose applications have been denied, and to make non-binding recommendations to the SBE. This provision requires the written recommendation to indicate whether the appeal should be upheld or denied, with supporting justification. The exemption provides that the Commission's recommendation is not subject to any provisions of chapter 120, F.S.

Rationale: According to the Department of Education (DOE), the Commission has no decision making authority. It reviews the district's decision, and makes a recommendation to the SBE. The SBE, acting in the quasi-judicial role identified above, is not bound by the Commission's recommendation. Thus, APA review of the Commission's recommendation is not necessary.

Recommendation: The DOE recommends retention of the exemption.

Given that the Commission's recommendation is non-binding, staff of the Committee on Education concurs with the DOE recommendation.

1002.335(5)(f)

The 2006 Legislature established the Florida Schools of Excellence Commission (FSE), and identified as its purpose the operation in an alternate capacity as an independent state level charter school authorizer.79 With the addition of the FSE, the district school board and the FSE will share concurrent authority to authorize charter schools and FSE charter schools within that particular district. District school boards are, however, authorized to apply to the State Board of Education (SBE) for an exclusive grant of authority to approve charter school applications. Following a public, noticed hearing, the SBE is required to grant or deny exclusive authority to the district school board. The exemption provides that this SBE decision is not subject to ch. 120 provisions, and constitutes a final action subject only to judicial review by the district court of appeal.

Rationale: According to the Department of Education, under s. 1002.335(5)(f), F.S., the State Board of Education (SBE) reviews the district's resolution to retain exclusive authority and also reviews any subsequent challenge to the grant of exclusive authority. APA review would be duplicative of these SBE reviews.

Recommendation: The Department of Education recommends retention of the exemption.

To the extent that the SBE is acting in a quasi-judicial role, Committee on Education staff recommends modification of the exemption to require that the SBE decision include findings of fact, similar to what an administrative law judge would provide. Although s. 1002.335(5)(f), F.S., requires SBE consideration of a variety of factors, these are not required to be included in the SBE's written decision.

1002.335(6)(d)

Municipalities, state universities, community colleges, and regional educational consortia are authorized to apply to the Florida Schools of Excellence Commission (FSE) for status as cosponsors of charter schools. The FSE's decision to deny an application or revoke approval of a cosponsor is not subject to ch. 120, F.S., and may be appealed to the State Board of Education.

Rationale: According to the Department of Education, under s. 1002.335(6)(d), F.S., the SBE acts in a quasi-judicial role. The SBE makes a recommendation to approve/deny the Florida Schools of Excellence Commission's decision and remands for implementation. Therefore, the SBE ultimately reviews the FSE decision on appeal. Any APA review would be duplicative of SBE review, which is subject to direct judicial review.

[79] Section 1002.335(3)(a), F.S.

Recommendation: The DOE recommends retention of the exemption.

Staff of the Committee on Education does not concur in the DOE's recommendation. Although the SBE's role may be considered to be quasi-judicial, it is the FSE's decision that is at issue. Committee on Education staff recommends, at minimum, that the exemption be modified to require the FSE to include findings of fact in its written decision.

1002.34(6)(b)

This provision authorizes a district school board, community college board of trustees, or a consortium of one or more of each to agree to sponsor a center to be located in the board's jurisdictional area. For those applications that are denied, the applicant is authorized to appeal the board's decision to the State Board of Education (SBE). The SBE is required to remand the application to the sponsor with a written recommendation of approval or denial. The exemption provides that the SBE's decision is not subject to ch. 120, F.S.

Rationale: According to the Department of Education, the SBE is acting in a quasi-judicial role. It makes a recommendation to approve/deny the sponsor's decision and remands for implementation. Any APA review would be duplicative of SBE review.

Recommendation: The Department of Education recommends retention of the exemption.

To the extent that the SBE is acting in a quasi-judicial role, staff of the Committee on Education recommends modification of the exemption to require that the SBE decision include findings of fact, similar to what an administrative law judge would provide.

1002.39(6)(c)

As a part of the Department of Education's oversight responsibilities for the John M. McKay Scholarships for Students with Disabilities Program, the DOE must establish a process for individuals to notify the department of violations of law related to scholarship program participation. Further, the DOE must conduct an inquiry of a legally sufficient complaint about a violation by a parent, a private school, or a school district. Alternatively, the DOE may refer the complaint to the appropriate agency for investigation. Section 1002.39(6)(c), F.S., provides that the DOE's inquiry into a complaint is not subject to the requirements of chapter 120, F.S.

Rationale: This provision was enacted by the 2006 Legislature and establishes a complaint process for alleged violations of the scholarship program requirements by parents, private schools, and school districts. The DOE is currently proposing rules for adoption by the State Board of Education to implement this provision. The proposed rules include more specific details for handling these types of complaints.[80]

Recommendation: The DOE noted that the inquiry process is less formal than the process set forth in chapter 120, F.S., and recommends retaining the current exemption. The DOE indicated that chapter 120, F.S., safeguards are provided in other provisions of s. 1002.39, F.S. According to the DOE, the provisions of chapter 120, F.S., do apply to an inquiry resulting in a proposed agency action that affects the substantial interests of parties. This is basically a consumer complaint process.

Staff of the Committee on Education recommends modifying the existing exemption to require the provision of notice to parties who are substantially affected by the outcome of the inquiry.

Public K-12 Education

1003.57(1)(e)

Each school district must provide for an appropriate program of special instruction, facilities, and services for exceptional students. An exceptional student is any student who has been determined eligible for a special program in accordance with State Board of Education (SBE) rule and includes students who are gifted and students with disabilities.[81] The law further defines the term "exceptional students with disabilities."[82]

Section 1003.57, F.S., prohibits a student from being given special instruction or services as an exceptional student until he or she has been properly evaluated, classified and placed in the manner prescribed by SBE rule. Section 1003.57(1)(e), F.S., requires the parent of an exceptional student evaluated, placed, or denied placement to be notified of each evaluation, placement, or denial. In addition, parents must be notified of the right to a due process hearing.

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[80] Proposed Rules 6A-6.03315 and 6A-6.0970.

[81] Section 1003.01(3)(a), F.S.

[82] Exceptional students with disabilities (s. 1003.01(3)(a), F.S.) are those who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospital and homebound, autistic, developmentally delayed children, ages birth through five years, or children, ages birth through two years, with established conditions that are identified in SBE rules.

These hearings are exempt from the provisions of ss. 120.569 (relating to decisions which affect substantial interests), and 120.57 (relating to hearings involving disputed issues of material fact), except to the extent that the SBE adopts rules establishing other procedures.

Due process hearings must be conducted by an administrative law judge (ALJ) from the Division of Administrative Hearings. The ALJ's decision is final; however, an aggrieved party retains the right to bring a civil action in circuit court or request a review of the ALJ's order by the district court of appeal as provided by s. 120.68, F.S.

Rationale: Procedural safeguards provide the ability of parents to understand the rights of their child, facilitate communication between parents and schools, and detail the due process procedures if a complaint about the implementation of the federal Individuals with Disabilities Education Act (IDEA) as it relates to an individual child. The IDEA and federal regulations provide detailed requirements for administrative due process hearings related to parental notification of evaluations and placement decisions.[83] Current SBE rules also set forth specific provisions for due process hearings, including the rights of all parties, judicial review of administrative decisions, and the responsibilities of the school districts, the Department of Education (DOE), and the administrative law judge.[84]

Recommendation: The DOE recommends retaining the exemptions for due process hearings, since pertinent due process requirements are already specified in the federal IDEA regulations, which would override any state statute on administrative hearings.

Staff of the Committee on Education concurs with the DOE recommendation.

Support for Learning

1006.07(1)(a)

District school boards are tasked with the control of students at school and for proper attention to student health, safety, and welfare, including adopting rules for the control, discipline, in-school suspension, suspension, and expulsion of students. Suspension hearings are exempted from the provisions of chapter 120, F.S.

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[83] 20 U.S.C. ss. 1413 and 1415 and 34 C.F.R. § 300.500 et seq., relating to procedural safeguards for the provision of a free appropriate education. These provisions include the rights of parties to a hearing, timelines, and judicial review of the findings and decisions rendered in the hearing.

[84] Rule 6A-6.03311(11), F.A.C.

Rationale: Notice of grounds for disciplinary action, including in-school and out-of-school suspension, is provided through the code of student conduct that school districts discuss and provide to teachers, parents, and students at the beginning of each school year. The code must be based on rules governing student conduct and discipline adopted by the district school board.[85]

Current SBE rules provide procedures for the suspension of a student who is formally charged with a felony for an incident that allegedly occurred on other than school property, but that has an adverse impact on the school in which the student is enrolled.[86] The procedures provide for notice of the charge and the right to a hearing, as well as an opportunity for the student to be heard. The procedures for disciplining students with disabilities, including expedited due process hearings, are established in rule.[87]

Students who commit an offense which warrants out-of-school suspension are eligible for disciplinary programs. Rules define disciplinary programs as programs that are longer than 10 days duration and are designed to serve students who are disruptive in the traditional school environment.[88] In-school suspension programs may be less than 10 days duration.

Suspension hearings are exempted from the provisions of chapter 120. F.S., while expulsion hearings are governed by ss. 120.569 and 120.57(2), F.S., and are exempt from the public meetings requirements in s. 286.011, F.S. However, the student's parent must be given notice of the public meetings provisions in s. 286.011, F.S., and may elect to have the expulsion hearing held in compliance with that section.

Recommendation: The DOE recommends retaining the exemption for suspension hearings from all the provisions of chapter 120, F.S. Entitling a student to a chapter 120 hearing before the school could suspend that child would be unduly burdensome, and, in effect, could also handicap school safety efforts. Suspension is a temporary action taken by a school or school district based on local policy. Expulsion is a permanent action and hearings are governed by portions of the Administrative Procedures Act (APA). Therefore, removal of

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[85] Section 1006.07(2), F.S.
[86] Rule 6A-1.0956, F.A.C.
[87] Rules 6A-6.03312 and 6A-6.03311, F.A.C. Due process hearings for students with disabilities are governed by s. 1003.57(1)(e), F.S., and the federal Individuals with Disabilities Education Act (IDEA) as amended by P.L. 108-446. The IDEA and federal regulations provide detailed requirements for administrative due process hearings related to parental notification of evaluations and placement decisions.
[88] Rule 6A-6.0527, F.A.C.

the exemption would result in suspension hearings being governed by the APA, rather than local policy.

Section 1002.20(4)(a)1., F.S., requires a school to make a good faith effort to immediately notify a parent by telephone of the student's suspension, and the reason for that suspension. To the extent that immediate notice is required in law, and that local policy provides for notice of a hearing and for a student to be heard at the hearing, staff of the Committee on Education concurs with the DOE's recommendation.