RULEMAKING OVERSIGHT
&
REPEAL
SUBCOMMITTEE
MEETING

Wednesday, March 27, 2013
10:30 a.m. – 12:30 p.m.

306 House Office Building

MEETING PACKET

Will Weatherford
Speaker

John Tobia
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Rulemaking Oversight & Repeal Subcommittee

Start Date and Time:	Wednesday, March 27, 2013 10:30 am
End Date and Time:	Wednesday, March 27, 2013 12:30 pm
Location:	306 HOB
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 7 Water Management Districts by Porter, Pilon
CS/HB 23 Public Meetings by Government Operations Subcommittee, Rodrigues, R.
CS/HB 127 Meetings of District School Boards by K-12 Subcommittee, Stark
CS/HB 667 Real Estate Brokers and Appraisers by Business & Professional Regulation Subcommittee, Porter
HB 1165 Ratification of Rules Implementing Workers' Compensation Law by Brodeur
HB 1225 Administrative Procedures by Adkins

Consideration of the following proposed committee bill(s):

PCB RORS 13-01 -- AHCA Administrative Authority

Other Business

NOTICE FINALIZED on 03/25/2013 16:18 by Powell.Sonja

FLORIDA HOUSE OF REPRESENTATIVES

Rules & Calendar Committee
Rulemaking Oversight & Repeal Subcommittee

Will Weatherford
Speaker

John Tobia
Chair

AGENDA
Wednesday, March 27, 2013
10:30 a.m. – 12:30 p.m.
Room 306 House Office Building

- Opening Remarks by Chair Tobia
- Roll Call by Sonja Powell, CAA
- Announcements
- Consideration of the following bill(s):
    - HB 1225 Administrative Procedures by Adkins
    - CS/HB 127 Meetings of District School Boards by K-12 Subcommittee, Stark
    - HB 7 Water Management Districts by Porter, Pilon
    - CS/HB 667 Real Estate Brokers and Appraisers by Business & Professional Regulation Subcommittee, Porter
    - HB 1165 Ratification of Rules Implementing Workers' Compensation Law by Brodeur

402 South Monroe Street, 400 House Office Building, Tallahassee, Florida 32399-1300
Telephone: 850–717-4881 Fax: 414-6872

- Consideration of the following proposed committee bill(s):
    - PCB RORS 13-01 -- AHCA Administrative Authority
- Consideration of the following bill(s):
    - CS/HB 23 Public Meetings by Government Operations Subcommittee, Rodrigues, R.
- Other Business
- Closing Remarks
- Meeting Adjourned

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7 Water Management Districts
SPONSOR(S): Porter and Pilon
TIED BILLS: None **IDEN./SIM. BILLS:** SB 244

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	12 Y, 0 N	Renner	Blalock
2) Rulemaking Oversight & Repeal Subcommittee		Miller	Rubottom
3) State Affairs Committee			

SUMMARY ANALYSIS

Under current law, each of the five water management districts (WMDs) must submit to the Department of Environmental Protection (DEP) for review and approval a priority list and schedule for the establishment of minimum flows and levels (MFLs) for surface watercourses, aquifers, and surface waters within the district. If the existing flow or level of a water body is below or projected within 20 years to fall below established MFLs, then a WMD must implement either a recovery strategy to restore the system to the established MFLs or a prevention strategy to prevent the system from falling below the established MFLs. MFLs are adopted by rule by the WMDs and are subject to administrative challenges.

The bill provides that the priority list and schedule submitted to the DEP by the WMDs also identify any reservations proposed by the WMDs to be established, and identify those listed water bodies that have the potential to be affected by withdrawals in an adjacent WMD for which the DEP's adoption of a reservation or a MFL may be appropriate.

The bill also provides that a WMD must provide the DEP with technical information and staff support for the development of a reservation, minimum flow or level, or recovery or prevention strategy to be adopted by rule by the DEP. A WMD must apply any reservation, minimum flow or level, or recovery or prevention strategy adopted by the DEP by rule without the WMD's adoption by rule of such reservation, minimum flow or level, or recovery or prevention strategy.

In addition, the bill provides that if the geographic area of a resource management activity, study, or project crosses WMD boundaries, the affected WMDs are authorized to designate a single affected district by interagency agreement to conduct all or part of the applicable resource management responsibilities. If funding assistance is provided to a resource management activity, study, or project, the WMD providing the funding must ensure that some or all the benefits accrue to the funding WMD. This provision does not impair any interagency agreement in effect on July 1, 2013.

The bill creates s. 373.171(5), F.S., exempting cooperative funding programs instituted by the several water management district governing boards from the rulemaking requirements of Ch. 120, F.S. However, any portion of an approved program which affects the substantial interests of a party would be subject to the hearing procedures established under section 120.569, F.S.

Lastly, the bill requires all WMDs, not just the Southwest Florida Water Management District, to jointly develop, together with the regional water supply authority, the water supply development component of a regional water supply plan, when the plan deals with or affects public utilities and public water supply for those areas served by a regional water supply authority.

The bill appears to have an indeterminate negative fiscal impact on state government (See Fiscal Analysis Section). The bill has a potentially positive fiscal impact on WMDs who enter into interagency agreements by reducing the duplication of services and promoting streamlining. The bill also appears to have a negative fiscal impact on WMDs by requiring them to provide technical information and staff support to the DEP for the development of a reservation, minimum flow or level, or recovery or prevention strategy.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Minimum Flows and Levels

Current Situation

The Department of Environmental Protection (DEP) and each Water Management District (WMD) are required to establish minimum flows for surface watercourses and minimum levels for ground water and surface waters within the district.[1] "Minimum flow" is the limit at which further water withdrawals from a given watercourse would significantly harm the water resources or ecology of the area.[2] "Minimum level" is the level of groundwater in an aquifer or the level of a surface water body at which further withdrawals will significantly harm the water resources of the area.[3]

Section 373.042(2), F.S., requires that each WMD submit annually to the DEP for review and approval a priority list and schedule for the establishment of minimum flows or levels for surface watercourses, aquifers, and surface waters within the WMD. The priority list and schedule must identify those water bodies for which the WMD will voluntarily undertake independent scientific peer review.

A person who will be substantially affected by a proposed minimum flow or minimum level may request that the DEP or the governing board of the WMD submit for independent scientific peer review all of the information and data on which the proposed flow or level is based. The request must be made in writing prior to the flow or level being established and prior to the filing of any petition for administrative hearing related to the flow or level.[4] The statute provides a process for conducting such review and states that the final report is admissible in evidence in any subsequent administrative challenge to establishing the minimum flow or level.[5]

The DEP has the sole authority to review rules of WMDs to ensure consistency with the DEP's water resource implementation rule.[6] This review must begin within 30 days of the adoption or revision of a rule by a WMD.

Effect of Proposed Changes

The bill amends s. 373.042(2), F.S., to provide that the priority list and schedule submitted to the DEP by the WMDs for the establishment of MFLs and reservations also identify:

- Any reservations proposed by the WMD to be established under s. 373.223(4), F.S.;[7] and
- Those listed water bodies that have the potential to be affected by withdrawals in an adjacent WMD for which the DEP adoption of a reservation or a minimum flow or level may be appropriate.

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[1] Section 373.042(1), F.S.
[2] Section 373.042(1)(a), F.S.
[3] Section 373.042(1)(b), F.S.
[4] Section 373.042(4)(a), F.S.
[5] Section 373.042(5), F.S. This subsection also requires the Administrative Law Judge to render the order within 120 days after the petition is filed unless the time is extended by agreement of all the parties.
[6] Section 373.114(2), F.S. The Water Resource Implementation Rule is promulgated as Chapter 62-40, F.A.C.
[7] Section 373.223(4), F.S., provides that the governing board or the DEP, can reserve from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety. These reservations must be subject to periodic review and revision in light of changed conditions. However, all presently existing legal uses of water must be protected so long as such use is not contrary to the public interest.

The bill also provides that a WMD must provide the DEP with technical information and staff support for the development of a reservation, minimum flow or level, or recovery or prevention strategy to be adopted by rule by the DEP. A WMD must apply any reservation, minimum flow or level, or recovery or prevention strategy adopted by the DEP by rule without the WMD's adoption by rule of such reservation, minimum flow or level, or recovery or prevention strategy.

Interagency Agreements

Current Situation

Pursuant to chapter 373, F.S., the state regulates various activities that affect surface waters and wetlands through the Environmental Resource Permit (ERP) program. The program is implemented jointly by the DEP and the five WMDs.[8] Operating Agreements between DEP and the WMDs outline specific responsibilities to each agency for any given application. Under those agreements, the DEP generally reviews and takes actions on applications involving:

- Solid waste, hazardous waste, domestic waste, and industrial waste facilities;
- Mining;
- Power plants, transmission and communication cables and lines, natural gas and petroleum exploration, production, and distribution lines and facilities;
- Docking facilities and attendant structures and dredging that are not part of a larger plan of residential or commercial development;
- Navigational dredging conducted by governmental entities, except when part of a larger project that a WMD has the responsibility to permit;
- Systems serving only one single-family dwelling unit or residential unit not part of a larger common plan of development;
- Systems located in whole or in part seaward of the coastal construction control line;
- Seaports; and
- Smaller, separate water-related activities not part of a larger plan of development (such as boat ramps, mooring buoys, and artificial reefs).

The WMDs have regulatory authority over reviewing and taking action on all other applications, mostly larger commercial and residential developments. Chapter 373, F.S., also grants the WMDs with the authority to implement the water supply and planning policies of the state, and to issue permits for the consumptive use of water. Each WMD is also responsible for water resource management and development. Section 373.705, F.S., provides that it is the intent of the legislature that WMDs take the lead in identifying and implementing water resource development projects, and be responsible for securing necessary funding for regionally significant water resource development projects. The WMDs are encouraged to implement water resource development projects as expeditiously as possible in areas subject to regional water supply plans. Each WMD governing board is required to include in its annual budget the amount needed for the fiscal year to implement water resource development projects, as prioritized in its regional water supply plans.

Section 373.046(4), F.S., authorizes the DEP and the WMDs to modify their division of responsibilities agreement and to enter into further interagency agreements by rulemaking pursuant to chapter 120, F.S., to provide for greater efficiency and to avoid duplication in the administration of part IV of chapter 373, F.S. (management and storage of surface waters). In developing the interagency agreements, the WMDs and the DEP must take into consideration the technical and fiscal ability of each WMD to implement all or some of the provisions of part IV of chapter 373, F.S.

[8] The five water management districts include Northwest Florida WMD, Suwannee River WMD, St. Johns River WMD, Southwest Florida WMD, and South Florida WMD.

Section 373.046(6), F.S., provides that when the geographic area of a regulatory activity crosses WMD boundaries, the affected WMDs may designate a single affected WMD by interagency agreement to carry out the WMD's regulatory responsibilities within that geographic area.

WMDs do not have the same statutory authority to enter into similar agreements for non-regulatory resource management activities, studies, or projects. In addition, a WMD may not fund resource management activities in another WMD even if some benefits inure to it from the activities.

Effect of Proposed Changes

The bill creates s. 373.046(7), F.S., providing that when the geographic area of a resource management activity, study, or project crosses WMD boundaries, the affected WMDs are authorized to designate a single affected district by interagency agreement to conduct all or part of the applicable resource management responsibilities, not including those regulatory responsibilities that are subject to s. 373.046(6), F.S., discussed above. Under the bill, if funding assistance is provided to a resource management activity, study, or project, the WMD providing the funding must ensure that some or all the benefits accrue to the funding WMD. The provisions in this new subsection will not impair any interagency agreement in effect on July 1, 2013.

Rules/Cooperative Funding Programs

Current Situation

The Boards of the several WMDs are authorized to adopt rules to implement their responsibilities under Chapter 373, F.S.[9] A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms.[10] To adopt a rule an agency must have an express grant of authority to implement a specific law by rulemaking.[11] The particular statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[12] A delegation of authority to an administrative agency by a law that is vague, uncertain, or so broad as to give no notice of what actions would violate the law, could be ruled unconstitutional because it allows the agency to make the law.[13] The Legislature may delegate rule-making authority to agencies but not the authority to determine what the law should be.[14]

The term "cooperative funding program" is not defined by statute. WMD attorneys have supplied the following informal working definitions:

- "Cooperative funding" or "cooperative funding program" means the expenditure of federal, state, or district funds in support of and in cooperation with other governmental entities or not-for-profit organizations for the purpose of accomplishing specific projects that meet the district's core mission responsibilities in the areas of water supply, flood protection, water quality protection, and preservation and enhancement of natural systems. Cooperative funding is not a procurement

[9] Section 373.171, F.S.
[10] Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region,* 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[11] Sections 120.52(8) & 120.536(1), F.S.
[12] *Sloban v. Florida Board of Pharmacy,* 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.,* 794 So. 2d 696, 704 (Fla. 1st DCA 2001).
[13] *Conner v. Joe Hatton, Inc.,* 216 So.2d 209 (Fla.1968).
[14] *Sarasota County. v. Barg,* 302 So.2d 737 (Fla. 1974).

activity. The cooperating entity is responsible for supervision of the cooperative project and contributes funds and/or services in support of the cooperative project.[15]

- "A cooperative funding program is a program in which a government agency through the use of legal agreements with other entities (local government, special district, private company, etc.) provides funding for public purposes consistent with the statutory mission of the agency."[16]

All WMDs participate with entities such as local governments or private landowners in cost-sharing for certain projects, including those creating sustainable water resources, providing flood protection, and enhancing conservation efforts. As authority for these arrangements the WMDs rely on their general responsibilities to protect water quality and regulate water supply.[17] Some are directed by proviso in the General Appropriations Act. The nature and fiscal impact of these funding programs is included generally in their annual budgeting process[18] and included in the budget of each WMD, usually denominated "interagency expenditures."[19] The policies and procedures controlling the application process, consideration, award, and implementation for each program are not ordinarily adopted through the rulemaking process of the Administrative Procedure Act (APA), with exceptions noted below.[20]

The Southwest Florida WMD (SWFWMD), in conjunction with the Department of Agriculture and Consumer Services, implements the "Facilitating Agricultural Resource Management Systems Program" (FARMS), the one program authorized by statute expressly referencing "cooperative funding programs."[21] The District adopted rules to implement this program (Chapter 40D-26, Florida Administrative Code).[22] SWFWMD also incorporated a joint funding agreement into the rule adopted as part of its strategy for recovery of minimum water flows and levels and environmental resources recovery plan for the Northern Tampa Bay Water Use Caution Area.[23] SWFWMD separately established a "Cooperative Funding Initiative" providing uniform policies and procedures for the District to cooperate in other projects "with county governments, municipalities, water supply authorities, and other interested entities in water management programs and projects of mutual benefit...."[24] These

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[15] Informally suggested by District staff in an email of March 5, 2013, from the St. John's River WMD Office of Communications and Intergovernmental Affairs to Staff of RO&R Subcommittee (SJRWMD 3/5/2013 email). This was not represented as the official position of the District.

[16] Informally suggested in an email of March 6, 2013, from staff of the South Florida WMD to staff of the RO & R Subcommittee (SFWMD 3/6/2013 email). This was not represented as the official position of the District.

[17] Section 373.083, F.S. Specific water quality projects may rely on ss. 373.042, 373.451, 373.536, 373.705, and 373.707, F.S. Water resource development projects are authorized under s. 373.705(3), F.S., and may also reference ss. 259.105, 373.470, 373.536, 373.701(3), and 373.703(2), (6), (9), F.S. Sections 373.701, 373.703, and 373.707 provide additional authority for water supply projects.

[18] WMDs annually submit a preliminary budget to the Speaker of the House and the President of the Senate. Section 373.535, F.S. Public hearings are part of the budgeting process for each District, as is review and approval by the Executive Office of the Governor. Section 373.536, F.S.

[19] See, Northwest Florida WMD "Consolidated Annual Report 2013-01, p. 4-6, at http://www.nwfwmd.state.fl.us/pubs/consolidatedAR/consolAR.html; Suwannee River WMD "Final Budget and Documents to the Governor" at http://www.mysuwanneeriver.com/index.aspx?NID=136; St. John's River WMD "FY 2012-2013 Adopted Budget Overview" at http://floridaswater.com/budget/; Southwest Florida WMD "FY 2012-2013 Budget" at http://www.swfwmd.state.fl.us/business/budget/; South Florida WMD "FY 2013 Budget" at http://www.sfwmd.gov/portal/page/portal/xweb%20about%20us/agency%20reports#budget_strategic_plan.

[20] Chapter 120, F.S. Each WMD meets the definition of an "agency" under s. 120.52(1), F.S., and may not apply a general policy implementing a specific statutory responsibility without first adopting that policy as a rule. Section 120.54, F.S. However, a specific contract between a District and another party, such as an agreement with a local government to for cost-sharing of a water supply project, is not a rule.

[21] Section 373.0363(3) & (4)(b), F.S. The SWFWMD asserts these are not regulatory programs and thus not subject to rulemaking. The SWFWMD asserts that if it were required to adopt rules for all procedures and policies pertaining to a cooperative funding program, the program could not be modified as necessary or implemented as efficiently.

[22] Rule 40D-26.011, F.A.C.

[23] Rule 40D-80.073(8)(a), F.A.C., incorporating the "Joint Funding Agreement Between the Southwest Florida Water Management District and The City of Tampa for Implementation of Recovery Projects to meet Minimum Flows of the Lower Hillsborough River, dated October 19, 2007."

[24] Board Policy Number 130-4. The uniform application process is established in District Procedure Number 13-4.

other cooperative funding arrangements are used by the District primarily to assist with water quality, water supply development, and water resource projects.[25] SWFWMD budgets funding for cooperative projects as "Interagency Expenditures (Cooperative Funding)" under "Acquisition, Restoration and Public Works," "Regulation," and "Outreach."[26]

The Suwannee River WMD (SRWMD) relies on written policies and procedures for accepting, evaluating, and granting applications for cost-sharing projects.[27] The Board of SRWMD by directive established a separate funding program to encourage improved irrigation efficiency, conservation, and pollution prevention by agricultural producers.[28] SRWMD budgets funding for cooperative projects as "Interagency Expenditures" under "Water Resources Planning and Monitoring" and "Acquisition, Restoration and Public Works."[29]

The South Florida WMD (SFWMD) implemented a uniform system controlling the filing, evaluation, award, and monitoring of "grants," which is defined to include cooperative agreements.[30] SFWMD currently participates in over 900 funding agreements with local governments, federal, state, and local agencies, and private entities. These projects range from a "Water Savings Incentive Program" in part implementing s. 373.707, F.S., to "Watershed Protection Plan" projects as part of Everglades restoration,[31] to environmental monitoring.[32] SFWMD apparently summarizes cooperative funding in its budget as "Interagency Expenditures."[33]

The St. Johns River WMD (SJRWMD) presently helps fund 22 projects[34] and participates in another 4 funded by state or federal funds for a specific purpose.[35] SJRWMD also engages in cooperative funding with agricultural landowners through its Tri-County Agricultural Area Water Management Partnership.[36] SJRWMD budgets cooperative funding expenditures as "Interagency Expenditures (Cooperative Funding)" only under "Acquisition, Restoration and Public Works."[37]

The Northwest Florida WMD (NWFWMD) currently participates in cost-sharing for a number of cooperative projects, most of which pertain to water supply infrastructure.[38] NWFWMD budgets cooperative funding as "Interagency Expenditures (Cooperative Funding)" under "Acquisition, Restoration and Public Works" and "Operations and Maintenance of Lands and Works."[39]

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[25] March 6, 2013, email from SWFWMD Office of the General Counsel to staff of RO & R Subcommittee (SWFWMD 3/6/2013 email).
[26] http://www.swfwmd.state.fl.us/business/budget/
[27] "Cooperative Funding Program Policy" and "Cooperative Funding Program Procedure" on file with staff.
[28] "Suwannee River Water Management District Governing Board Directive GBD12-0005," on file with staff.
[29] http://www.mysuwanneeriver.com/index.aspx?NID=136
[30] "South Florida Water Management District Policies and Procedures, Part II, Art. XII, Grants and Cooperative Agreements" at http://library.municode.com/index.aspx?clientId=70019.
[31] Section 373.470(6)(e), F.S.
[32] SFWMD 3/6/2013 email.
[33] "South Florida Water Management District Standard Format Tentative FY 2013 Budget Submission" (8/1/2012), p. 30, at http://my.sfwmd.gov/portal/pls/portal/portal_apps.repository_lib_pkg.repository_browse?p_keywords=budgetfy2013&p_thumbnails=no
[34] "Four projects related to water resource development in accordance with 373.536, 373.705 and 373.707, F.S.; Twelve projects related to development plans and programs for surface water projects in accordance with 373.451 and 373.707, F.S; and Six projects related to establishment of MFLs and AWS in accordance with 373.042, 373.536, 373.705, and 373.707, F.S." SJRWMD 3/5/2013 email.
[35] "Water Protection and Sustainability Program; section 373.707(6) – (9), F.S.; Indian River Lagoon License Plate Program; section 320.08058(10), F.S.; Lower St. Johns River Basin Initiative; special legislative appropriations; National Estuaries Program: Federal Clean Water Act, 33 U.S.C. section 466, et seq.," SJRWMD also provides an online summary of its cooperative funding projects at http://floridaswater.com/cooperativefunding/.
[36] Application guidelines, form, eligibility checklist, and application procedure summary at http://floridaswater.com/agriculture/costshare.html.
[37] "FY 2012-2013 Budget," p. 11-13, 16, at http://www.swfwmd.state.fl.us/business/budget/.
[38] "Consolidated Annual Report 2013-01," Ch. 1, p. 4-6, at http://www.nwfwmd.state.fl.us/pubs/consolidatedAR/consolAR.html.
[39] "Preliminary Fiscal Year 2013-2014 Budget," p. 37-46, at http://www.nwfwmd.state.fl.us/bizfinance.html.

Each WMD has policies and procedures for the "cooperative funding" process, including submission and consideration of applications and monitoring project progress. These policies appear to meet the statutory definition of "rules" provided by Florida's APA[40] because they generally apply to all applicants seeking cost-sharing assistance and failure to comply may result in delay or denial of an application or affect the disbursement of funds by the District for approved project. Failing to adopt a statement meeting the definition of a rule exposes a District to an order directing that it immediately cease using the unadopted statement.[41] Agencies generally may not rely on an unadopted rule to determine a party's substantive rights.[42]

The APA currently provides that any agency proceeding affecting the substantial rights of a party must be conducted under the statutory hearing procedures unless the parties choose mediation under s. 120.573, F.S., or the summary hearing procedure under s. 120.574, F.S.[43]

Effect of Proposed Changes

The bill creates s. 373.171(5), F.S., exempting cooperative funding programs from the rulemaking requirements of chapter 120, F.S. The bill does not define "cooperative funding program" and the term could be subject to differing interpretations and applications by the WMDs. Because no rulemaking exemption is necessary at present for WMDs to execute cost-sharing contracts with other entities, the exemption would remove the rulemaking requirement from the adoption of the standard policies and procedures presently guiding this contracting process as administered by the separate WMDs.

The bill also requires that "any portion of an approved program affecting the substantial interests of a party would be subject to the administrative hearing provisions under s. 120.569, F.S."[44] This provision appears to restate the requirement of existing law that agency actions affecting such interests are subject to such review.

Regional Water Supply Planning

Current Situation

Section 373.709, F.S., requires WMDs to conduct water supply needs assessments. A WMD that determines existing resources will not be sufficient to meet reasonable-beneficial uses for the planning period must prepare a regional water supply plan. The plans must contain:

- A water supply development component;
- A water resource development component;
- A recovery and prevention strategy;
- A funding strategy;
- The impacts on the public interest, costs, natural resources, etc;
- Technical data and information;
- Any MFLs established for the planning area;
- The water resources for which future MFLs must be developed.; and
- An analysis of where variances may be used to create water supply development or water resource development projects.

[40] Section 120.52(16), F.S.
[41] Section 120.56(4), F.S.
[42] Section 120.57(1)(e), F.S.
[43] Section 120.569(1), F.S.
[44] A party whose substantial interests are affected by the proposed agency action of a WMD is entitled to a hearing under the basic procedures set out in s. 120.569, F.S.

Currently, only the Southwest Florida WMD is required to jointly develop, with the regional water supply authority, the water supply development component of a regional water supply plan where such plan deals with or affects public utilities and public water supply for those areas served by a regional water supply authority.

Effect of Proposed Changes

The bill amends s. 373.709(3), F.S., to require all WMDs to jointly develop, together with the regional water supply authority, the water supply development component of a regional water supply plan that deals with or affects public utilities and public water supply for those areas served by a regional water supply authority.

B. SECTION DIRECTORY:

Section 1. Amends s. 373.042, F.S., relating to minimum flows and levels.

Section 2. Amends s. 373.046, F.S., relating to interagency agreements.

Section 3. Creates s. 373.171(5), F.S., exempting cooperative funding programs instituted by the several water management district governing boards from the rulemaking requirements of Ch. 120, F.S.

Section 4. Amends s. 373.709, F.S., relating to regional water supply planning.

Section 5. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill requires the priority list and schedule that is submitted to the DEP for establishing minimum flows and levels for certain water bodies to also include those water bodies that have the potential to be affected by withdrawals in an adjacent WMD, which may result in the DEP having to adopt additional reservations, minimum flows or levels, and recovery and prevention strategies. This provision in the bill could result in an indeterminate negative fiscal impact on the DEP.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The bill requires WMDs to provide technical information and staff support to the DEP for the development of a reservation, minimum flow or level, or recovery or prevention strategy for adoption by rule by the DEP. This could result in an indeterminate negative fiscal impact on the WMDs.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may potentially have a positive fiscal impact on WMDs who enter into interagency agreements by reducing the duplication of services and promoting streamlining.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes certain reservations, minimum flows and levels, and recovery or prevention strategies adopted by the DEP to be applied by the WMDs without requiring the WMDs to adopt them by rule. Where certain resource management activities, studies, or projects cross district boundaries the affected WMDs are authorized to designate one of the affected districts to conduct some or all of their respective statutory responsibilities under certain conditions. Because this authority appears more likely to be implemented for specific activities on a "case by case" basis, additional rulemaking by the WMDs does not appear to be required.

The bill also creates s. 373.171(5), F.S., exempting cooperative funding programs from the rulemaking requirements of chapter 120, F.S. The bill does not define "cooperative funding program." Despite the rulemaking exemption, the bill preserves the right of a party whose substantial interests are affected by any portion of an approved program to seek a hearing under the provisions of s. 120.569, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not define "cooperative funding program" and the term could be subject to differing interpretations and applications by the WMDs.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to water management districts; amending s. 373.042, F.S.; requiring water management districts to include certain reservations and water bodies in priority lists and schedules; providing for the adoption of certain reservations and minimum flows and levels by the Department of Environmental Protection; requiring water management districts to apply, without adopting by rule, the reservations, minimum flows and levels, and recovery and prevention strategies adopted by the department; amending s. 373.046, F.S.; authorizing water management districts to enter into interagency agreements for resource management activities under specified conditions; providing applicability; amending s. 373.171, F.S.; exempting cooperative funding programs from certain rulemaking requirements; amending s. 373.709, F.S., relating to regional water supply planning; removing a reference to the Southwest Florida Water Management District; requiring a regional water supply authority and the applicable water management district to jointly develop the water supply component of the regional water supply plan; providing an effective date.

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

Section 1. Subsections (4) and (5) of section 373.042,

Florida Statutes, are renumbered as subsections (5) and (6), respectively, a new subsection (4) is added to that section, and subsection (2) of that section is amended, to read:

373.042 Minimum flows and levels.—

(2) By November 15, 1997, and annually thereafter, each water management district shall submit to the department for review and approval a priority list and schedule for the establishment of minimum flows and levels for surface watercourses, aquifers, and surface waters within the district. The priority list and schedule shall ~~also~~ identify those listed water bodies for which the district will voluntarily undertake independent scientific peer review; any reservations proposed by the district to be established pursuant to s. 373.223(4); and those listed water bodies that have the potential to be affected by withdrawals in an adjacent district for which the department's adoption of a reservation pursuant to s. 373.223(4) or a minimum flow or level pursuant to subsection (1) may be appropriate. By March 1, 2006, and annually thereafter, each water management district shall include its approved priority list and schedule in the consolidated annual report required by s. 373.036(7). The priority list shall be based upon the importance of the waters to the state or region and the existence of or potential for significant harm to the water resources or ecology of the state or region, and shall include those waters which are experiencing or may reasonably be expected to experience adverse impacts. Each water management district's priority list and schedule shall include all first magnitude springs, and all second magnitude springs within state

or federally owned lands purchased for conservation purposes. The specific schedule for establishment of spring minimum flows and levels shall be commensurate with the existing or potential threat to spring flow from consumptive uses. Springs within the Suwannee River Water Management District, or second magnitude springs in other areas of the state, need not be included on the priority list if the water management district submits a report to the Department of Environmental Protection demonstrating that adverse impacts are not now occurring nor are reasonably expected to occur from consumptive uses during the next 20 years. The priority list and schedule is ~~shall~~ not ~~be~~ subject to any proceeding pursuant to chapter 120. Except as provided in subsection (3), the development of a priority list and compliance with the schedule for the establishment of minimum flows and levels pursuant to this subsection satisfies ~~shall satisfy~~ the requirements of subsection (1).

(4) A water management district shall provide the department with technical information and staff support for the development of a reservation, minimum flow or level, or recovery or prevention strategy to be adopted by the department by rule. A water management district shall apply any reservation, minimum flow or level, or recovery or prevention strategy adopted by the department by rule without the district's adoption by rule of such reservation, minimum flow or level, or recovery or prevention strategy.

Section 2. Subsection (7) is added to section 373.046, Florida Statutes, to read:

373.046 Interagency agreements.—

(7) If the geographic area of a resource management activity, study, or project crosses water management district boundaries, the affected districts may designate a single affected district to conduct all or part of the applicable resource management responsibilities under this chapter, with the exception of those regulatory responsibilities that are subject to subsection (6). If funding assistance is provided to a resource management activity, study, or project, the district providing the funding must ensure that some or all of the benefits accrue to the funding district. This subsection does not impair any interagency agreement in effect on July 1, 2013.

Section 3. Subsection (5) is added to section 373.171, Florida Statutes, to read:

373.171 Rules.—

(5) Cooperative funding programs are not subject to the rulemaking requirements of chapter 120. However, any portion of an approved program which affects the substantial interests of a party is subject to s. 120.569.

Section 4. Subsection (3) of section 373.709, Florida Statutes, is amended to read:

373.709 Regional water supply planning.—

(3) The water supply development component of a regional water supply plan which deals with or affects public utilities and public water supply for those areas served by a regional water supply authority and its member governments ~~within the boundary of the Southwest Florida Water Management District~~ shall be developed jointly by the authority and the applicable water management district. In areas not served by regional water

supply authorities, or other multijurisdictional water supply entities, and where opportunities exist to meet water supply needs more efficiently through multijurisdictional projects identified pursuant to paragraph (2)(a), water management districts are directed to assist in developing multijurisdictional approaches to water supply project development jointly with affected water utilities, special districts, and local governments.

Section 5. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 23 Public Meetings
SPONSOR(S): Government Operations Subcommittee; Rodrigues and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 50

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N, As CS	Stramski	Williamson
2) Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom
3) State Affairs Committee			

SUMMARY ANALYSIS

The State Constitution and the Florida Statutes set forth the state's public policy regarding access to government meetings; however, both are silent concerning whether citizens have a right to be heard at a public meeting. To date, Florida courts have heard two cases concerning whether a member of the public has a right to be heard at a meeting when he or she is not a party to the proceedings. Current case law provides that while Florida law requires meetings to be open to the public, it does not give the public the right to speak.

The bill requires members of the public to be given a reasonable opportunity to be heard on a proposition before a board or commission. However, the opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if certain requirements are met. The bill also provides that the opportunity to be heard is not required at certain meetings of a board or commission.

The bill authorizes a board or commission to adopt limited rules or policies: prescribing procedures relating to the time an individual has to address the board or commission; providing guidelines for allowing representatives to speak on behalf of groups or factions at meetings where large numbers of individuals wish to be heard; prescribing procedures by which an individual may inform a board or commission of a desire to be heard; and designating a period of time for public comment. If the board or commission adopts rules or policies in compliance with the act and follows such rules or policies when providing an opportunity for the public to be heard, the board or commission is deemed to be acting in accordance with the act.

The bill provides that a circuit court has jurisdiction to issue an injunction for the purpose of enforcing this act upon the filing of an application for such injunction by any citizen of Florida. Whenever an action is filed against a board or commission to enforce the provisions of the act, the court must assess reasonable attorney fees against the appropriate state agency or authority if the court determines that the defendant acted in violation of the act. The bill authorizes the court to assess reasonable attorney's fees against the individual filing such an action if the court finds that the action was filed in bad faith or was frivolous. The bill provides that if a board or commission appeals a court order that found the board or commission to violate this bill, and such order is affirmed, the court shall award reasonable attorney fees for the appeal.

The bill provides that any action taken by a board or commission that is found to be in violation of the act is not void as a result of such violation.

The bill could have a negative fiscal impact on state and local governments.

This bill may be a county or municipal mandate. *See* Section III.A.1. of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

State Constitution: Open Meetings
Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. The section requires that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.

Article I, s. 24(c) of the State Constitution authorizes the Legislature to provide exemptions from the open meeting requirements upon a two-thirds vote of both legislative chambers, in a bill that specifies the public necessity giving rise to the exemption.

Government in the Sunshine Law
Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., also known as the "Government in the Sunshine Law" or "Sunshine Law," further requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken be open to the public at all times.[1] The board or commission must provide reasonable notice of all public meetings.[2] Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public's access to the facility.[3] Minutes of a public meeting must be promptly recorded and be open to public inspection.[4]

Right to Speak at Meetings
The State Constitution and the Florida Statutes do not require citizens to be heard at public meetings of collegial governmental bodies. To date, Florida appellate courts have heard two cases directly addressing whether a member of the public has a right to be heard at a meeting when he or she is not a party to the proceedings.[5]

In *Keesler v. Community Maritime Park Associates, Inc.*[6], the plaintiffs sued the Community Maritime Park Associates, Inc., (CMPA) alleging that the CMPA violated the Sunshine Law by not providing the plaintiffs with the opportunity to speak at a meeting concerning the development of certain waterfront property. The plaintiffs argued that the phrase "open to the public" granted citizens the right to speak at public meetings. The First District Court of Appeal held:

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[1] Section 286.011(1), F.S.
[2] *Id.*
[3] Section 286.011(6), F.S.
[4] Section 286.011(2), F.S.
[5] Florida courts have heard numerous cases regarding Sunshine Law violations; however, only two appear to be on point regarding the public's right to speak at a public meeting. Other cases have merely opined that the public has an inalienable right to be present and to be heard. The courts have opined that "boards should not be allowed, through devious methods, to 'deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.'" *See, for example, Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 699 (Fla. 1969) ("specified boards and commissions ... should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made"); *Krause v. Reno*, 366 So.2d 1244, 1250 (Fla. 3rd DCA 1979) ("citizen input factor" is an important aspect of public meetings); *Homestead-Miami Speedway, LLC v. City of Miami*, 828 So.2d 411 (Fla. 3rd DCA 2002) (city did not violate Sunshine Law when there was public participation and debate in some but not all meetings regarding a proposed contract).
[6] 32 So.3d 659 (Fla. 1st DCA 2010).

> [A]lthough the Sunshine Law requires that meetings be open to the public, the law does not give the public the right to speak at the meetings. Appellants have failed to point to any case construing the phrase "open to the public" to grant the public the right to speak, and in light of the clear and unambiguous language in *Marston*[7] (albeit dicta), we are not inclined to broadly construe the phrase as granting such a right here.[8]

The second case, *Kennedy v. St. Johns Water Management District*[9], was argued before the Fifth District Court of Appeal on October 13, 2011. At a meeting of the St. Johns Water Management District (District), the overflow crowd was put in other rooms and provided a video feed of the meeting. Additionally, the District limited participation in the meeting by members of a group called "The St. Johns Riverkeeper." Only the St. Johns Riverkeeper representative and attorney were allowed to address the District board. Mr. Kennedy, who wanted to participate in the discussion, sued arguing that the Sunshine Law requires that citizens be given the opportunity to be heard. Mr. Kennedy also alleged that the District violated the Sunshine Law by failing to have a large enough facility to allow all who were interested in attending the meeting to be present in the meeting room. On October 25, 2011, the Fifth District Court of Appeal affirmed the trial court's ruling that the District did not violate the Sunshine Law as alleged.

Traditional parliamentary law is inherently applicable to some extent in all collegial public bodies ("public bodies"), whether elected, representative or appointive. It provides a guide to understanding the rights and responsibilities of participants in meetings of public bodies. The fundamental requirements of decision-making by a validly constituted public body include the following:[10]

- ✓ Authority to decide
- ✓ A meeting of the public body
- ✓ Proper notice
- ✓ A quorum present
- ✓ A question clearly presented
- ✓ An opportunity to debate
- ✓ Decision by majority vote
- ✓ No fraud or deception in the determination
- ✓ No violation of binding law

These principles reveal that the purpose of meeting, debating and voting is for *the public body*, to make up *its* collective mind. Whether a body is composed of elected representatives or appointed specialists, in a republican form of government,[11] it acts on behalf of and in the name of the people or some subset of the public. The genius of this form is that it allows more deliberative decision-making than direct democracy or mob rule, while protecting the public from the arbitrary unaccountability of a dictator.

In the American tradition, freedom of speech as well as the right to *petition* government for a redress of grievances have been separated in time and place from the conduct of meetings of public bodies. The principles behind parliamentary law provide that membership in a public body entails the right to debate on substantive questions, and to speak on points of privilege, subject to the right of the majority of the membership to limit such speech. Only members of a legislative body and their invited guests have a right to presence on the floor of a legislative chamber or to address the legislative body. Even Governors and Presidents must be invited to address a legislature in session. Accordingly, with limited exceptions, other public bodies have typically not been required to allow public *participation* in their

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[7] In *Wood v. Marston*, the Florida Supreme Court held that the University of Florida improperly closed meetings of a committee charged with soliciting and screening applicants for the deanship of the college of law. However, the *Marston* court noted "nothing in this decision gives the public the right to be more than spectators. The public has no authority to participate in or to interfere with the decision-making process." *Wood v. Marston*, 442 So.2d 934, 941 (Fla. 1983).

[8] *Keesler* at 660-661.

[9] *Kennedy v. St. Johns River Water Management District*, No. 2009-0441-CA (Fla. 7th Cir. Ct. 2010), *per curiam affirmed* 84 So.3d 331 (Fla. 5th DCA 2011).

[10] See, e.g., "Ten Principles That Govern Procedure in Group Decision Making", Mason's Manual of Legislative Procedure, pp. 2-3 (NCSL 2010) (hereinafter, "Mason's").

[11] A republican form of government is guaranteed to every U. S. state. Art. IV, s. 4, U. S. Const.

meetings,[12] despite open meeting laws and other innovations designed to assure public *scrutiny* of public decision-making,

Because of this separation of public speech from decision-making meetings, lobbying involves communication and persuasion *prior to* public decision-making. Unlike the relationship between attorneys and courts, lobbyists have never held an unconditional right to address a public meeting called to make public decision. Public bodies do have the right to hear the opinions of others possessing valuable information to aid the body in its deliberations.[13] However, the body has the clear right to decide whether or not the presentation of such opinions in its meeting may be helpful. Thus, legislative committees invite visitors to speak, but are not compelled to do so. And they are particularly reluctant to do so when the demand to speak exceeds the time authorized for the meeting. In short, the members of a public body have a limited right to address a meeting, but visitors do not.

Visitors who participate in public meetings are not bound by the ethical rules and laws that govern the participation of elected or appointed members of public bodies. Under traditional practice, however, non-members invited to speak may be asked by a public body to disclose their interests and any conflicts relating to the proposal before the body. Non-member participants may also be placed under oath to confirm their truthfulness under penalty of perjury.

In sum, representative and appointed public bodies are organized to act on behalf of the public, and typically are either elected or appointed to represent the public interest or to contribute some particular expertise to the public body. Such bodies meet to make decisions on behalf of the public by melding the divergent views of their members into a single view of the body. In such meetings, the unrestrained active participation of unelected or unappointed participants has never been deemed necessary, and has often been counterproductive to the orderly determination of the meeting's decision-making objective.

Effect of the Bill

The bill creates a new section of law governing the opportunity for the public to be heard at public meetings of a board or commission. The bill defines the term "board" or "commission" to mean a board or commission of any state agency or authority or of any agency or authority of a county, municipal corporation, or political subdivision.

The bill requires members of the public to be given a reasonable opportunity to be heard on a proposition before a board or commission. However, the opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if the opportunity:

- Occurs at a meeting that is during the decisionmaking process; and
- Is within reasonable proximity in time before the meeting at which the board or commission takes the official action.

It is unclear what is meant by the terms "proposition" and "reasonable proximity" because the terms are not defined.

The opportunity to be heard is not required for purposes of meetings that are exempt from open meeting requirements. In addition, the opportunity to be heard is not required when a board or commission is considering:

- An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, when compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act;
- An official act involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations; or

[12] Limited exceptions include bodies assigned quasi-judicial responsibilities to decide specific substantial interests of particular parties, who are entitled to appear and defend their interests. Even then, a right to address the body is tied to a substantial interest affected.

[13] Section 43, para. 6, p. 37-38, Mason's.

- A meeting in which the board or commission is acting in a quasi-judicial capacity, except as otherwise provided by law.

It is unclear what is considered an "unreasonable delay" when deciding if the public's opportunity to be heard should be curtailed.

If the board or commission adopts rules or policies to govern the opportunity to be heard, then those rules or policies must be limited to those that:

- Provide guidelines regarding the amount of time an individual has to address the board or commission;
- Prescribe procedures that allow a representative of a group or faction on a proposition to address the board or commission at meetings in which a large number of individuals wish to be heard, rather than all members of the group or faction;
- Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard; to indicate his or her support, opposition, or neutrality on a proposition; and to indicate his or her designation of a representative to speak for him or her or his or her group on a proposition if he or she so chooses; or
- Designate a specified period of time for public comment.

The bill authorizes the adoption of rules or policies to allow representatives of factions or groups to address the board, but does not specifically address the manner of selecting such representatives. Neither does the bill define factions or groups.

If the board or commission adopts rules or policies in compliance with the act and follows such rules or policies when providing an opportunity to be heard, the board or commission is deemed to be acting in compliance with the act.

The bill provides that a circuit court has jurisdiction to issue an injunction for the purpose of enforcing this section upon the filing of an application for such injunction by any citizen of Florida. Whenever an action is filed against a board or commission to enforce the provisions of this act, the court must assess reasonable attorney fees against the appropriate state agency or authority if the court determines that the defendant to such action acted in violation of the act. The bill also authorizes the court to assess reasonable attorney fees against the individual filing such an action if the court finds that the action was filed in bad faith or was frivolous. These provisions do not apply to a state attorney or his or her duly authorized assistants or any officer charged with enforcing the provisions of the act. If a board or commission appeals a court order that found the board or commission to violate this bill, and such order is affirmed, the court shall award reasonable attorney fees for the appeal.

The bill would allow lobbyists and others having special interests, whether disclosed or undisclosed, to exercise all the rights granted to members of the public. Such interested participants would even be able to recruit speakers and filibuster the time allotted for public input. The bill does not appear to allow any conditions such as an oath or affirmation or the disclosure of interests or conflicts.

The bill also would allow any person or organization, including those who are not constituents of the board or commission, to speak on any subject remotely related to the proposition being deliberated whenever the opportunity for public comment is made available. Even paid commercials may be protected by the bill.

The bill provides that any action taken by a board or commission that is found to be in violation of the act is not void as a result of such violation.

The bill provides that the act fulfills an important state interest.

B. SECTION DIRECTORY:

Section 1 creates s. 286.0114, F.S., providing that the public be provided with a reasonable opportunity to be heard at public meetings.

Section 2 provides a legislative finding of an important state interest.

Section 3 provides an effective date of October 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Governmental entities could incur additional meeting related expenses because longer and more frequent meetings could be required when considering items of great public interest. As a result, it is likely staff would have to be compensated, security would have to be provided, and other expenses related to the meeting and meeting facility would be incurred. The amount of those potential expenses is indeterminate and would vary depending on the magnitude of each issue and the specific associated meeting requirements.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The mandates provision of Art. VII, s. 18 of the State Constitution may apply because this bill could cause counties and municipalities to incur additional expenses associated with longer meetings or an increased number of meetings due to the new requirement that the public be provided with the opportunity to speak at such meetings; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments. If an exemption does not apply, an exception may still apply if the bill articulates a finding of serving an important state interest and if the bill applies to all persons similarly situated. The bill articulates a finding of serving an important state interest and it applies to boards and commissions of all state agencies and authorities and all agencies and authorities of counties, municipal corporations, and political subdivisions. Therefore, an exception appears to apply.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill limits a presumed authority of every board or commission to adopt rules or policies governing the opportunity to be heard. The limited rules or policies may require, at meetings in which a large number of individuals wish to be heard, that representatives of groups or factions on an item, rather than all of the members of the groups or factions, address the board or commission. It requires representatives of factions or groups to address the board, but does not directly address the manner of selecting such representatives. It also does not appear to provide sufficient guidance to the definition of "factions" or "groups" in order to allow a clear distinction between an individual and a group having a similar position on a question. (May all speakers in favor of a question be considered part of a single faction or group?)

As drafted, the opportunity to be heard is subject to rules or policies adopted by the state or local board or commission. Allowing each state board or commission to create its own rules allows it to tailor its rules to its needs, but may not provide as much ease of use by the public as would uniform rules created by an entity such as the Administration Commission.

The bill allows time to be limited by rule but does not appear to provide guidance sufficient for a board or commission to determine whether a time limit allows "reasonable" time.

The bill does not provide sufficient guidance to determine whether a public participant, once recognized to speak, may be limited to the proposition before the board or commission.

Not every board and commission may possess sufficient rulemaking authority to adopt rules as contemplated by the bill. Nothing in the bill can be easily construed to grant such authority. If a public body lacked such authority, the only constraint on public participation would be a judge's interpretation of the phrase "reasonable opportunity".

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues: Placement in Law

The bill creates s. 286.0114, F.S., to provide provisions governing the opportunity for the public to be heard at a public meeting of a board or commission. It has been suggested that the provisions be created in s. 286.0110, F.S., in order to ensure that the provisions are placed in law behind the Sunshine Law. As currently drafted, the opportunity to speak provisions would be placed in law behind exemptions to the Sunshine Law. However, the placement of statutory provisions does not ordinarily affect their meaning. The Florida Statutes are organized by a numbering system established by the Office of Legislative Services.[14] So much leeway is authorized in the organization process that the placement and numbering of statutes should not be used in interpretation, except as may be required by express references thereto.[15]

The Government Operations Subcommittee amended the bill to provide needed consistency in the use of the terms "board" and "commission". As a consequence, the bill has the same scope as Florida's open meetings law.[16] Accordingly, the bill does not appear to apply to all public bodies,[17] particularly to those bodies created by the Constitution having their own inherent procedural jurisdiction.

Other Comments: Remedies

The bill provides that a person may seek injunctive relief to enforce the right to a reasonable opportunity to be heard. However, the bill also provides that any act taken by a board or commission in violation of the bill is not void. A challenge brought by a person who alleges that he or she was not provided a reasonable opportunity to be heard before a board or commission about a proposition may

[14] *See,* Section 11.242(2), F.S.

[15] *See,* Section 11.242(5)(c)-(g), F.S. *See also,* Art. III, s. 6, Fla. Const. (laws may not be amended by reference to title only but only by changing the text of the substantive provisions).

[16] Section 286.011, F.S.

[17] The self-executing open meetings provision of the Florida Constitution applies to "any collegial public body of the executive branch...or...of a county, municipality, school district, or special district, at which official acts are to be taken...." Art. I, s. 24, Fla. Const. The term "any collegial body" appears broader than the definition of "board or commission" in the bill.

be rendered moot if the board or commission has taken a final action on the proposition. Moot matters are generally not considered by courts. Injunctive relief, for example, might not be available in such a scenario as there would be no action of the board or commission that could be enjoined.[18] Declaratory relief may likewise be unavailable.[19] On the other hand, there is a generally recognized exception to the rule of mootness where a matter is capable of repetition and evading review. Where a harm is capable of recurring, courts may consider a case even though the specifics of that particular case may render it moot.[20]

Non-English Speakers

The bill does not make provision for non-English speakers, translation of non-English comments or the allocation of time between speakers for whom a reasonable opportunity may require translation and those who do not require translation.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 6, 2013, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably with committee substitute. The committee substitute:

- Defines the term "board" or "commission". This change creates consistency in the use of the term throughout the bill.
- Clarifies that the opportunity to be heard must be afforded before action is taken on a proposition. The original bill inconsistently referenced the terms "proposition" or "item".
- Clarifies that the rule requirements under the bill only pertain to the opportunity to be heard, and that the requirements do not limit the ability of a board or commission to maintain order and decorum.
- Authorizes the court to assess attorney fees to a challenger if the challenger prevails on appeal from a trial court order finding a violation of the opportunity to be heard.
- Provides a legislative finding of an important state interest.
- Provides that if a board or commission adopts rules or policies and follows those rules or policies, then the board or commission is deemed to be acting in compliance with the act. The original bill stated if a board or commission adopted rules or policies and followed those rules or policies it would merely be presumed to be acting in compliance with the act.
- Delays the effective date from July 1, 2013, to October 1, 2013.
- Removes the provision providing that an opportunity to be heard must be provided at a meeting with the same notice requirements as the meeting at which an official action on a proposition is taken.
- Clarifies that the opportunity to be heard does not apply to an official act involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations.

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[18] *See, for example, Chafetz v. Greene*, 203 So.2d 18 (Fla. 3rd DCA 1967) (dismissing a suit seeking to enjoin an election as moot since the election had been held); *Halloran v. Pensacola Ass'n of Life Underwriters, Inc.*, 395 So.2d 554 (Fla. 1st DCA 1981) (dismissing as moot a suit seeking to enjoin a temporary suspension where the suspension had expired).

[19] *See Boatman v. Florida Dep't of Corrections*, 924 So.2d 906 (Fla. 1st DCA 2008) (finding that portion of complaint dealing with conditions for which an inmate sought declaratory and injunctive relief were rendered moot by the inmate's transfer).

[20] *See Gangloff v. Taylor*, 758 So.2d 1159 (Fla. 4th DCA 2000) (holding that action challenging a homeowner's association's assessments was not rendered moot by a change in the method of levying assessments as there was no guarantee that future boards would not attempt to reinstate the old method of levying assessments); *Z.R. v. State*, 596 So.2d 723 (Fla. 5th DCA 1992) (stating that a challenge to detention without an adjudicatory hearing in violation of statute could proceed even after the detention had terminated, as illegal detentions might otherwise be capable of repetition yet evading judicial review).

A bill to be entitled

An act relating to public meetings; creating s. 286.0114, F.S.; defining the term "board" or "commission"; requiring that a member of the public be given a reasonable opportunity to be heard by a board or commission before it takes official action on a proposition; providing exceptions; establishing requirements for rules or policies adopted by the board or commission which govern the opportunity to be heard; providing that compliance with the requirements of this section is deemed to have occurred under certain circumstances; providing that a circuit court has jurisdiction to issue an injunction for enforcement under certain circumstances; authorizing a court to assess reasonable attorney fees in actions filed against a board or commission; providing that an action taken by a board or commission that violates this section is not void; providing that the act fulfills an important state interest; providing an effective date.

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

Section 1. Section 286.0114, Florida Statutes, is created to read:

286.0114 Public meetings; reasonable opportunity to be heard; attorney fees.—

(1) For purposes of this section, the term "board" or "commission" means a board or commission of any state agency or authority or of any agency or authority of a county, municipal corporation, or political subdivision.

(2) Members of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is held during the decisionmaking process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action. This section does not prohibit a board or commission from maintaining orderly conduct or proper decorum in a public meeting. The opportunity to be heard is subject to rules or policies adopted by the board or commission, as provided in subsection (4).

(3) The requirements in subsection (2) do not apply to:

(a) An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, if compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act;

(b) An official act involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations;

(c) A meeting that is exempt from s. 286.011; or

(d) A meeting during which the board or commission is acting in a quasi-judicial capacity. This paragraph does not

affect the right of a person to be heard as otherwise provided by law.

(4) Rules or policies of a board or commission that govern the opportunity to be heard are limited to those that:

(a) Provide guidelines regarding the amount of time an individual has to address the board or commission;

(b) Prescribe procedures for allowing representatives of groups or factions on a proposition to address the board or commission, rather than all members of such groups or factions, at meetings in which a large number of individuals wish to be heard;

(c) Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard; to indicate his or her support, opposition, or neutrality on a proposition; and to indicate his or her designation of a representative to speak for the individual or the individual's group on a proposition if the individual so chooses; or

(d) Designate a specified period of time for public comment.

(5) If a board or commission adopts rules or policies in compliance with this section and follows such rules or policies when providing an opportunity for members of the public to be heard, the board or commission is deemed to be acting in compliance with this section.

(6) A circuit court has jurisdiction to issue an injunction for the purpose of enforcing this section upon the filing of an application for such injunction by a citizen of this state.

(7)(a) Whenever an action is filed against a board or commission to enforce this section, the court shall assess reasonable attorney fees against such board or commission if the court determines that the defendant to such action acted in violation of this section. The court may assess reasonable attorney fees against the individual filing such an action if the court finds that the action was filed in bad faith or was frivolous. This paragraph does not apply to a state attorney or the state attorney's duly authorized assistants or an officer charged with enforcing this section.

(b) Whenever a board or commission appeals a court order that has found the board or commission to have violated this section, and such order is affirmed, the court shall assess reasonable attorney fees for the appeal against such board or commission.

(8) An action taken by a board or commission that is found to be in violation of this section is not void as a result of that violation.

Section 2. The Legislature finds that a proper and legitimate state purpose is served when members of the public are given a reasonable opportunity to be heard on a proposition before a board or commission of a state agency or authority, or of an agency or authority of a county, municipal corporation, or political subdivision. Therefore, the Legislature determines and declares that this act fulfills an important state interest.

Section 3. This act shall take effect October 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 127 Meetings of District School Boards
SPONSOR(S): Stark
TIED BILLS: **IDEN./SIM. BILLS:** SB 134

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) K-12 Subcommittee	12 Y, 0 N, As CS	Beagle	Ahearn
2) Rulemaking Oversight & Repeal Subcommittee		Miller	Rubottom
3) Education Appropriations Subcommittee			
4) Education Committee			

SUMMARY ANALYSIS

Florida law requires each district school board to hold at least one regular monthly meeting for the transaction of business according to a schedule arranged by the board. School board meetings must be held in the office of the district school superintendent or a room convenient to that office and regularly designated as the board meeting room. Meetings may be held at other public locations if at least 48 hours public notice is given. The law does not specify the weekdays or times in which particular meetings must be held.

The bill requires each district school board to convene at least one regular meeting per quarter during evening hours. These quarterly meetings must coincide with the school year. This change provides increased opportunity for parent and public participation in board meetings.

The bill does not have a fiscal impact on state or local governments.

The bill takes effect July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

District School Board Meetings

Florida law requires each district school board to hold at least one regular meeting each month for the transaction of business according to a schedule arranged by the board.[1] School board meetings must be held in the office of the district school superintendent or a room convenient to that office and regularly designated as the board meeting room. Meetings may be held at other public locations if at least 48 hours public notice is given.[2] The law does not specify the weekdays or times in which particular meetings must be held.

Special school board meetings are convened when called by the district school superintendent, acting individually or on the request of the board chair or a majority of the board members. If the superintendent does not call a board meeting when requested by the chair or a majority of board members, the meeting may be called by the chair or a majority of members by providing 2 days' written notice to the district superintendent.

Effect of Proposed Changes

The bill requires each district school board to convene at least one regular meeting per quarter during evening hours. These quarterly meetings must coincide with the school year. This change would provide increased opportunity for parent and public participation in board meetings. The bill also clarifies the process for calling a special meeting of the district school board without changing that procedure.

B. SECTION DIRECTORY:

Section 1. Amends s. 1001.372, F.S., relating to district school board meetings; requires school boards to convene one meeting per quarter within the school year during evening hours.

Section 2. Provides that the bill takes effect July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

[1] Section 1001.372(1), F.S.

[2] Section 1001.372(2)(a)-(b), F.S. The meeting must be noticed in a newspaper of general circulation in the county. If there is no newspaper of general circulation in the county, the meeting may be noticed by announcements over at least one radio station whose signal is generally received in the county or notice posted on the courthouse door. Section 1001.372(2)(c), F.S.

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill requires district school boards to create written criteria for deciding when to convene a quarterly meeting during evening hours. As generally-applicable statements implementing the law within the district, these criteria meet the statutory definition of rules.[3] District school boards are subject to the Administrative Procedure Act[4] and are required to adopt these criteria through the statutory rulemaking process.[5] In response to the bill, school boards are anticipated to adopt rules on when and how an evening meeting will be scheduled, whether the required evening meeting will count as one of the regular meetings convened in a given quarter, and whether different criteria for public participation will be adopted for evening meetings.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not define "evening hours".

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[3] Section 120.52(16), F.S.

[4] Chapter 120, F.S. As an "educational unit," a district school board meets the definition of an "agency" under the APA. Section 120.52(1), F.S.

[5] Section 120.54, F.S. Some school boards have adopted existing meeting criteria by rule. School Board of Broward County Policy 1100A, "Scheduling of Meetings," at http://www.broward.k12.fl.us/sbbcpolicies/index.asp; The School Board of Leon County, Policy 0160 – Meetings, at http://www.neola.com/leon-fl/.

A bill to be entitled

An act relating to meetings of district school boards; amending s. 1001.372, F.S.; requiring district school boards to convene at least one regular meeting each quarter within a school year during the evening hours and to create criteria for convening such a meeting; providing an effective date.

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

Section 1. Subsection (1) of section 1001.372, Florida Statutes, is amended to read:

1001.372 District school board meetings.—

(1) REGULAR AND SPECIAL MEETINGS.—

(a) The district school board shall hold not less than one regular meeting each month for the transaction of business according to a schedule arranged by the district school board. The district school board shall convene at least one regular meeting each quarter within a school year during the evening hours. The district school board shall create written criteria for deciding when to convene a quarterly meeting during the evening hours.

(b) The district school board ~~and~~ shall convene in a special meeting ~~sessions~~ when called by the district school superintendent or by the district school superintendent on request of the chair of the district school board, or on request of a majority of the members of the district school board. If the district school superintendent does not call a special

meeting when requested to do so, as prescribed in this paragraph, such a meeting may be called by the chair of the district school board or by a majority of the members of the district school board by giving 2 days' written notice of the time and purpose of the meeting to all members and to the district school superintendent. An action~~; provided that actions~~ taken at a special meeting has ~~meetings shall have~~ the same force and effect as if taken at a regular meeting, and~~; and provided further that in the event the district school superintendent should fail to call a special meeting when requested to do so, as prescribed herein, such a meeting may be called by the chair of the district school board or by a majority of the members of the district school board by giving 2 days' written notice of the time and purpose of the meeting to all members and to the district school superintendent, in which event~~ the minutes of the meeting must ~~shall~~ set forth the facts regarding the procedure in calling the meeting and the reason the meeting was called. The minutes must ~~therefor and shall~~ be signed ~~either~~ by the chair or by a majority of the members of the district school board.

Section 2. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 667 Real Estate Brokers and Appraisers
SPONSOR(S): Business & Professional Regulation Subcommittee; Porter
TIED BILLS: **IDEN./SIM. BILLS:** SB 852

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professional Regulation Subcommittee	10 Y, 0 N, As CS	Collins	Luczynski
2) Rulemaking Oversight & Repeal Subcommittee		Miller	Rubottom
3) Government Operations Appropriations Subcommittee			
4) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The bill amends s. 120.574 and ch. 475, F.S., to comply with policies promulgated by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council and the Appraisal Qualifications Board of the Appraisal Foundation. Specifically, the bill:

- Requires use only of the summary hearing process for real estate appraiser complaints;
- Removes the term "licensed appraiser" from the definition of "supervisory appraiser;"
- Eliminates the reference to "licensed" appraisers from the supervisory requirements for trainee real estate appraisers;
- Eliminates the Florida Real Estate Appraisal Board's ability to consider the subsequent passage of time and good behavior when considering the application of a person who has prior discipline and criminal history, and instead requires the applicant to meet the conditions set forth by the Appraisal Qualifications Board; and
- Updates a reference regarding the adoption of the most recent Appraisal Qualifications Board Qualification Criteria.

Additionally, the bill amends s. 475.215(1), F.S., to place additional limitations on additional brokers' licenses. Specifically, the bill:

- Provides that an additional license may not be issued if that license will be used in a manner that is likely to be harmful to any person;
- Provides the Florida Real Estate Commission with the ability to deny a multiple license request in certain circumstances; and
- Provides that a final order of discipline against the primary brokers' license applies to both the primary license and to any multiple licenses held by that broker at the time the final order becomes effective.

The bill has an indeterminate, but insignificant fiscal impact on state funds. See fiscal comments.

The bill is effective upon becoming law, except as otherwise expressly provided.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background of the Appraisal Industry

The Appraisal Foundation

The Appraisal Foundation (TAF) is a private, non-profit educational organization that was formed in 1987 to promote professionalism in the valuation industry.[1] TAF is governed by a Board of Trustees, which oversees three independent boards:

- The Appraisal Standards Board (ASB), which establishes the generally-accepted standards of the profession, known as the Uniform Standards of Professional Appraisal Practice (USPAP);
- The Appraiser Qualifications Board (AQB), which establishes the minimum education, experience, and examination requirements for appraisers; and
- The Appraisal Practices Board (APB), which is responsible for developing best practices and voluntary guidance to professionals.[2]

The Appraisal Subcommittee (ASC)

Generally

The Appraisal Subcommittee (ASC) of the Federal Financial Institutions Examination Council was created in 1989, pursuant to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[3] Because the savings and loan crisis of the 1980s was caused in part by questionable real estate lending practices, the purpose of Title XI was to ensure real estate appraisals pertaining to federally related real estate transactions, including those insured or guaranteed through various federal programs, were in writing, met uniform standards, and were prepared by appraisers who met standards of competence and were subject to effective supervision.[4] The ASC is charged with monitoring the states' appraisal regulatory programs.[5] Moreover, it is responsible for monitoring and reviewing the activities of the Appraisal Foundation and its three Boards.[6] As such, the ASC oversees Florida's appraiser regulatory program, administered by the Department of Business and Professional Regulation (Department).

The ASC has six members, designated by the heads of the:

- Board of Governors of the Federal Reserve System (FRB);
- Federal Deposit Insurance Corporation (FDIC);
- Office of the Comptroller of the Currency (OCC);
- Office of Thrift Supervision (OTS);
- National Credit Union Administration (NCUA); and
- Department of Housing and Urban Development (HUD).[7]

Reviews and Enforcement

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[1] https://www.asc.gov/About-the-ASC/ASCHistory.aspx, last visited on February 27, 2013.
[2] Id.
[3] See, generally: 12 U.S.C. ss. 3331-3351.
[4] 12 U.S.C. s. 3331.
[5] 12 U.S.C. s. 3332(a).
[6] 12 U.S.C. s. 3332(b).
[7] 12 C.F.R. s. 1102.303(b).

The ASC conducts biennial on-site reviews of each state's appraisal agency, with more frequent visits to states with weak enforcement programs.[8] The ASC has the ability to disapprove a state's appraisal regulatory program, which effectively disqualifies that state's appraisers from conducting appraisals for federally-related transactions.[9] A "federally-related transaction" is any real estate-related financial transaction which: 1) a federal financial institution's regulatory agency or the Resolution Trust Corporation engages in, contracts for, or regulates; and 2) requires the services of an appraiser.[10]

The Florida Real Estate Appraisal Board

The Florida Real Estate Appraisal Board (FREAB), within the Division of Real Estate at the Department, administers and enforces the state's real estate appraiser laws.[11] Specifically, through its rules, the FREAB has the power to:

- Regulate the issuance of licenses, certifications, registrations, and permits;
- Discipline appraisers;
- Establish qualifications for licenses, certifications, registrations, and permits;
- Regulate approved courses;
- Establish standards for real estate appraisers; and
- Establish standards for and regulate supervisory appraisers.[12]

As discussed above, the ASC has oversight over the state's appraisal regulatory program, as administered by the FREAB within the Department.

Administrative Procedures for Disciplinary Cases

Current Situation

The Administrative Procedure Act and Appraiser Disciplinary Proceedings

A. Investigation, Probable Cause, and Filing the Formal Complaint

Disciplinary cases before the FREAB are investigated and prosecuted by the Department.[13] A case begins when a complaint[14] is filed with the Department. As the Department may investigate only legally sufficient complaints,[15] upon receipt a complaint is reviewed by intake staff for compliance with the statutory standard.

- This initial step typically is accomplished within 10 working days from receipt.

If necessary to determine legal sufficiency the Department may request additional information. Such correspondence with complainants will extend this determination for an indefinite period before a case is assigned for investigation.

[8] https://www.asc.gov/About-the-ASC/ASCHistory.aspx, last visited on February 27, 2013.
[9] See, generally: 12 U.S.C. s. 3347 and 12 C.F.R. s. 1102 Subpart B.
[10] 12 U.S.C. s. 3350(4).
[11] See, generally: s. 475.613, F. S.
[12] Section 475.613(2), F. S.
[13] Section 455.225, F.S.
[14] Most complaints must be in writing and signed by the complainant, although the statute makes limited provision for anonymous complaints or those made by confidential informants.
[15] "A complaint is legally sufficient if it contains ultimate facts that show that a violation of this chapter, of any of the practice acts relating to the professions regulated by the department, or of any rule adopted by the department or a regulatory board in the department has occurred." Section 455.225(1)(a), F.S.

Legally sufficient complaints are investigated by the Department.[16] The case is assigned to a Department investigator and a copy of the complaint sent to the registrant for response.[17]

- The statute fixes no set time to investigate complaints;[18] according to the Department, investigations of complaints against appraisers typically take more than 100 days.

Once the investigation is complete the Department submits the investigative report to a probable cause panel of the FREAB.[19] A typical report details the Department's investigative findings, provides copies of the complaint and all relevant documents, contains the Department's legal recommendation as to whether further action is warranted, and provides a draft administrative complaint for the panel's consideration (if that is the Department's recommendation.

As with most regulatory boards, meetings of the FREAB probable cause panel coincide with regular meetings of the board. The FREAB currently meets bi-monthly. The statute imposes no specific time by which the Department must submit its investigative report for consideration of probable cause. Although meetings of probable cause panels for licensing boards under the Department are not open to the public before a finding of probable cause (unless the registrant waives such confidentiality),[20] because of concerns expressed by ASC the Department and FREAB permit the registrant to appear before the panel and respond to the investigative report.

The panel has 30 days from receiving the final investigative report to determine probable cause.[21] If the panel neither acts to determine probable cause nor issues the registrant a letter of guidance in lieu of finding probable cause, the Department has 10 days to determine probable cause.[22]

If the panel finds probable cause for administrative action against the registrant, at the same meeting the chair of the panel typically signs the finding that also directs the Department to file the formal complaint. Because of the confidentiality requirement discussed above, in cases where the registrant has not waived confidentiality the Department waits until the 10 day period expires before filing the formal complaint. The Department files the formal administrative complaint with its agency clerk and initiates the administrative proceeding by serving a copy of the complaint on the registrant.[23] Initial service typically is by certified mail in order to document the date the registrant receives the formal complaint.

- Use of certified mail adds 5 days to the time for response.[24]
- The registrant has 21 days from receiving the formal complaint to respond to the allegations and request a hearing.[25]

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[16] Section 455.225(1)(a), F.S. The statute provides an alternative to the investigation process by authorizing the Department to issue "notices of noncompliance" to registrants for minor violations that neither cause harm, nor demonstrate professional incompetence, nor threaten public health, safety, or welfare. Section 455.225(3)(a), F.S.

[17] Section 455.225(1)(b), F.S. The registrant has 20 days from receipt to file a response.

[18] "The department shall allocate sufficient and adequately trained staff to expeditiously and thoroughly determine legal sufficiency and investigate all legally sufficient complaints." Section 455.225(2), F.S. These terms are not defined in the statute and are given their "ordinary and customary" definitions. "Expeditious" means to act with speed and efficiency. *The American Heritage Dictionary of the English Language* (4th ed.), 625.

[19] Determination of probable cause to proceed with filing administrative action against the subject of the investigation is made by a panel of the FREAB, not the Department. Rule 61J1-1.009(1), F.A.C.

[20] All meetings of the probable cause panel are exempted from the requirements for public meetings in s.286.011, F.S., until 10 days after a finding of probable cause. Section 455.225(4), F.S. This includes the notice and agenda requirements for public meetings under s. 120.525, F.S.

[21] Section 455.225(4), F.S. The statute provides the panel 15 days from receiving the initial report to make a reasonable request for additional information; the 30 day period would begin only after the requested information is furnished. The Secretary of the Department may extend the 15 and 30 day periods.

[22] Section 455.225(4), F.S. The Department has not yet responded to an inquiry from staff as to the percentage of cases presented to the FREAB panel that result in a finding of probable cause.

[23] Rule 28-106.2015(3), F.A.C.

[24] Rule 28-106.103, F.A.C.

- Because a failure to respond within 21 days waives the right to a hearing,[26] the Department normally waits at least 5 days after the 21 day deadline before proceeding to allow time for delivery of a request postmarked on the 21st day. Thus, in a typical case up to 31 days may elapse before the Department receives a response to the formal complaint.

The registrant's response to the formal complaint determines the type and length of administrative proceedings before the FREAB takes final action. If the registrant does not respond, the attorney for the Department will notify counsel for the FREAB[27] who will prepare a final order for consideration and action at the next board meeting. If the registrant responds but does not dispute any alleged material fact, the Department grants a hearing to be set before the FREAB at its next meeting. The registrant is notified of the opportunity to appear before the FREAB and respond to the application of law and imposition of discipline proposed in the formal complaint, including the opportunity to present matters mitigating the proposed discipline.[28] At the conclusion of the hearing the FREAB directs board counsel to prepare a final order for execution by the executive director of the FREAB[29] (see discussion on Final Orders by the FREAB, below). If the registrant responds and disputes the facts of the formal complaint, the Department has 15 days to grant the hearing request and refer the case to the Division of Administrative Hearings (DOAH).[30]

- The Department typically contacts the registrant (or the registrant's attorney or qualified representative if the response was signed on behalf of the registrant) to negotiate a settlement before referring the case to DOAH.
- There is no fixed time for these negotiations.

B. Proceedings before DOAH

The normal hearing process before DOAH is conducted pursuant to ss. 12.569 and 120.57(1), F.S. Five days from receiving a hearing referral from the Department, DOAH issues an initial order designating the administrative law judge (ALJ) to whom the case is assigned, providing additional information, and advising of the availability of the summary hearing procedure in s. 120.574, F.S.[31] The initial order requires the parties to file within 7 days a notice of basic information. Usually within a day of receiving this response the ALJ issues an order scheduling the case for final hearing, typically within less than 90 days from the date of the scheduling order.

Within the time constraints established by the scheduled hearing, the Department and the registrant may conduct discovery.[32] In a typical case, if a party requests a continuance of the final hearing on good grounds the ALJ will grant at least one such continuance. If so, the final hearing likely will be conducted more than 100 days after referral by the Department. According to the Department, final evidentiary hearings in cases against FREAB registrants usually take no more than 4 hours.

The Department is responsible for preserving the testimony at the hearing and providing a transcript at actual cost.[33] This is commonly done by contract with a certified court reporter. The ALJ usually allows the parties 10 days from the filing of the official transcript to submit proposed recommended orders, and

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[25] Rule 28-101.111(2), F.A.C.
[26] Rule 28-106.111(4), F.A.C.
[27] Section 455.221, F.S. The Department contracts with the Department of Legal Affairs to provide separate counsel for FREAB. Under s. 455.221(3), F.S., the same attorney cannot both prosecute a case and provide counsel for the board on the same matter.
[28] Section 120.57(2), F.S., Rule 28-106.302, F.A.C.
[29] Under s. 455.203(2), F.S., the Department appoints the executive director of FREAB, subject to board approval.
[30] Section 120.569(2)(a), F.S. However, the only consequence if an agency does not comply with the 15 day time limit is the possibility of the respondent seeking a writ of mandamus from circuit court to compel the referral.
[31] Section 120.574(1)(a), F.S.
[32] Section 120.569(2)(f), F.S., Rule 28-106.206, F.A.C.
[33] Section 120.57(1)(g), F.S., Rule 28-106.214, F.A.C.

then completes and submits to the Department a recommended order within 30 days from the date the transcript is filed.[34]

C. Final Orders by the FREAB

For cases referred to DOAH, once the ALJ enters the recommended final order both the Department and registrant have 15 days to file exceptions to the recommended findings of fact and conclusions of law, followed by 10 days to respond to the other's exceptions.[35]

- If these documents are delivered by mail 5 days is added to each deadline, so that the final filing may be due as much as 35 days after the ALJ enters the recommended order.

The recommended order and any exceptions and responses thereto are submitted for consideration by the FREAB at its next meeting. The board rules on the various exceptions and whether to accept the ALJ's recommendations.[36] After reviewing the recommended order and exceptions from a DOAH proceeding, or conducting the hearing under s. 120.57(2), F.S., if the registrant did not dispute the material facts, the FREAB directs board counsel to prepare the final order. If the registrant did not respond to the formal complaint, the FREAB may consider a proposed final order prepared by board counsel and either approves the proposal or direct counsel to prepare a different order.

According to the Department, once the FREAB approves the final order an additional 30 – 60 days is required for board counsel and staff to generate, execute, file, and serve the final order.

D. Summary proceedings under s. 120.574

The APA provides a summary hearing procedure as an alternative to conventional hearings before DOAH.[37] After the Department refers a case to DOAH, any party may move for a summary hearing within 15 days from the ALJ's service of the initial order; if all parties consent to using the summary hearing procedure, the final summary hearing is conducted within 30 days from the date all parties agree.[38] Available discovery is very restricted.[39] A party may move at any time to continue the final hearing or to have the proceedings conducted under the normal hearing process of ss. 120.569 and 120.57(1), F.S. If the case proceeds under the summary procedure, the ALJ, not the FREAB, renders the final order in the case no later than 30 days after the conclusion of the hearing or the filing of the transcript, whichever is later.[40]

Federal Concerns with Florida Disciplinary Process

ASC policy encourages state regulators to resolve appraisal cases within one year.[41] When following the current administrative hearing process as outlined above, the Department currently is unable to

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[34] Rule 28-106.216, F.A.C.
[35] Section 120.57(1)(k), F.S., Rule 28-106.217, F.A.C.
[36] The Department has not yet responded to an inquiry from staff as to the percentage of cases in which the FREAB adopts the recommended conclusions of law pertaining to finding violations of ch. 475, Part I, F.S., or the rules of the board, and the percentage of cases in which the board accepts the recommended sanctions.
[37] Section 120.574, F.S.
[38] Section 120.574(1)(b), F.S.
[39] Section 120.574(2)(a)2., F.S.
[40] Section 120.574(2)(f), F.S.
[41] "Appraisal Subcommittee Policy Statements" (Oct. 2008), Statement 10E, page 19. Title XI is silent on the time required for state regulators to complete disciplinary cases but authorizes the ASC to disapprove a state's appraiser certifications if that state "fails to recognize and enforce the standards, requirements, and procedures prescribed pursuant to this chapter ..." 12 U.S.C. s. 3347(b)(1). Although the 12 month standard has been a policy for over 10 years, it is not supported by any empirical data showing a pronounced increase in risk to economic transactions or the general public if a case takes longer than 12 months to complete. (From statements by Jim Park, Director of ASC, in a meeting attended by House and Senate Staff, the Department, and DOAH, 3/8/2013).

resolve all cases within one year.[42] This inability to achieve 100% compliance with ASC Policy Statement 10E[43] places the Department at risk of the ASC initiating a written finding that would disapprove Florida's regulatory process and "de-certify" all appraisers in Florida from providing appraisals for federal transactions.[44]

Recently, the ASC released its compliance review report for the Department for the period of December 2009 through December 2011. The review found that at the time of the review, Florida had 415 outstanding complaints, 101 of which were unresolved for more than one year.[45] Only four were considered "special documented circumstances," and thus, exempt from the one-year policy.[46] The effect is that twenty-three percent of Florida's complaints were unresolved for more than one year at the time of the review.[47] Moreover, in 2010, the state had a similar negative review by the ASC.[48]

Due to ASC concerns about the time for resolving complaints, the Department must submit quarterly complaint logs to the ASC staff for review.[49] Further, the ASC has indicated it would place additional requirements upon the Department if progress is not made.[50]

Some states such as Mississippi are determined by the ASC to comply with its policies. The Mississippi Appraisal Board (MAB) conducts all disciplinary proceedings under rules of the board. Similar to Florida, complaints initially are reviewed for legal sufficiency. If so, a response is requested from the registrant within 20 days. Unlike Florida, the investigation begins once this 20 day response period expires.[51] Unlike Florida, there is no probable cause panel; if the investigation indicates a violation occurred the hearing process may commence. Hearings are conducted by a hearing officer appointed by the MAB but the board issues the final order making findings of fact and conclusions of law and imposing the requisite discipline.[52] This process appears to have few fixed time frames, allowing flexibility to move more quickly while preserving the right of the registrant to notice and a meaningful hearing.

Effect of Proposed Changes

The bill creates s. 120.574(3), F.S., requiring DOAH hearings on estate appraiser complaints be conducted only by the summary hearing process. The purpose is to conform the state's administrative hearing process for appraisal cases to existing federal policy. The bill precludes motions for

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[42] The Department has indicated its inability to routinely comply with ASC Policy Statement 10E, which provides that appraisal cases be resolved within one year. Department of Business and Professional Regulation 2013 Legislative Analysis, page 2, dated February 18, 2013, on file with BPR subcommittee.

[43] Policy Statement 10E does allow for proceedings exceeding 12 months in "special documented circumstances." The Department takes the position that the present administrative adjudicatory process leaves it unable to process even routine contested cases in less than 12 months.

[44] 12 U.S.C. s. 3347(b).

[45] Appraisal Subcommittee Compliance Review Report, page 5, dated June 13, 2012, on file with BPR subcommittee.

[46] Id.

[47] Id.

[48] The ASC compliance review report for the period of December 2007 through December 2009 found that thirty-three percent of all of the Department's cases were unresolved for longer than one year. ASC Compliance Review Report, page 3, dated June 14, 2010, on file with BPR subcommittee.

[49] Appraisal Subcommittee Compliance Review Report, page 5, dated June 13, 2012, on file with BPR subcommittee.

[50] Id. The Department has expressed concern that ASC could penalize the Department, including the imposition of fines. When asked whether ASC had such authority, and its source, ASC personnel only generally refer to the amendments to Title XI made by the Dodd–Frank Wall Street Reform and Consumer Protection Act. Section 1473(k) of the Dodd-Frank Act amends 12 U.S.C. s. 3347 by providing greater specificity for ASC's oversight function, including in these criteria a standard for state regulatory programs to resolve complaints "in a reasonable time period." In addition to decertifying the appraisers in a state with a non-complying regulatory program the ASC now has the authority to remove appraisers from the national registry for up to 90 days pending state licensing or regulatory proceedings. The authority of the ASC to impose sanctions against a state is limited to those described in 12 U.S.C. s. 3347 as amended by Dodd-Frank s. 1473(k), which does not appear to provide authority to impose fines against a state.

[51] Code of Mississippi State Regulations 30-1502-3.2, at http://www.mrec.state.ms.us/mab/license_law.html (accessed 3/21/2013).

[52] Code of Mississippi State Regulations 30-1502-3.3, at http://www.mrec.state.ms.us/mab/license_law.html (accessed 3/21/2013).

continuance in appraisal cases absent extraordinary circumstances. As discussed below in Comments/Constitutional Issues, severely restricting the hearing process for all appraiser registrants may pose due process concerns.

Finally, the bill allows DOAH to assign former administrative law judges, circuit or county judges, or special masters to adjudicate summary hearings for appraisal cases. The bill provides no criteria for eligibility for such appointment and may constitute a grant of unbridled discretion to the Chief Administrative Law Judge.[53]

Definition of "Appraiser"

Current Situation

The ASC has established two title designations for appraisers: "state licensed" and "state certified."[54] Moreover, the AQB has approved a third designation, "certified residential appraiser," which the ASC has also recognized.[55] The ASC strongly urges states to use these federally-recognized designations or titles in order to decrease the likelihood of confusion among users, and to prevent the employment of appraisers who do not have the required designation to perform the appraisal for which they are engaged.[56]

Since July 1, 2003, Florida does not issue new credentials for "licensed" appraisers. Moreover, the AQB no longer permits licensed appraisers to supervise trainee appraisers- only certified appraisers may act as supervisory appraisers.[57] Despite this new criteria, Florida's statutory language still defines a "supervisory appraiser" as a licensed appraiser, a certified residential appraiser, or a certified general appraiser who is responsible for the direct supervision of one or more trainee appraisers.[58]

Effect of Proposed Changes

The bill amends s. 475.611(1)(u), F.S., to remove the term "licensed appraiser" from the definition of "supervisory appraiser." Instead, the term "supervisory appraiser" only includes the various forms of "certified appraisers." This conforms the definition of "supervisory appraiser" to existing federal policy.

Similarly, the bill amends ss. 475.612(1) and 475.6221(1), F.S., to eliminate the reference to "licensed" appraisers from the supervisory requirements for trainee real estate appraisers. This conforms the supervisory requirements for trainee real estate appraisers to existing federal policy.

References to Current AQB Qualification Criteria

Current Situation

Section 475.615, F.S., sets forth the qualifications for registration or certification of appraisers, as outlined by the Real Property Appraiser Qualification Criteria (Qualification Criteria) of the AQB. Specifically, under s. 475.615(2), F.S., the FREAB is authorized to waive or otherwise modify any education, experience, or examination requirements established in the section in order to conform to the requirements established by the AQB.

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[53] In a meeting on 3/8/3013 attended by House and Senate staff, together with representatives of the Department and the ASC, the Chief Administrative Law Judge stated DOAH would be able to meet the expedited hearing process required under the bill with existing personnel and would not need additional temporary assistance.
[54] Appraisal Subcommittee Policy Statements, Statement 2, page 8, on file with BPR subcommittee.
[55] Id.
[56] Id.
[57] The Real Property Appraiser Qualification Criteria, page 55, on file with BPR subcommittee.
[58] Section 475.611(1)(u), F. S.

The section expressly references the requirements adopted by the AQB on February 20, 2004, which is the date that a previous version of the Qualification Criteria was adopted.[59] A new version of the Qualification Criteria was adopted on December 9, 2011, which will go into effect on January 1, 2015.

Effect of Proposed Changes

The bill amends s. 475.615(2), F.S., to change the reference of the date of the Qualification Criteria version from February 20, 2004 to December 9, 2011. This provision has an effective date of January 1, 2014 in order to allow time for rule adoption by the Department.

Qualification for Registration or Certification of Appraisers

Current Situation

As discussed above, s. 475.615, F.S., sets forth the qualifications for registration or certification of appraisers, as outlined by the Qualification Criteria of the AQB. Generally, the statute requires that an appraiser applicant must be competent to handle appraisals "with safety to those with whom they may undertake a relationship of trust and confidence and the general public."[60] Denial of a prior registration or certification request, or revocation of suspension of a prior registration or certification in any jurisdiction is a relevant factor in determining competency to practice in Florida.[61] If any of these disciplinary actions have occurred, the applicant is deemed to not be qualified; however, the applicant will still be deemed to be qualified if, because of time and subsequent good conduct and reputation, or by any other reason that is deemed to be sufficient, the FREAB believes that the interest of the public is not likely to be endangered by the granting of the registration or certification.[62]

On December 9, 2011, the AQB adopted a new version of its Qualification Criteria, to require background checks and to disqualify applicants who have certain background issues.[63] Some applicants may qualify with certain offenses and discipline after five years, while certain criminal offenses render the applicant permanently disqualified.[64]

Effect of Proposed Changes

The bill amends s. 475.615(6), F.S., to eliminate the ability of the FREAB to consider the subsequent passage of time and good behavior when considering the license application of an applicant who has prior discipline and criminal history. Instead, the bill requires the FREAB to adopt the specific AQB Qualification Criteria requirements regarding applicant disqualification which were adopted on December 9, 2011, as discussed above. This provision has an effective date of January 1, 2014 in order to allow time for rule adoption by the Department.

Multiple or Additional Brokers' Licenses

Current Situation

Section 475.17(1), F.S., sets forth the qualifications for practice for a real estate broker. Specifically, an applicant must:

- Be a natural person of at least eighteen years of age;
- Hold a high school diploma or its equivalent;

[59] Section 475.615(2), F. S.
[60] Section 475.615(6), F. S.
[61] Id.
[62] Id.
[63] The new Qualification Criteria, including the new disqualification provisions, will go into effect on January 1, 2015.
[64] The Real Property Appraiser Qualification Criteria, page 53-54, on file with BPR subcommittee.

- Be honest, truthful, trustworthy, of good character, and have a good reputation for fair dealing; and
- Be competent and qualified to make real estate transactions and conduct negotiations.[65]

In addition to the requirements provided in s. 475.17(1)(a), F.S., the applicant must also hold an active real estate sales associate license for a specified period of time,[66] complete a pre-licensing course,[67] pass the Florida Real Estate Brokers' Examination,[68] and participate in post-licensure education.[69]

In addition to a primary brokers' license, a licensed broker may also be issued additional brokers' licenses whenever it is clearly shown that the request for additional licenses is necessary to the conduct of the real estate brokerage business, and that the additional licenses will not be used in a manner that is likely to be prejudicial.[70]

Relative to licensee complaints, discipline is only imposed against the license that is specifically charged in the administrative complaint.[71] Consequently, in order to impose discipline on any additional brokers' licenses, the complaining party must have charged each additional license number in the administrative complaint. Currently, it is possible for a broker to obtain an additional license during the enforcement process in order to avoid having disciplinary actions attached to that additional license.[72]

Effect of Proposed Changes

The bill amends s. 475.215(1), F.S., to provide that an additional license may not be granted if that license will be used in a manner that is likely to be harmful to any person. The limitation that an additional license may not be granted if that license will be used in a manner that is likely to be prejudicial remains intact. The bill also allows the Florida Real Estate Commission (FREC) to deny an additional license request pursuant to s. 475.17(1)(a), F.S., which provides qualification requirements for brokers, as discussed above. Finally, the bill provides that a final order of discipline against the brokers' primary license applies to both the primary license and to any multiple licenses held by that broker at the time the final order becomes effective.

B. SECTION DIRECTORY:

Section 1: creates s. 120.574(3), F.S., requiring a summary hearing process for real estate appraiser complaints.

Section 2: amends s. 475.215(1), F.S., to provide that an additional license may not be issued if that license will be used in a manner that is likely to be harmful to any person; that the FREC may deny an additional license request pursuant to s. 475.17(1)(a), F.S.; and that a final order of discipline against the primary brokers' license applies to both the primary license and to any multiple licenses held by that broker at the time the final order becomes effective.

Section 3: amends s. 475.611(1)(u), F.S., to remove the term "licensed appraiser" from the definition of "supervisory appraiser."

Section 4: amends s. 475.612(1), F.S., to remove the term "licensed appraiser" from the supervisory requirements for trainee real estate appraisers.

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[65] Section 475.17(1)(a), F. S.
[66] Section 475.17(2)(b), F. S.
[67] Section 475.17(2)(a), F. S.
[68] Section 475.175, F. S.
[69] Section 475.17(3)(a), F. S.
[70] Section 475.215(1), F. S.
[71] Department of Business and Professional Regulation 2013 Legislative Analysis, page 3, dated February 18, 2013, on file with BPR subcommittee.
[72] Id.

Section 5: amends s. 475.615(2), F.S., to update the reference to the date of the adoption of the most recent Qualification Criteria by the AQB; and amends s. 475.615(6), F.S., to eliminate the ability of the FREAB to consider the subsequent passage of time and good behavior when considering the license application of an applicant who has prior discipline and criminal history, and instead requires the applicant to meet the conditions set forth by the AQB.

Section 6: amends s. 475.6221(1), F.S., to eliminate the reference to "licensed" appraisers from the supervisory requirements for trainee real estate appraisers.

Section 7: provides that the bill shall take effect upon becoming law, except as otherwise expressly provided.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill requires additional rulemaking and accounts for an increase in summary administrative hearings. The associated costs are indeterminate, but are likely insignificant and can be absorbed with existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of sales tax shared with counties or municipalities.

2. Other:

Where the Legislature creates a right to a hearing, minimal considerations of due process require the parties receive reasonable notice and a fair hearing. The present administrative hearing process under ss. 120.569 and 120.57, F.S., requires reasonable notice to parties substantially affected by agency action and provides a complete opportunity for such parties to respond and fully present material relevant to their defense or opposition to the agency action. Both the statutory procedures and their implementing rules allow agencies and DOAH sufficient flexibility in organizing and conducting administrative proceedings to afford parties litigating more complex issues ample opportunity to present their cases effectively, even if that requires longer periods for discovery, motion practice, trial, and post-hearing submittals.

Constraining all Florida appraisers subject to disciplinary proceedings to the summary process of s. 120.574, F.S., may prevent certain registrants from effectively defending against administrative charges because they cannot effectively discover information necessary to their cases or because they were denied a reasonable continuance. Allowing continuances only in "extraordinary circumstances" without defining that condition or providing adequate guidance to determine when a circumstance is "extraordinary" makes the opportunity for hearing subject to differing, possibly arbitrary or capricious, applications of the statutory standards.
As the director of DOAH, the Chief Administrative Law Judge would exercise solely the authority to designate former judges or other "special masters" to adjudicate summary hearings involving registered appraisers. With no guidance from the statute, the Chief ALJ could appoint retired judges, those removed after impeachment, even those who resigned and were subsequently convicted of a crime. The APA requires ALJ candidates at least to be members of The Florida Bar in good standing; the bill provides no such guidance. A delegation of authority to an administrative agency by a law that is vague, uncertain, or so broad as to give no notice of what actions would violate the law, could be ruled unconstitutional because it allows the agency to make the law.[73] The Legislature must provide minimal standards and guidelines in the law creating a program to provide for its proper administration by the assigned executive agency. The Legislature may delegate rule-making authority to agencies but not the authority to determine what the law should be.[74] Authorizing DOAH, and therefore the Chief ALJ, to exercise all discretion in the appointment of "additional adjudicators" for these summary proceedings may well be ruled unconstitutional as a violation of the state separation of powers.[75]

B. RULE-MAKING AUTHORITY:

The bill eliminates the ability of the FREAB to consider the subsequent passage of time and good behavior when considering the license application of an applicant who has prior discipline and criminal history. Instead, it requires the FREAB to adopt specific AQB Qualification Criteria requirements, by rule. As a result, agency rulemaking is required in order to adopt the new Qualification Criteria.

The bill changes the reference to the date of the AQB Qualification Criteria version from February 20, 2004 to December 9, 2011. As a result, the provision will require agency rulemaking to adopt the new Qualification Criteria.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Administrative Procedures for Disciplinary Cases

The bill requires the final order be rendered within ninety days after the date the administrative complaint is filed. The bill does not alter the current requirements for initiating administrative action. The Department will continue filing the complaint with the agency clerk, serving the registrants, waiting the required 21 days for a response (plus an additional 5 days to allow the registrant to mail the response), and then have another 15 days before referring the case to DOAH. Under the present

[73] *Conner v. Joe Hatton, Inc.*, 216 So.2d 209 (Fla.1968).
[74] *Sarasota County. v. Barg*, 302 So.2d 737 (Fla. 1974).
[75] Art. II, s. 3, Fla. Const.

statutes, a case could be referred to DOAH with as little as 55 days remaining of the 90 days provided. If the intent is to require DOAH to render a final order within 90 days once it receives the case, the bill creates ambiguity with other statutory requirements.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to real estate brokers and appraisers; amending s. 120.574, F.S.; providing that specified administrative procedures for summary hearings apply to disciplinary cases involving certain real estate appraisers; providing exceptions and conditions relating to such procedures; amending s. 475.215, F.S.; providing a qualifying condition for the issuance of additional licenses to a licensed broker; providing grounds for the Florida Real Estate Commission to deny multiple license requests; providing for applicability and effect of certain final orders of discipline on primary and multiple licenses held by a broker; amending s. 475.611, F.S.; revising the definition of the term "supervisory appraiser"; amending s. 475.612, F.S.; conforming a provision to changes made by the act; amending s. 475.615, F.S.; revising the dated version of certain requirements adopted by the Appraiser Qualifications Board of the Appraisal Foundation based upon which the Florida Real Estate Appraisal Board is authorized to waive or modify certain education, experience, or examination requirements applicable to certified appraisers and registered trainee appraisers; revising certain exceptions from provisions specifying that certain applicants for certification or registration as an appraiser or trainee appraiser are not deemed to be qualified for such certification or registration;

amending s. 475.6221, F.S.; deleting authority for a licensed appraiser to act as the direct supervisor of a registered trainee real estate appraiser; providing effective dates.

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

Section 1. Subsection (3) is added to section 120.574, Florida Statutes, to read:

120.574 Summary hearing.—

(3) The procedures in subsection (2) apply to disciplinary cases involving real estate appraisers licensed in this state. However:

(a) Final orders in such cases must be rendered within 90 days after the date the administrative complaint is filed.

(b) The provisions of subparagraph (2)(a)5. do not apply.

(c) Motions for continuance may not be granted absent extraordinary circumstances.

(d) The division may assign former administrative law judges or, former circuit or county court judges, or may designate special masters, to adjudicate the summary hearings under this section.

Section 2. Subsection (1) of section 475.215, Florida Statutes, is amended to read:

475.215 Multiple licenses.—

(1) A licensed broker may be issued upon request additional licenses as a broker, but not as a sales associate or as a broker associate, whenever it is clearly shown that the

requested additional licenses are necessary to the conduct of real estate brokerage business and that the additional licenses will not be used in a manner likely to be prejudicial or harmful to any person, including a licensee under this chapter. The commission may also deny a multiple license request pursuant to s. 475.17(1)(a). A final order of discipline rendered against a broker for a violation of this part or s. 455.227(1) applies to the primary license of the broker as well as any multiple licenses held by that broker at the time the final order becomes effective.

Section 3. Paragraph (u) of subsection (1) of section 475.611, Florida Statutes, is amended to read:

475.611 Definitions.—

(1) As used in this part, the term:

(u) "Supervisory appraiser" means ~~a licensed appraiser,~~ a certified residential appraiser~~,~~ or a certified general appraiser responsible for the direct supervision of one or more registered trainee appraisers and fully responsible for appraisals and appraisal reports prepared by those registered trainee appraisers. The board, by rule, shall determine the responsibilities of a supervisory appraiser, the geographic proximity required, the minimum qualifications and standards required of a ~~licensed or~~ certified appraiser before she or he may act in the capacity of a supervisory appraiser, and the maximum number of registered trainee appraisers to be supervised by an individual supervisory appraiser.

Section 4. Subsection (1) of section 475.612, Florida Statutes, is amended to read:

475.612 Certification, licensure, or registration required.—

(1) A person may not use the title "certified real estate appraiser," "licensed real estate appraiser," or "registered trainee real estate appraiser," or any abbreviation or words to that effect, or issue an appraisal report, unless such person is certified, licensed, or registered by the department under this part. However, the work upon which an appraisal report is based may be performed by a person who is not a certified or licensed appraiser or registered trainee appraiser if the work is supervised and approved, and the report is signed, by a certified or licensed appraiser who has full responsibility for all requirements of the report and valuation service. Only a certified or licensed appraiser may issue an appraisal report and receive direct compensation for providing valuation services for the appraisal report. A registered trainee appraiser may only receive compensation for appraisal services from her or his authorized certified ~~or licensed~~ appraiser.

Section 5. Effective January 1, 2014, subsections (2) and (6) of section 475.615, Florida Statutes, are amended to read:

475.615 Qualifications for registration or certification.—

(2) The board is authorized to waive or modify any education, experience, or examination requirements established in this part in order to conform with any such requirements established by the Appraiser ~~Appraisal~~ Qualifications Board of the Appraisal Foundation or any successor body recognized by federal law, including any requirements adopted on December 9, 2011 ~~February 20, 2004~~. The board shall implement this section

by rule.

(6) All applicants must be competent and qualified to make real estate appraisals with safety to those with whom they may undertake a relationship of trust and confidence and the general public. If any applicant has been denied registration, licensure, or certification, or has been disbarred, or the applicant's registration, license, or certificate to practice or conduct any regulated profession, business, or vocation has been revoked or suspended by this or any other state, any nation, or any possession or district of the United States, or any court or lawful agency thereof, because of any conduct or practices which would have warranted a like result under this part, or if the applicant has been guilty of conduct or practices in this state or elsewhere which would have been grounds for disciplining her or his registration, license, or certification under this part had the applicant then been a registered trainee appraiser or a licensed or certified appraiser, the applicant is ~~shall be~~ deemed not to be qualified unless the applicant has met the conditions adopted by the Appraiser Qualifications Board of the Appraisal Foundation on December 9, 2011, as prescribed by rule of the board and~~, because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient,~~ it appears to the board that the interest of the public is not likely to be endangered by the granting of registration or certification.

Section 6. Subsection (1) of section 475.6221, Florida Statutes, is amended to read:

475.6221 Employment of and by registered trainee real

estate appraisers.—

(1) A registered trainee real estate appraiser must perform appraisal services under the direct supervision of a ~~licensed or~~ certified appraiser who is designated as the primary supervisory appraiser. The primary supervisory appraiser may also designate additional ~~licensed or~~ certified appraisers as secondary supervisory appraisers. A secondary supervisory appraiser must be affiliated with the same firm or business as the primary supervisory appraiser and the primary or secondary supervisory appraiser must have the same business address as the registered trainee real estate appraiser. The primary supervisory appraiser must notify the Division of Real Estate of the name and address of any primary and secondary supervisory appraiser for whom the registered trainee will perform appraisal services, and must also notify the division within 10 days after terminating such relationship. Termination of the relationship with a primary supervisory appraiser automatically terminates the relationship with the secondary supervisory appraiser.

Section 7. Except as otherwise expressly provided in this act, this act shall take effect upon becoming a law.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 667 (2013)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	____	(Y/N)
ADOPTED AS AMENDED	____	(Y/N)
ADOPTED W/O OBJECTION	____	(Y/N)
FAILED TO ADOPT	____	(Y/N)
WITHDRAWN	____	(Y/N)
OTHER		

Committee/Subcommittee hearing bill: Rulemaking Oversight & Repeal Subcommittee

Representative Porter offered the following:

Amendment (with title amendment)

Remove lines 36-50

T I T L E A M E N D M E N T

Remove lines 3-7 and insert:

amending s. 475.215,

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1165 Ratification of Rules Implementing Workers' Compensation Law
SPONSOR(S): Brodeur
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee		Miller	Rubottom
2) Insurance & Banking Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The Department of Financial Services adopted amendments to the rule incorporating by reference the Florida Workers' Compensation Health Care Provider Reimbursement Manual. The Manual sets out the policies, guidelines, codes, and maximum reimbursement allowances for services and supplies furnished by health care providers under the Workers' Compensation statutes. The Manual also states the reimbursement policies and payment methodologies for pharmacists and medical suppliers pertaining to Workers' Compensation.

The Statement of Estimated Regulatory Costs showed Rule 69L-7.020, F.A.C., *Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2011 Edition*, would have a specific, adverse economic effect, or would increase regulatory costs, exceeding $1 million over the first 5 years the rule was in effect. Accordingly, the Rule must be ratified by the Legislature before it may go into effect.

The Rule was adopted on October 24, 2011, and initially submitted for ratification on December 21, 2011. The Department resubmitted the ratification request on February 1, 2013.

The proposed bill authorizes the Rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida's workers' compensation law[1] provides medically necessary treatment and care for injured employees, including medications. The Department of Financial Services, Division of Workers' Compensation, (DFS) provides regulatory oversight of Florida's workers' compensation system. The law provides for reimbursement formulas and methodologies to compensate providers of health services to compensation claimants, subject to maximum reimbursement allowances (MRAs).[2] DFS incorporates the uniform schedules MRAs by rule in reimbursement manuals.[3]

Currently, the reimbursement schedules for individual licensed providers are contained in the Florida Workers' Compensation Health Care Provider Reimbursement Manual (Manual), 2008 Edition. On December 18, 2009, the Three-Member Panel approved a revised uniform schedule of MRAs for physicians and other recognized practitioners. DFS initiated rulemaking to update the Manual and On October 24, 2011, adopted the amended version of Rule 69L-7.020, F.A.C., incorporating by reference the 2011 Edition of the Manual and updating incorporating references to other materials used for provider reimbursement together with the Manual. According to the Statement of Estimated Regulatory Costs (SERC), the revisions to MRAs in the updated Manual will result in increased costs to the overall compensation system of $17.5 million over the next five years.[4]

Reimbursement for Prescriptions

The Manual interprets the statutory reimbursement rate for dispensing prescription medications. Under the workers' compensation law, reimbursement for prescription medications is the average wholesale price (AWP) plus a $4.18 dispensing fee, except where the workers' compensation insurance carrier has contracted for a lower amount.[5] AWP is not defined in the worker's compensation law. The 2008 Edition of the Manual states:

> **SECTION V: DISPENSING OF MEDICATION.**
>
> A. Medicinal drugs.
>
> ...
>
> 5. Reimbursement limitations.
>
> ...
>
> b. Reimbursement for prescription drugs shall be as follows:

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[1] Chapter 440, F.S.

[2] Section 440.13(12), F.S. The law creates the Three-Member Panel (CFO or CFO designee and 2 Governor appointees subject to Senate confirmation) that sets all MRAs.

[3] Section 440.13(12), (14)(b), F.S. Chapter 69L-7, F.A.C. Currently there are three such manuals: the Florida Workers' Compensation Health Care Provider Reimbursement Manual (Rule 69L-7.020, F.A.C.), Florida Workers' Compensation Reimbursement Manual for Ambulatory Surgical Centers (Rule 69L-7.100, F.A.C.), and Florida Workers' Compensation Reimbursement Manual for Hospitals (Rule 69L-7.501, F.A.C.). Each manual is adopted by reference in the indicated rule.

[4] DFS, "Statement of Estimated Regulatory Costs for Legislative Review and Ratification of Proposed Rule Change, Pursuant to Section 120.541, Florida Statutes" (12/9/2011).

[5] Section 440.13(12)(c), F.S., reads: "As to reimbursement for a prescription medication, the reimbursement amount for a prescription shall be the average wholesale price plus $4.18 for the dispensing fee, except where the carrier has contracted for a lower amount. Fees for pharmaceuticals and pharmaceutical services shall be reimbursable at the applicable fee schedule amount. Where the employer or carrier has contracted for such services and the employee elects to obtain them through a provider not a party to the contract, the carrier shall reimburse at the schedule, negotiated, or contract price, whichever is lower. No such contract shall rely on a provider that is not reasonably accessible to the employee."

(1) The pharmaceutical reimbursement formula:

Average Wholesale Price (AWP) + $4.18 dispensing fee = Reimbursement; or

(2) the contracted reimbursement amount determined in accordance with the contractual arrangement between the provider and insurer.[6]

The version of this provision in the 2011 Edition of the Manual states:

Dispensing Medications

...

Reimbursement is the lesser of:

- Average Wholesale Price (AWP) + $4.18 = Reimbursement; or
- The amount the carrier has contracted for pursuant to s. 440.13(12)(c), F.S.

The concern has been expressed that the 2011 provision may not as clearly conform to the statute being implemented as the 2008 provision now in effect.

No concern has been brought to the attention of House staff regarding any other provision of the Manual.

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[7] Rulemaking authority is delegated by the Legislature[8] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[9] a rule. Agencies do not have discretion whether to engage in rulemaking.[10] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[11] The grant of rulemaking authority itself need not be detailed.[12] The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[13]

An agency begins the formal rulemaking process by filing a notice of the proposed rule.[14] The notice is published by the Department of State in the Florida Administrative Weekly[15] and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.[16]

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[6] Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2008 Edition, p. 16-17.
[7] Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region,* 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[8] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).
[9] Section 120.52(17).
[10] Section 120.54(1)(a), F.S.
[11] Section 120.52(8) & s. 120.536(1), F.S.
[12] *Save the Manatee Club, Inc.,* supra at 599.
[13] *Sloban v. Florida Board of Pharmacy,*982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.,* 794 So. 2d 696, 704 (Fla. 1st DCA 2001).
[14] Section 120.54(3)(a)1, F.S..
[15] Section 120.55(1)(b)2, F.S.
[16] Section 120.541(2)(a), F.S.

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.[17] Next is the likely adverse impact on business competitiveness,[18] productivity, or innovation.[19] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[20] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[21] A rule must be filed for adoption before it may go into effect[22] and cannot be filed for adoption until completion of the rulemaking process.[23] A rule projected to have a specific economic impact exceeding $1 million in the aggregate over 5 years[24] must be ratified by the Legislature before going into effect.[25] As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Impact of Rule

The Rule incorporates by reference the 2011 Edition of the Manual, providing for reimbursement of health care providers under the increased MRAs approved by the Three-Member Panel.

Effect of Proposed Change

The bill ratifies Rule 69L-7.020, F.A.C., allowing the rule to go into effect.

B. SECTION DIRECTORY:

Section 1: Ratifies Rule 69L-7.020, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill creates no additional source of state revenues.
2. Expenditures: The bill requires no state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill itself has no impact on local government revenues.

[17] Section 120.541(2)(a)1., F.S.
[18] Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[19] Section 120.541(2)(a) 2., F.S.
[20] Section 120.541(2)(a) 3., F.S.
[21] Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State .
[22] Section 120.54(3)(e)6, F.S.
[23] Section 120.54(3)(e), F.S.
[24] Section 120.541(2)(a), F.S.
[25] Section 120.541(3), F.S.

2. Expenditures: The bill does not impose additional expenditures on local governments. To the extent local governments are responsible for paying workers' compensation claims or obtain workers' compensation insurance, they will incur increased costs due to the increase in maximum reimbursements for providers.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill itself does not directly impact the private sector. Private employers responsible for paying workers' compensation claims or obtaining workers' compensation insurance will incur increased costs due to the increase in maximum reimbursements for providers.

D. FISCAL COMMENTS:

The economic impacts projected in the statement of estimated regulatory costs would result from the operation of the new provider reimbursement provisions of the Manual incorporated in the rule.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

No other constitutional issues are presented by the bill.

B. RULE-MAKING AUTHORITY:

The bill meets the final statutory requirement for the department to exercise its rulemaking authority concerning the periodic adjustment of Workers' Compensation health care provider reimbursement policies and rates. No additional rulemaking authority is required.

C. DRAFTING ISSUES OR OTHER COMMENTS:

For clarity it is suggested the bill include that the Manual also relates to the payment methodologies for pharmacists and medical suppliers.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to ratification of rules implementing the Workers' Compensation Law; ratifying a specified rule for the sole and exclusive purpose of satisfying any condition on effectiveness pursuant to s. 120.541(3), F.S., which requires ratification of any rule meeting any of specified thresholds for likely adverse impact or increase in regulatory costs; providing an effective date.

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

Section 1. (1) The following rule is ratified for the sole and exclusive purpose of satisfying any condition on effectiveness imposed under s. 120.541(3), Florida Statutes: Rule 69L-7.020, Florida Administrative Code, entitled "Florida Workers' Compensation Health Care Provider Reimbursement Manual," relating to the incorporation by reference of the manual and various other materials that provide reimbursement policies, codes, and maximum reimbursement allowances for medical services and suppliers, to implement the Workers' Compensation Law.

(2) This act serves no other purpose and shall not be codified in the Florida Statutes. After this act becomes law, its enactment and effective dates shall be noted in the Florida Administrative Code or the Florida Administrative Register or both, as appropriate. This act does not alter rulemaking authority delegated by prior law, does not constitute

legislative preemption of or exception to any provision of law governing adoption or enforcement of the rules cited, and is intended to preserve the status of any cited rule as a rule under chapter 120, Florida Statutes. This act does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited.

Section 2. This act shall take effect upon becoming a law.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1165 (2013)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Rulemaking Oversight & Repeal Subcommittee

Representative Brodeur offered the following:

Amendment (with title amendment)

Remove line 14 and insert:

sole and exclusive purpose of satisfying the condition on

Remove lines 20-22 and insert:

policies, guidelines, codes, maximum reimbursement allowances for medical services and suppliers, and payment methodologies for pharmacists and medical suppliers, to implement the Workers' Compensation Law.

T I T L E A M E N D M E N T

Remove line 5 and insert:

the condition on effectiveness pursuant to s.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1225 Administrative Procedures
SPONSOR(S): Adkins
TIED BILLS: **IDEN./SIM. BILLS:** SB 1696

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom
2) Government Operations Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

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

- Adopts a definition of "small business" applicable to the entire APA;
- Shifts the burden of proof from challengers to agencies when the validity of existing rules are challenged
- Shifts part of the burden from challengers to agencies in challenges to unadopted rules;
- Removes a requirement that agencies have 30 days to initiate rulemaking to avoid liability for attorney fees in successful challenges to unadopted rules;
- Removes the defense to an unadopted rule challenge that an agency did not know or should not have known that an agency statement or policy was an unadopted rule;
- Authorizes parties to request mediation in proceedings relating to declaratory statements and in rule challenges;
- Removes discretion of agencies, the Governor and the Governor and Cabinet to identify rules for which first time, minor violations, should be addressed by a notice of noncompliance;
- Removes discretion of cabinet officers to exempt certain licensing rules from the notice of noncompliance provisions;

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

The bill has an indeterminate fiscal impact on agency revenues.

The bill is effective July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current situation

Small business

Florida's Administrative Procedure Act (APA) provides certain accommodations for small businesses[1] but does not provide a definition of "small business". In rulemaking, an agency must consider the impact on small businesses defined for that purpose as employing less than 200 employees and having a net worth less than $5 million,[2] but agencies are authorized to define "small business" to included businesses having more than 200 employees. By contrast, Florida's Equal Access to Justice Act provides for attorney fees to be awarded in administrative proceedings to prevailing parties who are small businesses, defined as having not more than 25 employees with a net worth not more than $2 million.[3]

Attorney fees

In addition to the special attorney fee provisions in the Equal Access to Justice Act, the APA provides for the recovery of attorney fees when a non-prevailing party has participated for an improper purpose, when an agency's actions are not substantially justified, when an agency relies upon an unadopted rule and is successfully challenged after 30 days notice of the need to adopt rules, and when an agency loses an appeal in a proceeding challenging an unadopted rule.[4] These attorney fee provisions supplement the attorney fee provisions provided by other laws.[5]

Burden of proof

In general, laws carry a presumption of validity and those challenging the validity of a law carry the burden of proving invalidity. The APA retains this presumption of validity by requiring those challenging adopted rules to carry the burden of proving a rule's invalidity.[6] However, in the case of proposed rules, the APA places the burden on the agency to demonstrate the validity of the rule as proposed, once the challenger has raised specific objections to the rule's validity.[7] In addition, a rule may not be filed for adoption until any pending challenge is resolved.[8]

In the case of a statement or policy in force that was not adopted as a rule, a challenger must prove that the statement or policy meets the definition of a rule under the APA. If so, and if the statement or policy has not been validly adopted, the agency must prove that rulemaking is not feasible or practicable.[9]

Mediation

The APA provides for mediation by agreement of the parties in those cases where the agency offers mediation to a person whose substantial interests are affected by an agency's action.[10] The APA does not require mediation in any particular case. Mediation is a process that is most likely to be effective when the parties agree to that form of dispute resolution. Because mediation is only concluded by agreement, rather than the determination of a third party—a judge or arbiter—compelling mediation is

[1] Sections 120.54, 120.541, and 120.74, F.S.
[2] Section 120.54(3)(b), F.S., incorporates by reference the definition of "small business" in s. 288.703(6), F.S.
[3] Section 57.111, F.S.
[4] Section 120.595, F.S.
[5] See, for example, ss. 57.105, 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.
[6] Section 120.56(3), F.S.
[7] Section 120.56(2), F.S.
[8] Section 120.54(3)(e)2., F.S.
[9] Section 120.56(4), F.S.
[10] Section 120.573, F.S.

not often practical. Without any formal mediation, many administrative disputes are resolved by negotiation prior to, or after the initiation of formal proceedings in the Division of Administrative Hearings.

Declaratory Statements

The APA provides for the opportunity to request, for notice and opportunity for public input, and for the issuance of a "declaratory statement" of an agency's opinion on the applicability of a law or rule over which the agency has authority to a particular set of facts set forth in the petition.[11] When issued, a declaratory statement is the agency's legal opinion that binds the agency under principles of estoppel. An agency has the option to deny the petition, and will typically do so if a live enforcement action is pending with respect to similar facts. Anecdotal evidence indicates that the declaratory statement process in the APA has not proven productive in Florida. By contrast, the Internal Revenue Service and the Florida Department of Revenue each frequently issue binding opinions upon request of taxpayers.

Minor Violations

The APA directs agencies to issue a "notice of noncompliance" as the first response when the agency encounters a first minor violation of a rule.[12] The law provides that a violation is a minor violation if it "does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm". Agencies are authorized to designate those rules for which a violation would be a minor violation. An agency's designation of rules under the provision is excluded from the definition of rulemaking under the APA but may be subject to review and revision by the Governor or Governor and Cabinet.[13] An agency under the direction of a cabinet officer has the discretion not to use the "notice of noncompliance" once each licensee is provided a copy of all rules upon issuance of a license, and annually thereafter.

Effect of the Bill

Section 1 amends s.120.52, F.S., to adopt a definition of "small business" for the APA. The definition references s. 288.703 which defines "small business" as a business having less than 200 employees and $5 million in net worth. As described above, that definition is already incorporated elsewhere in the APA. The effect might be interpreted to reduce the flexibility allowed in rulemaking for agencies to expand the definition to businesses with 200 or more employees. However, the definition would likely not have any effect on the operation of the APA.

Section 2 amends s. 120.56, F.S., to shift the burden of proof from challengers to agencies to prove that their existing rules are valid. It also removes the burden of proof on challengers to agency statements defined as rules (but not validly adopted as rules), requiring the agency to prove the statement is not a rule, that it was validly adopted, or that rulemaking is not feasible or not practicable. This change will likely reduce the motivation of parties to challenge proposed rules (for which the agencies now have the burden of proving legal validity) prior to the final adoption, at a time when a finding of invalidity or other change to the proposed rule would not impact existing legal requirements.

Section 3 amends s. 120.595, F.S., relating to attorney fees in APA proceedings, to eliminate the defense that the agency did not know and should not have known a statement was an unadopted rule, and eliminate a requirement that an agency may not be responsible for attorney fees unless provided 30 days notice that the statement may constitute an unadopted rule prior to the filing of the challenge and that the agency failed to file a notice of rulemaking to correct the deficiency. The effect will be that attorney fees will be awarded even if the agency immediately initiates rulemaking in response to the petition challenging the unadopted rule.

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[11] Section 120.565, F.S.

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

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

Section 4 amends s. 120.573, F.S., relating to mediation of disputes, to authorize a party to request mediation in any case involving a challenge to the validity of an existing rule, proposed rule or an unadopted rule, or a proceeding pursuant to a petition seeking declaratory statement. This would have no substantial impact on the effect of present law, particularly in light of the nature of the matters referenced, which constitute determinations of law that are not ordinarily amenable to mediation.

Section 5 amends s. 120.695, F.S., to remove the discretion of agencies to designate rules for which minor violations would be subject to a notice of noncompliance and the discretion of cabinet officers to opt out of the provisions of the section by keeping licensees regularly advised of the content of governing rules. As a result, every first violation of a rule that does not cause harm or threaten the public health, safety or welfare could only addressed by a notice of noncompliance. This would likely reduce the deterrence of many rules not currently designated for treatment as minor violations, would likely increase litigation over what is or is not a minor violation, and likely increase the cost of enforcement to counter-balance the lost deterrence, while reducing the revenues generated from fines for first violations of many rules.

Sections 6-8 are conforming changes to separate statutes which do not add to the effect of the bill.

B. SECTION DIRECTORY:

Section 1 creates a new s.120.52(18), F.S., and renumbers existing subsections (18)-(22), to adopt a definition of "small business" for purposes of the APA.

Section 2 amends s. 120.56(3)(a) and (4)(b), F.S., relating to challenges to existing rules and unadopted rules...

Section 3 amends s. 120.595, F.S., relating to attorney fees.

Section 4 amends s. 120.573, F.S., relating to mediation of disputes.

Section 5 amends s. 120.695(2), F.S., relating to notice of noncompliance and minor violations of rules.

Section 6 makes conforming changes to s. 420.9072, F.S.

Section 7 makes conforming changes to s. 420.9075, F.S.

Section 8 makes conforming changes to s. 443.092, F.S.

Section 9 provides an affective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   Local governments are not typically governed by the APA, but some are made subject to it by special law. In such cases, some revenues presently raised by fines for first time violations of rules would be lost.

2. Expenditures:

   The bill would be unlikely to impact local government expenditures. Local governments might benefit from a reduction in fines assessed by state agencies, but those governed by the APA might have to increase enforcement expenditures to overcome the loss of deterrence described in A.2 above. Those governed by the APA may also experience a reduction in revenues from fines for first time violations of rules.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

The fiscal impacts described above are indeterminate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   It is unlikely that the fiscal impact on local governments would be significant enough to implicate the provisions of s. 18, Art. VII, Florida Constitution.

2. Other:

B. RULE-MAKING AUTHORITY:

The bill does not alter rulemaking authority except by abolishing the discretion, exempt from the rulemaking provisions of the APA, to designate rules for which first-time violations might be addressed through a notice of noncompliance.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to administrative procedures; amending s. 120.52, F.S.; defining the term "small business" as used in the Administrative Procedure Act; amending s. 120.56, F.S.; providing that the agency has the burden of proof in proceedings challenging the validity of existing rules and unadopted agency statements; amending s. 120.595, F.S.; removing certain exceptions from requirements that attorney fees and costs be rendered against the agency in proceedings in which the petitioner prevails in a challenge to an unadopted agency statement; amending s. 120.573, F.S.; authorizing any party to request mediation of rule challenge and declaratory statement proceedings; amending s. 120.695, F.S.; removing obsolete provisions with respect to required agency review and designation of minor violations; amending ss. 420.9072, 420.9075, and 443.091, F.S.; conforming cross-references; providing an effective date.

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

Section 1. Subsections (18) through (22) of section 120.52, Florida Statutes, are renumbered as subsections (19) through (23), respectively, and a new subsection (18) is added to that section, to read:

120.52 Definitions.—As used in this act:

(18) "Small business" has the same meaning as provided in

s. 288.703.

Section 2. Paragraph (a) of subsection (3) and paragraph (b) of subsection (4) of section 120.56, Florida Statutes, are amended to read:

120.56 Challenges to rules.—

(3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.—

(a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has the ~~a~~ burden of going forward. The agency then has the burden to prove ~~proving~~ by a preponderance of the evidence that the existing rule is not an invalid exercise of delegated legislative authority as to the objections raised.

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

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3), such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings pending rulemaking shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The petitioner has the burden of going forward. ~~If a hearing is held and the petitioner proves the allegations of the petition,~~ The agency then has ~~shall have~~ the

burden to prove by a preponderance of the evidence that the statement does not constitute a rule under s. 120.52, that the agency adopted the statement by the rulemaking procedure provided by s. 120.54, or ~~of proving~~ that rulemaking is not feasible or not practicable under s. 120.54(1)(a).

Section 3. Section 120.595, Florida Statutes, is amended to read:

120.595 Attorney ~~Attorney's~~ fees.—

(1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—

(a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and ~~a~~ reasonable attorney fees ~~attorney's fee~~ to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not

establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney ~~attorney's~~ fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall

the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

(2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).—If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). An ~~No~~ award of attorney ~~attorney's~~ fees as provided by this subsection may not ~~shall~~ exceed $50,000.

(3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3) AND (5).—If the appellate court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that its actions were substantially justified or

special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). An ~~No~~ award of attorney ~~attorney's~~ fees as provided by this subsection may not ~~shall~~ exceed $50,000.

(4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4).—

(a) If the appellate court or administrative law judge determines that all or part of an agency statement violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance on the statement and any substantially similar statement pursuant to s. 120.56(4)(e), a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

(b) Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3)(a), such notice shall automatically operate as a stay of proceedings pending rulemaking. The administrative law judge may vacate the stay for

good cause shown. A stay of proceedings under this paragraph remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees accrued by the petitioner before ~~prior to~~ the date the notice was published~~,~~ ~~unless the agency proves to the administrative law judge that it did not know and should not have known that the statement was an unadopted rule~~. ~~Attorneys' fees and costs under this paragraph and paragraph (a) shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before a petition under s. 120.56(4) was filed and that the agency failed to publish the required notice of rulemaking pursuant to s. 120.54(3) that addresses the statement within that 30-day period. Notice to the agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing substantially the same information, or a petition filed pursuant to s. 120.54(7).~~ An award of attorney ~~attorney's~~ fees as provided by this paragraph may not exceed $50,000.

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

(d) If the agency prevails in the proceedings, the appellate court or administrative law judge shall award

reasonable costs and attorney ~~attorney's~~ fees against a party if the appellate court or administrative law judge determines that the party participated in the proceedings for an improper purpose as defined in paragraph (1)(e) or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts.

(5) APPEALS.—When there is an appeal, the court in its discretion may award reasonable attorney ~~attorney's~~ fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney ~~attorney's~~ fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

(6) OTHER SECTIONS NOT AFFECTED.—Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney ~~attorney's~~ fees and costs in administrative proceedings. ~~Nothing in~~ This section does not ~~shall~~ affect the availability of attorney ~~attorney's~~ fees and costs as provided in those sections.

Section 4. Section 120.573, Florida Statutes, is amended to read:

120.573 Mediation of disputes.—

(1) Each announcement of an agency action that affects substantial interests shall advise whether mediation of the administrative dispute for the type of agency action announced is available and that choosing mediation does not affect the right to an administrative hearing. If the agency and all parties to the administrative action agree to mediation, in writing, within 10 days after the time period stated in the announcement for election of an administrative remedy under ss. 120.569 and 120.57, the time limitations imposed by ss. 120.569 and 120.57 shall be tolled to allow the agency and parties to mediate the administrative dispute. The mediation shall be concluded within 60 days of such agreement unless otherwise agreed by the parties. The mediation agreement shall include provisions for mediator selection, the allocation of costs and fees associated with mediation, and the mediating parties' understanding regarding the confidentiality of discussions and documents introduced during mediation. If mediation results in settlement of the administrative dispute, the agency shall enter a final order incorporating the agreement of the parties. If mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.57 are resumed.

(2) Any party to a proceeding conducted pursuant to a petition seeking an administration determination of the invalidity of an existing rule, proposed rule, or unadopted agency statement under s. 120.56 or a proceeding conducted

pursuant to a petition seeking a declaratory statement under s. 120.565 may request mediation of the dispute under this section.

Section 5. Subsection (2) of section 120.695, Florida Statutes, is amended to read:

120.695 Notice of noncompliance.—

(2)(a) Each agency shall issue a notice of noncompliance as a first response to a minor violation of a rule. A "notice of noncompliance" is a notification by the agency charged with enforcing the rule issued to the person or business subject to the rule. A notice of noncompliance may not be accompanied with a fine or other disciplinary penalty. It must identify the specific rule that is being violated, provide information on how to comply with the rule, and specify a reasonable time for the violator to comply with the rule. A rule is agency action that regulates a business, occupation, or profession, or regulates a person operating a business, occupation, or profession, and that, if not complied with, may result in a disciplinary penalty.

(b) ~~Each agency shall review all of its rules and designate those for which~~ A violation would be a minor violation ~~and~~ for which a notice of noncompliance must be the first enforcement action taken against a person or business subject to regulation~~. A violation of a rule is a minor violation~~ if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm. ~~If an agency under the direction of a cabinet officer mails to each licensee a notice of the designated rules at the time of licensure and at least~~

~~annually thereafter, the provisions of paragraph (a) may be exercised at the discretion of the agency. Such notice shall include a subject-matter index of the rules and information on how the rules may be obtained.~~

~~(c) The agency's review and designation must be completed by December 1, 1995; each agency under the direction of the Governor shall make a report to the Governor, and each agency under the joint direction of the Governor and Cabinet shall report to the Governor and Cabinet by January 1, 1996, on which of its rules have been designated as rules the violation of which would be a minor violation.~~

~~(d) The Governor or the Governor and Cabinet, as appropriate pursuant to paragraph (c), may evaluate the review and designation effects of each agency and may apply a different designation than that applied by the agency.~~

(c)~~(e)~~ This section does not apply to the regulation of law enforcement personnel or teachers.

~~(f) Designation pursuant to this section is not subject to challenge under this chapter.~~

Section 6. Paragraph (a) of subsection (1) of section 420.9072, Florida Statutes, is amended to read:

420.9072 State Housing Initiatives Partnership Program.—The State Housing Initiatives Partnership Program is created for the purpose of providing funds to counties and eligible municipalities as an incentive for the creation of local housing partnerships, to expand production of and preserve affordable housing, to further the housing element of the local government comprehensive plan specific to affordable housing, and to

increase housing-related employment.

(1)(a) In addition to the legislative findings set forth in s. 420.6015, the Legislature finds that affordable housing is most effectively provided by combining available public and private resources to conserve and improve existing housing and provide new housing for very-low-income households, low-income households, and moderate-income households. The Legislature intends to encourage partnerships in order to secure the benefits of cooperation by the public and private sectors and to reduce the cost of housing for the target group by effectively combining all available resources and cost-saving measures. The Legislature further intends that local governments achieve this combination of resources by encouraging active partnerships between government, lenders, builders and developers, real estate professionals, advocates for low-income persons, and community groups to produce affordable housing and provide related services. Extending the partnership concept to encompass cooperative efforts among small counties as defined in s. 120.52 ~~120.52(19)~~, and among counties and municipalities is specifically encouraged. Local governments are also intended to establish an affordable housing advisory committee to recommend monetary and nonmonetary incentives for affordable housing as provided in s. 420.9076.

Section 7. Subsection (7) of section 420.9075, Florida Statutes, is amended to read:

420.9075 Local housing assistance plans; partnerships.—

(7) The moneys deposited in the local housing assistance trust fund shall be used to administer and implement the local

housing assistance plan. The cost of administering the plan may not exceed 5 percent of the local housing distribution moneys and program income deposited into the trust fund. A county or an eligible municipality may not exceed the 5-percent limitation on administrative costs, unless its governing body finds, by resolution, that 5 percent of the local housing distribution plus 5 percent of program income is insufficient to adequately pay the necessary costs of administering the local housing assistance plan. The cost of administering the program may not exceed 10 percent of the local housing distribution plus 5 percent of program income deposited into the trust fund, except that small counties, as defined in s. 120.52 ~~120.52(19)~~, and eligible municipalities receiving a local housing distribution of up to $350,000 may use up to 10 percent of program income for administrative costs.

Section 8. Paragraph (d) of subsection (1) of section 443.091, Florida Statutes, is amended to read:

443.091 Benefit eligibility conditions.—

(1) An unemployed individual is eligible to receive benefits for any week only if the Department of Economic Opportunity finds that:

(d) She or he is able to work and is available for work. In order to assess eligibility for a claimed week of unemployment, the department shall develop criteria to determine a claimant's ability to work and availability for work. A claimant must be actively seeking work in order to be considered available for work. This means engaging in systematic and sustained efforts to find work, including contacting at least

five prospective employers for each week of unemployment claimed. The department may require the claimant to provide proof of such efforts to the one-stop career center as part of reemployment services. The department shall conduct random reviews of work search information provided by claimants. As an alternative to contacting at least five prospective employers for any week of unemployment claimed, a claimant may, for that same week, report in person to a one-stop career center to meet with a representative of the center and access reemployment services of the center. The center shall keep a record of the services or information provided to the claimant and shall provide the records to the department upon request by the department. However:

1. Notwithstanding any other provision of this paragraph or paragraphs (b) and (e), an otherwise eligible individual may not be denied benefits for any week because she or he is in training with the approval of the department, or by reason of s. 443.101(2) relating to failure to apply for, or refusal to accept, suitable work. Training may be approved by the department in accordance with criteria prescribed by rule. A claimant's eligibility during approved training is contingent upon satisfying eligibility conditions prescribed by rule.

2. Notwithstanding any other provision of this chapter, an otherwise eligible individual who is in training approved under s. 236(a)(1) of the Trade Act of 1974, as amended, may not be determined ineligible or disqualified for benefits due to enrollment in such training or because of leaving work that is not suitable employment to enter such training. As used in this

subparagraph, the term "suitable employment" means work of a substantially equal or higher skill level than the worker's past adversely affected employment, as defined for purposes of the Trade Act of 1974, as amended, the wages for which are at least 80 percent of the worker's average weekly wage as determined for purposes of the Trade Act of 1974, as amended.

3. Notwithstanding any other provision of this section, an otherwise eligible individual may not be denied benefits for any week because she or he is before any state or federal court pursuant to a lawfully issued summons to appear for jury duty.

4. Union members who customarily obtain employment through a union hiring hall may satisfy the work search requirements of this paragraph by reporting daily to their union hall.

5. The work search requirements of this paragraph do not apply to persons who are unemployed as a result of a temporary layoff or who are claiming benefits under an approved short-time compensation plan as provided in s. 443.1116.

6. In small counties as defined in s. 120.52 ~~120.52(19)~~, a claimant engaging in systematic and sustained efforts to find work must contact at least three prospective employers for each week of unemployment claimed.

Section 9. This act shall take effect July 1, 2013.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Rulemaking Oversight & Repeal Subcommittee

Representative Adkins offered the following:

Amendment (with title amendment)

Remove lines 23-299 and insert:

Section 1. Paragraphs (d) and (e) of subsection (3) of section 57.111, Florida Statutes, are amended to read:

57.111 Civil actions and administrative proceedings initiated by state agencies; attorneys' fees and costs.—

(3) As used in this section:

(d) The term "small business party" means:

1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million, including both personal and business investments;

b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than $2 million; or

c. An individual whose net worth did not exceed $2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade; or

2. Any small business party as defined in subparagraph 1., without regard to the number of its employees or its net worth, in any action under s. 72.011 or in any administrative proceeding under that section to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon, or penalty therefor~~.~~; or

3. Any small business as defined in s. 288.703(6) in any administrative proceeding pursuant to chapter 120 and any appeal thereof.

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency. A proceeding is not substantially justified when the agency action involves identical or substantially similar facts and circumstances and the specified law, rule or order on which the party substantially affected by the agency action petitioned for a declaratory statement under s. 120.565 and:

1. The agency action contradicts a declaratory statement issued under s. 120.565 to the substantially affected party; or

2. The agency denied the petition under s. 120.565 prior to initiating the agency action against the substantially affected party.

Section 2. Subsections (18) through (22) of section 120.52, Florida Statutes, are renumbered as subsections (19) through (23), respectively, and a new subsection (18) is added to that section, to read:

120.52 Definitions.—As used in this act:

(18) "Small business" has the same meaning as provided in s. 288.703.

Section 3. Section 120.55, Florida Statutes, is amended to read:

120.55 Publication.—

(1) The Department of State shall:

(a)1. Through a continuous revision and publication system, compile and publish electronically, on an Internet website managed by the department, the "Florida Administrative Code." The Florida Administrative Code shall contain all rules adopted by each agency, citing the grant of rulemaking authority and the specific law implemented pursuant to which each rule was adopted, all history notes as authorized in s. 120.545(7), complete indexes to all rules contained in the code, and any other material required or authorized by law or deemed useful by the department. The electronic code shall display each rule chapter currently in effect in browse mode and allow full text search of the code and each rule chapter. The department may

contract with a publishing firm for a printed publication; however, the department shall retain responsibility for the code as provided in this section. The electronic publication shall be the official compilation of the administrative rules of this state. The Department of State shall retain the copyright over the Florida Administrative Code.

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

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

4. Forms shall not be published in the Florida Administrative Code; but any form which an agency uses in its dealings with the public, along with any accompanying instructions, shall be filed with the committee before it is used. Any form or instruction which meets the definition of "rule" provided in s. 120.52 shall be incorporated by reference into the appropriate rule. The reference shall specifically state that the form is being incorporated by reference and shall

include the number, title, and effective date of the form and an explanation of how the form may be obtained. Each form created by an agency which is incorporated by reference in a rule notice of which is given under s. 120.54(3)(a) after December 31, 2007, must clearly display the number, title, and effective date of the form and the number of the rule in which the form is incorporated.

5. The department shall allow adopted rules and material incorporated by reference to be filed in electronic form as prescribed by department rule. When a rule is filed for adoption with incorporated material in electronic form, the department's publication of the Florida Administrative Code on its Internet website must contain a hyperlink from the incorporating reference in the rule directly to that material. The department may not allow hyperlinks from rules in the Florida Administrative Code to any material other than that filed with and maintained by the department, but may allow hyperlinks to incorporated material maintained by the department from the adopting agency's website or other sites.

(b) Electronically publish on an Internet website managed by the department a continuous revision and publication entitled the "Florida Administrative Register," which shall serve as the official publication and must contain:

1. All notices required by ss. 120.54(2) and 120.54(3)(a), showing the text of all rules proposed for consideration.

2. All notices of public meetings, hearings, and workshops conducted in accordance with s. 120.525, including a statement of the manner in which a copy of the agenda may be obtained.

3. A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules.

4. Notice of petitions for declaratory statements or administrative determinations.

5. A summary of each objection to any rule filed by the Administrative Procedures Committee.

6. A listing of rules filed for adoption in the previous 7 calendar days.

7. A listing of all rules filed for adoption pending legislative ratification under s. 120.541(3) until notice is received of ratification or withdrawal of such rule.

8. Any other material required or authorized by law or deemed useful by the department.

The department may contract with a publishing firm for a printed publication of the Florida Administrative Register and make copies available on an annual subscription basis.

(c) Prescribe by rule the style and form required for rules, notices, and other materials submitted for filing.

(d) Charge each agency using the Florida Administrative Register a space rate to cover the costs related to the Florida Administrative Register and the Florida Administrative Code.

(e) Maintain a permanent record of all notices published in the Florida Administrative Register.

(2) The Florida Administrative Register Internet website must allow users to:

(a) Search for notices by type, publication date, rule number, word, subject, and agency.

(b) Search a database that makes available all notices published on the website for a period of at least 5 years.

(c) Subscribe to an automated e-mail notification of selected notices to be sent out before or concurrently with publication of the electronic Florida Administrative Register. Such notification must include in the text of the e-mail a summary of the content of each notice.

(d) View agency forms and other materials submitted to the department in electronic form and incorporated by reference in proposed rules.

(e) Comment on proposed rules.

(3) Publication of material required by paragraph (1)(b) on the Florida Administrative Register Internet website does not preclude publication of such material on an agency's website or by other means.

(4) Each agency shall provide copies of its rules upon request, with citations to the grant of rulemaking authority and the specific law implemented for each rule.

(5) Each agency that provides an e-mail alert service to inform licensees or other registered recipients of important notices, shall use such service to notify recipients of each notice required under ss. 120.54(2) and 120.54(3)(a), including but not limited to notice of rule development, notice of proposed rules, and notice of filing rules for adoption, and provide internet links to the appropriate rule page on the

Secretary of State website, or internet links to an agency website that contains the proposed rule or final rule.

(6) Any publication of a proposed rule promulgated by an agency, whether published in the Florida Administrative Register or elsewhere, shall include, along with the rule, the name of the person or persons originating such rule, the name of the agency head who approved the rule, and the date upon which the rule was approved.

(~~6~~7) Access to the Florida Administrative Register Internet website and its contents, including the e-mail notification service, shall be free for the public.

(~~7~~8)(a) All fees and moneys collected by the Department of State under this chapter shall be deposited in the Records Management Trust Fund for the purpose of paying for costs incurred by the department in carrying out this chapter.

(b) The unencumbered balance in the Records Management Trust Fund for fees collected pursuant to this chapter may not exceed $300,000 at the beginning of each fiscal year, and any excess shall be transferred to the General Revenue Fund.

Section 4. Paragraph (b) of subsection (1), paragraph (a) of subsection (2), and subsection (4) of section 120.56, Florida Statutes, are amended to read:

120.56 Challenges to rules.—

(1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.—

(b) The petition challenging the validity of a proposed or adopted rule or an agency statement defined as a rule under this

section ~~seeking an administrative determination~~ must state with particularity:

1. ~~t~~The provisions alleged to be invalid and a statement ~~with sufficient explanation~~ of the facts establishing a prima facie case of ~~or grounds for the alleged~~ invalidity; and

2. ~~f~~Facts sufficient to show that the petitioner ~~person challenging a rule~~ is substantially affected by the challenged adopted rule or agency statement defined as a rule ~~it,~~ or ~~that the person challenging a proposed rule~~ would be substantially affected by the proposed rule~~it~~.

(2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—

(a) A substantially affected person may seek an administrative determination of the invalidity of a proposed rule by filing a petition seeking such a determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a); within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(e)2.; within 20 days after the statement of estimated regulatory costs or revised statement of estimated regulatory costs, if applicable, has been prepared and made available as provided in s. 120.541(1)(d); or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). The petition must state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of presenting a prima facie case demonstrating the invalidity of the proposed rule~~going forward~~. The agency then has the burden to prove by a

preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. ~~A person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change.~~ A person who is not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the resulting rule ~~and is not limited to challenging the change to the proposed rule~~.

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS UNADOPTED RULES; SPECIAL PROVISIONS.—

(a) Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes an unadopted rule ~~under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54~~.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3), such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings

pending rulemaking shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. ~~If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving~~

(c) The petitioner has the burden of presenting a prima facie case demonstrating the agency statement constitutes an unadopted rule. The agency then has the burden to prove by a preponderance of the evidence that the statement does not meet the definition of an unadopted rule, the statement was adopted as a rule in compliance with s. 120.54, or that rulemaking is not feasible or not practicable under s. 120.54(1)(a).

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

(~~d~~e) If an administrative law judge enters a final order that all or part of an unadopted rule ~~agency statement~~ violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule ~~statement~~ or any substantially similar statement as a basis for agency action.

(~~e~~f) If proposed rules addressing the challenged unadopted rule ~~statement~~ are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance on the

unadopted rule ~~statement~~ and any substantially similar statement until rules addressing the subject are properly adopted, and the administrative law judge shall enter a final order to that effect.

(~~f~~g) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under subsection (3) or under any other section of this chapter. This paragraph does not prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

Section 5. Paragraph (l) of subsection (2) of section 120.569, Florida Statutes, is amended to read:

120.569 Decisions which affect substantial interests.—

(2)

(l) Unless the time period is waived or extended with the consent of all parties, the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated, and it must be rendered within 90 days:

1. After the hearing is concluded, if conducted by the agency;

2. After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by an administrative law judge, provided that, at the election of the agency, the time for rendering the final order may be extended until 10 days after entry of final judgment on any appeal from a final order under s. 120.57(1)(e)5.; or

3. After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

Section 6. Paragraphs (e) and (h) of subsection (1) and subsection (2) of section 120.57, Florida Statutes, are amended to read:

120.57 Additional procedures for particular cases.—

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—

(e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. ~~The administrative law judge shall determine whether an agency statement constitutes an unadopted rule.~~ This subparagraph does not preclude application of valid ~~adopted~~ rules and applicable provisions of law to the facts.

2. In a matter initiated by agency action proposing to determine the substantive interests of a party, the party's timely petition for hearing may challenge the proposed agency action as based on a rule that is an invalid exercise of delegated legislative authority or based on an unadopted rule. For challenges brought under this subsection:

a. The challenge shall be pled as a defense with the particularity required in s. 120.56(1)(b);

b. Paragraph 120.56(3)(a) applies to a challenge alleging a rule is an invalid exercise of delegated legislative authority;

c. Paragraph 120.56(4)(c) applies to a challenge alleging an unadopted rule.

d. The agency shall have 15 days from the date of receiving a challenge under this paragraph to serve the challenging party a notice that the agency will continue to rely upon the rule or the alleged unadopted rule as a basis for the action determining the party's substantive interests. Failure to timely serve the notice shall constitute a binding stipulation that the agency shall not rely upon the rule or unadopted rule further in the proceeding. The agency shall include a copy of this notice with the referral of the matter to the division under s. 120.569(2)(a).

e. Nothing in this subparagraph precludes the consolidation of any proceeding under s. 120.56 with any proceeding under this paragraph.

3. Notwithstanding subparagraph 1., if an agency demonstrates that the statute being implemented directs it to adopt rules, that the agency has not had time to adopt those rules because the requirement was so recently enacted, and that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules, then the agency's action may be based upon those unadopted rules if~~, subject to de novo review by~~ the administrative law judge determines rulemaking is neither feasible nor practicable and the unadopted rules would not constitute an invalid exercise of delegated legislative authority if adopted as rules. ~~The agency action~~ An unadopted rule shall not be presumed valid~~ or invalid~~. The agency must demonstrate that the unadopted rule:

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

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

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

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

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

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

4. The administrative law judge shall determine under subparagraph 2. whether a rule is an invalid exercise of delegated legislative authority or an agency statement constitutes an unadopted rule and shall determine whether an unadopted rule meets the requirements of subparagraph 3. The determination shall be rendered as a separate final order no earlier than the date the administrative law judge serves the recommended order.

~~3~~5. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination ~~regarding an unadopted rule~~ under subparagraph 4 ~~1. or~~

~~subparagraph 2.~~ shall be included as a conclusion of law that the agency shall not reject ~~not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review~~.

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order. This paragraph shall not apply to proceedings authorized by paragraph (e).

(2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) An agency may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. No later than the date provided by the agency under subparagraph (a)2. for presenting material in opposition to the agency's proposed action or refusal to act, the party may file a petition under s. 120.56 challenging the rule, portion of rule, or the unadopted rule on which the agency bases its proposed action or refusal to act. The filing of a challenge under s. 120.56 pursuant to this paragraph shall stay all proceedings on the agency's proposed action or refusal to act until entry of the final order by the administrative law judge, which shall

provide additional notice that the stay of the pending agency action is terminated and any further stay pending appeal of the final order must be sought from the appellate court.

(c) The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.

3. All written statements submitted.

4. Any decision overruling objections.

5. All matters placed on the record after an ex parte communication.

6. The official transcript.

7. Any decision, opinion, order, or report by the presiding officer.

Section 7. Section 120.573, Florida Statutes, is amended to read:

120.573 Mediation of disputes.—

(1) Each announcement of an agency action that affects substantial interests shall advise whether mediation of the administrative dispute for the type of agency action announced is available and that choosing mediation does not affect the right to an administrative hearing. If the agency and all parties to the administrative action agree to mediation, in writing, within 10 days after the time period stated in the announcement for election of an administrative remedy under ss. 120.569 and 120.57, the time limitations imposed by ss. 120.569 and 120.57 shall be tolled to allow the agency and parties to mediate the administrative dispute. The mediation shall be concluded within 60 days of such agreement unless otherwise

agreed by the parties. The mediation agreement shall include provisions for mediator selection, the allocation of costs and fees associated with mediation, and the mediating parties' understanding regarding the confidentiality of discussions and documents introduced during mediation. If mediation results in settlement of the administrative dispute, the agency shall enter a final order incorporating the agreement of the parties. If mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.57 are resumed.

(2) Any party to a proceeding conducted pursuant to a petition seeking an administrative determination of the invalidity of an existing rule, proposed rule, or unadopted agency statement under s. 120.56 or a proceeding conducted pursuant to a petition seeking a declaratory statement under s. 120.565 may request mediation of the dispute under this section.

Section 8. Section 120.595, Florida Statutes, is amended to read:

120.595 Attorney's fees.—

(1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—

(a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and ~~a~~ reasonable attorney~~'s~~ fees to the prevailing party if the administrative

law judge determines ~~only where~~ the nonprevailing adverse party ~~has been determined by the administrative law judge to have~~ participated in the proceeding for an improper purpose.

1.~~(c)~~ Other than as provided below in paragraph (1)(d), ~~I~~in proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. ~~In making such determination, the administrative law judge shall consider whether t~~The nonprevailing adverse party shall be presumed to have participated in the pending proceeding for an improper purpose if:

a. Such party was an adverse party ~~has participated~~ in two or more other such proceedings involving the same prevailing party and the same subject; ~~project as an adverse party and~~

b. ~~i~~In those ~~which such two or more~~ proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position;~~, and shall consider~~

c. ~~w~~Whether the factual or legal position asserted in the pending ~~instant~~ proceeding would have been cognizable in the previous proceedings; and~~. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose~~

d. The nonprevailing adverse party has not rebutted the presumption of participating in the pending proceeding for an improper purpose.

2. ~~(d) In any proceeding in which the administrative law judge determines that~~ If a party is determined to have

participated in the proceeding for an improper purpose, the recommended order shall include such findings of fact and conclusions of law to establish the conclusion ~~so designate~~ and shall determine the award of costs and attorney~~'s~~ fees.

(ec) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

(d) For challenges brought under s. 120.57(1)(e), if the appellate court or the administrative law judge declares a rule or portion of a rule to be invalid or that the agency statement is an unadopted rule which does not meet the requirements of s.

120.57(1)(e)4., a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that special circumstances exist which would make the award unjust. Reasonable costs and reasonable attorney fees shall be awarded only for the period beginning 15 days following the receipt of the petition for hearing challenging the rule or unadopted rule. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(c). An award of attorney fees as provided by this subsection shall not exceed $50,000.

(2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).—If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney~~'s~~ fees, unless the agency demonstrates ~~that its actions were substantially justified or~~ special circumstances exist which would make the award unjust. ~~An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.~~ If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party

participated in the proceedings for an improper purpose as defined by paragraph (1)(~~e~~c). ~~No~~ An award of attorney's fees as provided by this subsection shall not exceed $50,000.

(3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3) AND (5).—If the appellate court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that ~~its actions were substantially justified or~~ special circumstances exist which would make the award unjust. ~~An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.~~ If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(ec). ~~No~~ An award of attorney's fees as provided by this subsection shall exceed $50,000.

(4) CHALLENGES TO ~~AGENCY ACTION~~ UNADOPTED RULES PURSUANT TO SECTION 120.56(4).—

(a) If the appellate court or administrative law judge determines that all or part of ~~an agency statement~~ unadopted rule violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance on the ~~statement~~ unadopted rule and any substantially similar statement pursuant to s.

120.56(4)(e), a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

(b) Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3)(a), such notice shall automatically operate as a stay of proceedings pending rulemaking. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings under this paragraph remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The administrative law judge shall award reasonable costs and reasonable attorney~~'s~~ fees incurred ~~accrued~~ by the petitioner before ~~prior to~~ the date the notice was published~~,~~ ~~unless the agency proves to the administrative law judge that it did not know and should not have known that the statement was an unadopted rule. Attorneys' fees and costs under this paragraph and paragraph (a) shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before a petition under s. 120.56(4) was filed and that the agency failed to publish the required notice of rulemaking pursuant to s. 120.54(3) that addresses the statement within that 30-day period. Notice to the agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing~~

~~substantially the same information, or a petition filed pursuant to s. 120.54(7)~~. An award of attorney~~'s~~ fees as provided by this paragraph may not exceed $50,000.

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

(d) If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and attorney's fees against a party if the appellate court or administrative law judge determines that the party participated in the proceedings for an improper purpose as defined in paragraph (1)(~~e~~c) or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts.

(5) APPEALS.—When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's

fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

(6) NOTICE OF INVALIDITY. A party failing to serve a Notice of Invalidity under this subsection shall not be entitled to an award of reasonable costs and attorney fees under this section except as provided in paragraph (d).

(a) Prior to filing a petition challenging the validity of a proposed rule under s. 120.56(2), an adopted rule under s. 120.56(3), or an agency statement defined as an unadopted rule under s. 120.56(4), the substantially affected person shall serve the agency head with notice of the proposed challenge. The notice shall identify the proposed or adopted rule or the unadopted rule the person proposes to challenge and a brief explanation of the basis for that challenge. The notice shall be received by the agency head no later than 5 days prior to the filing of a petition under s. 120.56(2), and no later than 30 days prior to the filing of a petition under s. 120.56(3) or s. 120.56(4).

(b) Reasonable costs and reasonable attorney fees shall be awarded only for the period beginning after the date the agency head receives the Notice of Invalidity under paragraph (a).

(c) Within the time limits specified in paragraph (a), if the agency provides the substantially affected person with written notice that the agency will not adopt the proposed rule or will not rely upon the adopted rule or the agency statement defined as an unadopted rule until after the agency has complied with the requirements of s. 120.54 to amend the proposed rule or the adopted rule or adopt the unadopted rule, such written

notice shall constitute a special circumstance under this section.

(d) This subsection does not apply to defenses raised and challenges authorized by s. 120.57(1)(e) or s. 120.57(2)(b).

(7) OTHER SECTIONS NOT AFFECTED.—Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney's fees and costs in administrative proceedings. Nothing in this section shall affect the availability of attorney's fees and costs as provided in those sections.

Section 9. Subsections (1), (2), and (9) of section 120.68, Florida Statutes, are amended to read:

120.68 Judicial review.—

(1) (a) A party who is adversely affected by final agency action is entitled to judicial review.

(b) A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings, or a final order under s. 120.57(1)(e)4., is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2)(a) Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.

(b) All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the date that ~~rendition of~~ the order being appealed was filed with the agency clerk. Such time is hereby extended for any party ten days from receipt by such party of the notice of the order if such notice

is received after the 25th day from the filing of the order. If the appeal is of an order rendered in a proceeding initiated under s. 120.56, or a final order under s. 120.57(1)(e)4., the agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee.

(~~b~~c) When proceedings under this chapter are consolidated for final hearing and the parties to the consolidated proceeding seek review of final or interlocutory orders in more than one district court of appeal, the courts of appeal are authorized to transfer and consolidate the review proceedings. The court may transfer such appellate proceedings on its own motion, upon motion of a party to one of the appellate proceedings, or by stipulation of the parties to the appellate proceedings. In determining whether to transfer a proceeding, the court may consider such factors as the interrelationship of the parties and the proceedings, the desirability of avoiding inconsistent results in related matters, judicial economy, and the burden on the parties of reproducing the record for use in multiple appellate courts.

(9) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.56, under s. 120.57(1)(e)5., or under s. 120.57(2)(b), or an agency's findings of immediate danger, necessity, and procedural fairness prerequisite to the adoption of an emergency rule pursuant to s. 120.54(4), unless the sole issue presented by the petition is

the constitutionality of a rule and there are no disputed issues of fact.

T I T L E A M E N D M E N T

Between lines 2 and 3, insert:

s. 57.111, F.S.; providing an additional definition of small business; describing when a proceeding is not substantially justified for purposes of an award under the Florida Equal Access to Justice Act; amending

Remove lines 5-14 and insert:

120.55, F.S.; providing for publication of notices of rule development and of rules filed for adoption; providing additional notice of rule development, proposals and adoptions; amending s. 120.56, F.S.; providing that the petitioner challenging a proposed rule or unadopted has the burden of establishing a prima facie case; amending s. 120.569, F.S.; providing for extension of time to render final agency action in certain circumstances; amending s. 120.57, F.S.; conforming proceedings opposing agency action based on an invalid rule or unadopted rule to proceedings for challenging rules; requiring notice whether the agency will rely on the challenged rule or unadopted rule; providing for the administrative law judge to make certain findings and enter final order on the validity of the rule or the use of unadopted rule; providing for stay of

proceedings not involving disputed issues of fact on timely filing of rule challenge; amending s. 120.573, F.S.; authorizing any party to request mediation of rule challenge and declaratory statement proceedings; amending s. 120.595, F.S.; providing for an award of attorney fees and costs in challenges brought under s. 120.57(1)(e), F.S.; removing certain exceptions from requirements that attorney fees and costs be rendered against the agency in proceedings in which the petitioner prevails in a rule challenge; requiring service of notice of invalidity to agency prior to bringing rule challenge as condition precedent for award of attorney fees and costs; amending s. 120.68, F.S.; providing for appellate review of orders rendered in challenges to rules or unadopted rules under s. 120.57, F.S.;

Amendment No. 1a

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Rulemaking Oversight & Repeal Subcommittee

Representative Gaetz offered the following:

Amendment to Amendment (1) by Representative Adkins **(with title amendment)**

Between lines 717 and 718 of the amendment, insert:

(7) DETERMINATION OF RECOVERABLE FEES AND COSTS.—For the purposes of this chapter, s. 57.105(5), and s. 57.111, in addition to an award of attorney fees and costs, the prevailing party shall also recover attorney fees and costs incurred in litigating entitlement to, and the determination or quantification of, attorney fees and costs for the underlying matter. Attorney fees and costs awarded for litigating entitlement to, and the determination or quantification of, attorney fees and costs for the underlying matter shall not be subject to the limitations on amounts set out in this chapter or s. 57.111.

Amendment No. 1a

T I T L E A M E N D M E N T

Remove line 807 of the amendment and insert:

for award of attorney fees and costs; providing for award of additional attorney fees and costs for litigating entitlement to and amount of attorney fees and costs in administrative actions and that such awards of additional fees and costs are not subject to certain statutory limits; amending s. 120.68, F.S.;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RORS 13-01 Repeals of Unnecessary AHCA Mandates
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom

SUMMARY ANALYSIS

The PCB repeals or revises a number of statutes containing unnecessary or confusing rulemaking directives and references relating to the Agency for Health Care Adminitration.

The Administrative Procedure Act (APA) provides clear guidance on when rules are necessary to implement laws. Provisions in the substantive laws that add directives to make rules in addition to any needed rulemaking authority and substantive policy guiding rulemaking are either unnecessary, redundant to the requirements of the APA, or provide for rules that are unnecessary. The bill provides WHEREAS language to clarify the intent not to substantively change rulemaking authority by deleting unnecessary rulemaking mandates and references.

The bill strikes unnecessary rulemaking provisions, or revises statutes providing guidelines for rulemaking to ensure that the APA will be the consistent guide to when rules are needed to implement the particular substantive laws.

The bill only affects rulemaking authority and responsibility of AHCA in its health care licensure responsibilities, primarily the chapter relating to nursing homes.

The bill does not make substantive changes to law.

The bill becomes effective on July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

AHCA has a number of regulatory responsibilities, among these being the licensure of health care facilities including abortion clinics, nursing homes and clinical laboratories.

In recent years, many of the facilities licensed by AHCA have come under increasing regulatory control of federal law relating to Medicaid and Medicare, and state laws providing greater specificity than previously provided. At the same time, frequent changes to many of these overlapping legal environments have made it difficult for AHCA to maintain rules consistent with current law. Some of this difficulty has related to unnecessary rulemaking mandates, particularly relating to statutes that provide sufficient specificity to enforce without resort to rulemaking.

Rulemaking is required by the APA whenever an agency has express authority to make rules, and must resort to rulemaking in order to implement, interpret or prescribe law, policy or requirements including mandatory forms.[1] Rulemaking is not discretionary under the APA.[2]

In 2009 and again in 2013, the Joint Administrative Procedures Committee held hearings focusing on 2007 legislation that, on its face, requires AHCA to make rules that have yet to be finally adopted. In some cases, that legislation and similar legislation contemplated rulemaking that was either unnecessary under the APA or already promulgated under previously enacted law.

Section 400.23(3) and (5), F.S., now provide very specific staffing ratios for licensed nursing homes. AHCA has been unable to update its rules to incorporate this recent reform but enforces the staffing standards pursuant to other statutory authority. Rulemaking mandates in these two provisions are unnecessary and inconsistent with the APA and the substantive law that requires enforcement with or without rules. [3] Technically, AHCA is out of compliance with these nominal rulemaking mandates, but no practical effect flows from that status.

Section 390.012, F.S., provides for rulemaking by AHCA to implement the provisions of chapter 390. The statute specifically provides that rules must require abortion clinics to be in compliance with s. 390.0111, F.S. In essence, AHCA has authority and direction to adopt rules to implement chapter 390, including a requirement to require clinics to comply with a particular provision of chapter 390. This is unnecessary verbiage in statute law and adds nothing to the agency's duties or authority. Moreover, it is inconsistent with the clear intent of the APA that statutes speak for themselves and rules should not reiterate them.[4]

Effect of Proposed Changes

The bill repeals or revises a number of statutory provisions to eliminate redundant, unnecessary, confusing and unused mandates and references relating to AHCA's rulemaking authority. The bill does not reduce any rulemaking authority possessed by AHCA nor alter any substantive law. The bill

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[1] Section 120.52(16), F.S., defines "rule" to mean "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...".

[2] Section 120.54(1)(a), F.S.

[3] Section 120.54(1)(c), F.S., requires "No statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules unless there is an express statutory provision prohibiting its application until the adoption of implementing rules."

[4] Section 120.545(1)(c), F.S., directing JAPC to make a determination whether a proposed rules reiterates or paraphrases statutory material.

provides WHEREAS language to clarify that not change in substantive law or rulemaking authority is intended by the statutory amendments.

B. SECTION DIRECTORY:

Section 1 amends s. 390.012(3)(d) by deleting a sentence requiring rules to require clinics to comply with s. 390.0111. The sentence is unnecessary to the enforcement of the provisions of the chapter.

Section 2 amends s. 400.021(11) to remove an unnecessary rulemaking reference.

Section 3 repeals s. 400.0712(3), which mandates "necessary" rules.

Section 4 amends s. 400.176(2) to remove an unnecessary rulemaking mandate.

Section 5 amends s. 400.23 by removing unnecessary rulemaking requirements and references.

Section 6 amends s. 400.487(7) by deleting an unnecessary rulemaking mandate.

Section 7 amends s. 400.497 by removing unnecessary rulemaking mandates.

Section 8 amends s. 400.506(12)(f) and (17) by eliminating unnecessary rulemaking mandates.

Section 9 repeals s. 400.509(7), an unnecessary rulemaking mandate.

Section 10 amends s. 400.914, to remove an unnecessary rulemaking mandate.

Section 11 amends s. 483.245(2), to remove an unnecessary rulemaking mandate.

Section 12 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None anticipate.
2. Expenditures: None anticipated.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None anticipated.
2. Expenditures: None anticipated

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None anticipated

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to implicate the mandates provisions of Article VI, Florida Constitution.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The purpose of the PCB is to clarify the administrative authority of AHCA to adopt rules as required by the provisions of the APA consistent with the needs of implementation of the relevant substantive laws. Accordingly the bill removes unnecessary, redundant and confusing rulemaking requirements and references.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to AHCA administrative authority; amending ss. 390.012, 400.021, 400.176, 400.23, 400.487, 400.497, 400.506, 400.914, and 483.245, F.S.; removing rulemaking requirements; repealing ss. 400.0712(3), and 400.509(7); providing an effective date.

WHEREAS, The Administrative Procedures Act, ch. 120, F.S. (the APA), provides that:

1. Rulemaking is not a matter of agency discretion,
2. Rules, to be adopted, require both a grant of express rulemaking authority and a specific law to be implemented or interpreted, and
3. Rulemaking is required whenever an agency intends to rely upon a statement of general applicability that meets the definition of a rule under s. 120.52(16), F.S.; and

WHEREAS, A grant of express rulemaking authority may have a broad or narrow scope, depending upon the clear intent of the legislature; and

WHEREAS, The repeal or deletion of a redundant provision authorizing rulemaking should not be interpreted to repeal rulemaking authority otherwise provided that clearly applies to the same subject; and

WHEREAS, Statutory provisions that mandate rulemaking when the substantive law would otherwise be implemented without need for administrative rules may be repealed without altering the

substantive law or rulemaking authority upon which such provisions rely;

NOW THEREFORE,

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

Section 1. Paragraph (d) of subsection (3) of section 390.012, Florida Statutes, is amended to read:

390.012 Powers of agency; rules; disposal of fetal remains.—

(3) For clinics that perform or claim to perform abortions after the first trimester of pregnancy, the agency shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter, including the following:

(d) Rules relating to the medical screening and evaluation of each abortion clinic patient. At a minimum, these rules shall require:

1. A medical history including reported allergies to medications, antiseptic solutions, or latex; past surgeries; and an obstetric and gynecological history.

2. A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa.

3. The appropriate laboratory tests, including:

a. Urine or blood tests for pregnancy performed before the abortion procedure.

b. A test for anemia.

c. Rh typing, unless reliable written documentation of blood type is available.

d. Other tests as indicated from the physical examination.

4. An ultrasound evaluation for all patients. The rules shall require that if a person who is not a physician performs an ultrasound examination, that person shall have documented evidence that he or she has completed a course in the operation of ultrasound equipment as prescribed in rule. ~~The rules shall require clinics to be in compliance with s. 390.0111.~~

5. That the physician is responsible for estimating the gestational age of the fetus based on the ultrasound examination and obstetric standards in keeping with established standards of care regarding the estimation of fetal age as defined in rule and shall write the estimate in the patient's medical history. The physician shall keep original prints of each ultrasound examination of a patient in the patient's medical history file.

Section 2. Subsection (11) of section 400.021, Florida Statutes, is amended to read:

400.021 Definitions.—When used in this part, unless the context otherwise requires, the term:

(11) "Nursing home bed" means an accommodation which is ready for immediate occupancy, or is capable of being made ready for occupancy within 48 hours, excluding provision of staffing; and which conforms to minimum space requirements, including the availability of appropriate equipment and furnishings within the 48 hours, as specified by ~~rule of~~ the agency, for the provision of services specified in this part to a single resident.

Section 3. Subsection (3) of section 400.0712, Florida Statutes, is repealed:

400.0712 Application for inactive license.—

~~(3) The agency shall adopt rules pursuant to ss. 120.536(1) and 120.54 necessary to implement this section.~~

Section 4. Subsection (2) of section 400.176, Florida Statutes, is amended to read:

400.176 Rebates prohibited; penalties.—

(2) The agency ~~shall adopt rules which~~ may establish and assess administrative penalties for acts prohibited by subsection (1). In the case of an entity licensed by the agency, such penalties may include any disciplinary action available to the agency under the appropriate licensing laws. In the case of an entity not licensed by the agency, such penalties may include:

(a) A fine not to exceed $5,000; and

(b) If applicable, a recommendation by the agency to the appropriate licensing board that disciplinary action be taken.

Section 5. Section 400.23, Florida Statutes, is amended to read:

400.23 Rules; evaluation and deficiencies; licensure status.—

(1) It is the intent of the Legislature that rules published and enforced pursuant to this part and part II of chapter 408 shall include criteria by which a reasonable and consistent quality of resident care may be ensured and the results of such resident care can be demonstrated and by which safe and sanitary nursing homes can be provided. It is further intended that reasonable efforts be made to accommodate the needs and preferences of residents to enhance the quality of life in a nursing home. In addition, efforts shall be made to

minimize the paperwork associated with the reporting and documentation requirements of these rules.

(2) Pursuant to the intention of the Legislature, the agency, in consultation with the Department of Health and the Department of Elderly Affairs, ~~shall~~may adopt ~~and enforce~~ rules to implement this part and part II of chapter 408. Rules shall~~,~~ ~~which shall include~~specify, but not be limited to, reasonable and fair criteria in relation to:

(a) The location of the facility and housing conditions that will ensure the health, safety, and comfort of residents, including an adequate call system. In making such rules, the agency shall be guided by criteria recommended by nationally recognized reputable professional groups and associations with knowledge of such subject matters. The agency shall update or revise such criteria as the need arises. The agency may require alterations to a building if it determines that an existing condition constitutes a distinct hazard to life, health, or safety. In performing any inspections of facilities authorized by this part or part II of chapter 408, the agency may enforce the special-occupancy provisions of the Florida Building Code and the Florida Fire Prevention Code which apply to nursing homes. Residents or their representatives shall be able to request a change in the placement of the bed in their room, provided that at admission they are presented with a room that meets requirements of the Florida Building Code. The location of a bed may be changed if the requested placement does not infringe on the resident's roommate or interfere with the resident's care or safety as determined by the care planning

team in accordance with facility policies and procedures. In addition, the bed placement may not be used as a restraint. Each facility shall maintain a log of resident rooms with beds that are not in strict compliance with the Florida Building Code in order for such log to be used by surveyors and nurse monitors during inspections and visits. A resident or resident representative who requests that a bed be moved shall sign a statement indicating that he or she understands the room will not be in compliance with the Florida Building Code, but they would prefer to exercise their right to self-determination. The statement must be retained as part of the resident's care plan. Any facility that offers this option must submit a letter signed by the nursing home administrator of record to the agency notifying it of this practice with a copy of the policies and procedures of the facility. The agency is directed to provide assistance to the Florida Building Commission in updating the construction standards of the code relative to nursing homes.

(b) The number and qualifications of all personnel, including management, medical, nursing, and other professional personnel, and nursing assistants, orderlies, and support personnel, having responsibility for any part of the care given residents.

(c) All sanitary conditions within the facility and its surroundings, including water supply, sewage disposal, food handling, and general hygiene which will ensure the health and comfort of residents.

(d) The equipment essential to the health and welfare of the residents.

(e) A uniform accounting system.

(f) The care, treatment, and maintenance of residents and measurement of the quality and adequacy thereof, based on rules developed under this chapter and the Omnibus Budget Reconciliation Act of 1987 (Pub. L. No. 100-203) (December 22, 1987), Title IV (Medicare, Medicaid, and Other Health-Related Programs), Subtitle C (Nursing Home Reform), as amended.

(g) The preparation and annual update of a comprehensive emergency management plan. The agency shall ~~adopt rules~~ establish~~ing~~ minimum criteria for the plan after consultation with the Division of Emergency Management. At a minimum, ~~the rules must provide for~~ plan components ~~that~~ should provide for~~address~~ emergency evacuation transportation; adequate sheltering arrangements; postdisaster activities, including emergency power, food, and water; postdisaster transportation; supplies; staffing; emergency equipment; individual identification of residents and transfer of records; and responding to family inquiries. The comprehensive emergency management plan is subject to review and approval by the local emergency management agency. During its review, the local emergency management agency shall ensure that the following agencies, at a minimum, are given the opportunity to review the plan: the Department of Elderly Affairs, the Department of Health, the Agency for Health Care Administration, and the Division of Emergency Management. Also, appropriate volunteer organizations must be given the opportunity to review the plan. The local emergency management agency shall complete its review within 60 days and either approve the plan or advise the

facility of necessary revisions.

(h) The availability, distribution, and posting of reports and records pursuant to s. 400.191 and the Gold Seal Program pursuant to s. 400.235.

(3)(a)1. The agency shall ~~adopt rules providing~~ enforce minimum staffing requirements for nursing home facilities~~. These requirements~~that must include, for each facility:

a. A minimum weekly average of certified nursing assistant and licensed nursing staffing combined of 3.6 hours of direct care per resident per day. As used in this sub-subparagraph, a week is defined as Sunday through Saturday.

b. A minimum certified nursing assistant staffing of 2.5 hours of direct care per resident per day. A facility may not staff below one certified nursing assistant per 20 residents.

c. A minimum licensed nursing staffing of 1.0 hour of direct care per resident per day. A facility may not staff below one licensed nurse per 40 residents.

2. Nursing assistants employed under s. 400.211(2) may be included in computing the staffing ratio for certified nursing assistants if their job responsibilities include only nursing-assistant-related duties.

3. Each nursing home facility must document compliance with staffing standards as required under this paragraph and post daily the names of staff on duty for the benefit of facility residents and the public.

4. The agency shall recognize the use of licensed nurses for compliance with minimum staffing requirements for certified nursing assistants if the nursing home facility otherwise meets

the minimum staffing requirements for licensed nurses and the licensed nurses are performing the duties of a certified nursing assistant. Unless otherwise approved by the agency, licensed nurses counted toward the minimum staffing requirements for certified nursing assistants must exclusively perform the duties of a certified nursing assistant for the entire shift and not also be counted toward the minimum staffing requirements for licensed nurses. If the agency approved a facility's request to use a licensed nurse to perform both licensed nursing and certified nursing assistant duties, the facility must allocate the amount of staff time specifically spent on certified nursing assistant duties for the purpose of documenting compliance with minimum staffing requirements for certified and licensed nursing staff. The hours of a licensed nurse with dual job responsibilities may not be counted twice.

(b) Nonnursing staff providing eating assistance to residents shall not count toward compliance with minimum staffing standards.

(c) Licensed practical nurses licensed under chapter 464 who are providing nursing services in nursing home facilities under this part may supervise the activities of other licensed practical nurses, certified nursing assistants, and other unlicensed personnel providing services in such facilities in accordance with rules adopted by the Board of Nursing.

(4) ~~Rules developed pursuant to t~~This section ~~shall~~ does not restrict the use of shared staffing and shared programming in facilities which are part of retirement communities that provide multiple levels of care and otherwise meet the

requirement of law or rule.

(5) ~~The agency, in collaboration with the Division of Children's Medical Services of the Department of Health, must adopt rules for~~:

(a) Minimum standards of care for persons under 21 years of age who reside in nursing home facilities may be established by the agency in collaboration with the Division of Children's Medical Services of the Department of Health. A facility may be exempted from these standards and the provisions of paragraph (b) for specific persons between 18 and 21 years of age, if the person's physician agrees that minimum standards of care based on age are not necessary.

(b) The following ~~M~~minimum staffing requirements for persons under 21 years of age who reside in nursing home facilities, ~~which~~ apply in lieu of the requirements contained in subsection (3).

1. For persons under 21 years of age who require skilled care:

a. A minimum combined average of 3.9 hours of direct care per resident per day must be provided by licensed nurses, respiratory therapists, respiratory care practitioners, and certified nursing assistants.

b. A minimum licensed nursing staffing of 1.0 hour of direct care per resident per day must be provided.

c. No more than 1.5 hours of certified nursing assistant care per resident per day may be counted in determining the minimum direct care hours required.

d. One registered nurse must be on duty on the site 24

hours per day on the unit where children reside.

2. For persons under 21 years of age who are medically fragile:

a. A minimum combined average of 5.0 hours of direct care per resident per day must be provided by licensed nurses, respiratory therapists, respiratory care practitioners, and certified nursing assistants.

b. A minimum licensed nursing staffing of 1.7 hours of direct care per resident per day must be provided.

c. No more than 1.5 hours of certified nursing assistant care per resident per day may be counted in determining the minimum direct care hours required.

d. One registered nurse must be on duty on the site 24 hours per day on the unit where children reside.

(6) Prior to conducting a survey of the facility, the survey team shall obtain a copy of the local long-term care ombudsman council report on the facility. Problems noted in the report shall be incorporated into and followed up through the agency's inspection process. This procedure does not preclude the local long-term care ombudsman council from requesting the agency to conduct a followup visit to the facility.

(7) The agency shall, at least every 15 months, evaluate all nursing home facilities and make a determination as to the degree of compliance by each licensee with the established rules adopted under this part as a basis for assigning a licensure status to that facility. The agency shall base its evaluation on the most recent inspection report, taking into consideration findings from other official reports, surveys, interviews,

investigations, and inspections. In addition to license categories authorized under part II of chapter 408, the agency shall assign a licensure status of standard or conditional to each nursing home.

(a) A standard licensure status means that a facility has no class I or class II deficiencies and has corrected all class III deficiencies within the time established by the agency.

(b) A conditional licensure status means that a facility, due to the presence of one or more class I or class II deficiencies, or class III deficiencies not corrected within the time established by the agency, is not in substantial compliance at the time of the survey with criteria established under this part or with rules adopted by the agency. If the facility has no class I, class II, or class III deficiencies at the time of the followup survey, a standard licensure status may be assigned.

(c) In evaluating the overall quality of care and services and determining whether the facility will receive a conditional or standard license, the agency shall consider the needs and limitations of residents in the facility and the results of interviews and surveys of a representative sampling of residents, families of residents, ombudsman council members in the planning and service area in which the facility is located, guardians of residents, and staff of the nursing home facility.

(d) The current licensure status of each facility must be indicated in bold print on the face of the license. A list of the deficiencies of the facility shall be posted in a prominent place that is in clear and unobstructed public view at or near the place where residents are being admitted to that facility.

Licensees receiving a conditional licensure status for a facility shall prepare, within 10 working days after receiving notice of deficiencies, a plan for correction of all deficiencies and shall submit the plan to the agency for approval.

(e) The agency shall ~~adopt rules that~~:

1. Establish uniform procedures for the evaluation of facilities.

2. Provide criteria in the areas referenced in paragraph (c).

3. Address other areas necessary for carrying out the intent of this section.

(8) The agency shall ~~adopt rules pursuant to this part and part II of chapter 408 to provide~~ ensure that, when the criteria established under subsection (2) are not met, such deficiencies shall be classified according to the nature and the scope of the deficiency. The scope shall be cited as isolated, patterned, or widespread. An isolated deficiency is a deficiency affecting one or a very limited number of residents, or involving one or a very limited number of staff, or a situation that occurred only occasionally or in a very limited number of locations. A patterned deficiency is a deficiency where more than a very limited number of residents are affected, or more than a very limited number of staff are involved, or the situation has occurred in several locations, or the same resident or residents have been affected by repeated occurrences of the same deficient practice but the effect of the deficient practice is not found to be pervasive throughout the facility. A widespread deficiency

is a deficiency in which the problems causing the deficiency are pervasive in the facility or represent systemic failure that has affected or has the potential to affect a large portion of the facility's residents. The agency shall indicate the classification on the face of the notice of deficiencies as follows:

(a) A class I deficiency is a deficiency that the agency determines presents a situation in which immediate corrective action is necessary because the facility's noncompliance has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in a facility. The condition or practice constituting a class I violation shall be abated or eliminated immediately, unless a fixed period of time, as determined by the agency, is required for correction. A class I deficiency is subject to a civil penalty of $10,000 for an isolated deficiency, $12,500 for a patterned deficiency, and $15,000 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last licensure inspection or any inspection or complaint investigation since the last licensure inspection. A fine must be levied notwithstanding the correction of the deficiency.

(b) A class II deficiency is a deficiency that the agency determines has compromised the resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. A class II deficiency is subject to a civil penalty

of $2,500 for an isolated deficiency, $5,000 for a patterned deficiency, and $7,500 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last licensure inspection or any inspection or complaint investigation since the last licensure inspection. A fine shall be levied notwithstanding the correction of the deficiency.

(c) A class III deficiency is a deficiency that the agency determines will result in no more than minimal physical, mental, or psychosocial discomfort to the resident or has the potential to compromise the resident's ability to maintain or reach his or her highest practical physical, mental, or psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. A class III deficiency is subject to a civil penalty of $1,000 for an isolated deficiency, $2,000 for a patterned deficiency, and $3,000 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last licensure inspection or any inspection or complaint investigation since the last licensure inspection. A citation for a class III deficiency must specify the time within which the deficiency is required to be corrected. If a class III deficiency is corrected within the time specified, a civil penalty may not be imposed.

(d) A class IV deficiency is a deficiency that the agency determines has the potential for causing no more than a minor

negative impact on the resident. If the class IV deficiency is isolated, no plan of correction is required.

(9) Civil penalties paid by any licensee under subsection (8) shall be deposited in the Health Care Trust Fund and expended as provided in s. 400.063.

(10) Agency records, reports, ranking systems, Internet information, and publications must be promptly updated to reflect the most current agency actions.

Section 6. Subsection (7) of section 400.487, Florida Statutes, is amended to read:

400.487 Home health service agreements; physician's, physician assistant's, and advanced registered nurse practitioner's treatment orders; patient assessment; establishment and review of plan of care; provision of services; orders not to resuscitate.—

(7) Home health agency personnel may withhold or withdraw cardiopulmonary resuscitation if presented with an order not to resuscitate executed pursuant to s. 401.45. ~~The agency shall adopt rules providing for the implementation of such orders.~~ Home health personnel and agencies shall not be subject to criminal prosecution or civil liability, nor be considered to have engaged in negligent or unprofessional conduct, for withholding or withdrawing cardiopulmonary resuscitation pursuant to such an order ~~and rules adopted by the agency~~.

Section 7. Section 400.497, Florida Statutes, is amended to read:

400.497 Rules establishing minimum standards.—The agency ~~shall~~may adopt~~, publish, and enforce~~ rules to implement part II

of chapter 408 and this part, including, ~~as applicable~~,the agency's duties and responsibilities under ss. 400.506 and 400.509.~~, which must~~ Rules shall specify, but not be limited to,~~provide~~ reasonable and fair minimum standards relating to:

(1) The home health aide competency test and home health aide training. The agency shall create the home health aide competency test and establish the curriculum and instructor qualifications for home health aide training. Licensed home health agencies may provide this training and shall furnish documentation of such training to other licensed home health agencies upon request. Successful passage of the competency test by home health aides may be substituted for the training required under this section and any rule adopted pursuant thereto.

(2) Shared staffing. ~~The agency shall allow~~ Sshared staffing is permitted if the home health agency is part of a retirement community that provides multiple levels of care, is located on one campus, is licensed under this chapter or chapter 429, and otherwise meets the requirements of law and rule.

(3) The criteria for the frequency of onsite licensure surveys.

(4) Licensure application and renewal.

(5) Oversight by the director of nursing, including:~~.~~ ~~The agency shall develop rules related to:~~

(a) Standards that address oversight responsibilities by the director of nursing of skilled nursing and personal care services provided by the home health agency's staff;

(b) Requirements for a director of nursing to provide to

the agency, upon request, a certified daily report of the home health services provided by a specified direct employee or contracted staff member on behalf of the home health agency. The agency may request a certified daily report only for a period not to exceed 2 years prior to the date of the request; and

(c) A quality assurance program for home health services provided by the home health agency.

(6) Conditions for using a recent unannounced licensure inspection for the inspection required in s. 408.806 related to a licensure application associated with a change in ownership of a licensed home health agency.

(7) The requirements for onsite and electronic accessibility of supervisory personnel of home health agencies.

(8) Information to be included in patients' records.

(9) Geographic service areas.

(10) Preparation of a comprehensive emergency management plan pursuant to s. 400.492.

(a) ~~The Agency for Health Care Administration shall adopt rules establishing minimum criteria for the plan and plan updates, with the concurrence of the Department of Health and in consultation with the Division of Emergency Management.~~

~~(b) The rules must address the requirements in s. 400.492. In addition, the rules~~ An emergency plan shall provide for the maintenance of patient-specific medication lists that can accompany patients who are transported from their homes.

(~~e~~b) The plan is subject to review and approval by the county health department. During its review, the county health department shall contact state and local health and medical

stakeholders when necessary. The county health department shall complete its review to ensure that the plan is in accordance with the ~~criteria in the Agency for Health Care Administration rules~~ requirements of law within 90 days after receipt of the plan and shall approve the plan or advise the home health agency of necessary revisions. If the home health agency fails to submit a plan or fails to submit the requested information or revisions to the county health department within 30 days after written notification from the county health department, the county health department shall notify the Agency for Health Care Administration. The agency shall notify the home health agency that its failure constitutes a deficiency, subject to a fine of $5,000 per occurrence. If the plan is not submitted, information is not provided, or revisions are not made as requested, the agency may impose the fine.

(~~d~~c) For any home health agency that operates in more than one county, the Department of Health shall review the plan, after consulting with state and local health and medical stakeholders when necessary. The department shall complete its review within 90 days after receipt of the plan and shall approve the plan or advise the home health agency of necessary revisions. The department shall make every effort to avoid imposing differing requirements on a home health agency that operates in more than one county as a result of differing or conflicting comprehensive plan requirements of the counties in which the home health agency operates.

(e~~d~~) The requirements in this subsection do not apply to:

1. A facility that is certified under chapter 651 and has

a licensed home health agency used exclusively by residents of the facility; or

2. A retirement community that consists of residential units for independent living and either a licensed nursing home or an assisted living facility, and has a licensed home health agency used exclusively by the residents of the retirement community, provided the comprehensive emergency management plan for the facility or retirement community provides for continuous care of all residents with special needs during an emergency.

Section 8. Paragraph (f) of subsection (12) and subsection (17) of section 400.506, Florida Statutes, is amended to read:

400.506 Licensure of nurse registries; requirements; penalties.—

(12) Each nurse registry shall prepare and maintain a comprehensive emergency management plan that is consistent with the criteria in this subsection and with the local special needs plan. The plan shall be updated annually. The plan shall include the means by which the nurse registry will continue to provide the same type and quantity of services to its patients who evacuate to special needs shelters which were being provided to those patients prior to evacuation. The plan shall specify how the nurse registry shall facilitate the provision of continuous care by persons referred for contract to persons who are registered pursuant to s. 252.355 during an emergency that interrupts the provision of care or services in private residences. Nurse registries may establish links to local emergency operations centers to determine a mechanism by which to approach specific areas within a disaster area in order for a

provider to reach its clients. Nurse registries shall demonstrate a good faith effort to comply with the requirements of this subsection by documenting attempts of staff to follow procedures outlined in the nurse registry's comprehensive emergency management plan which support a finding that the provision of continuing care has been attempted for patients identified as needing care by the nurse registry and registered under s. 252.355 in the event of an emergency under this subsection.

~~(f) The Agency for Health Care Administration shall adopt rules establishing minimum criteria for the comprehensive emergency management plan and plan updates required by this subsection, with the concurrence of the Department of Health and in consultation with the Division of Emergency Management.~~

~~(17) The Agency for Health Care Administration shall adopt rules to implement this section and part II of chapter 408.~~

Section 9. Subsection (7) of section 400.509, Florida Statutes, is repealed:

400.509 Registration of particular service providers exempt from licensure; certificate of registration; regulation of registrants.—

~~(7) The Agency for Health Care Administration shall adopt rules to administer this section and part II of chapter 408.~~

Note.—Former s. 400.478.

Section 10. Section 400.914, Florida Statutes, is amended to read:

400.914 ~~Rules establishing~~Rulemaking; standards.—

(1) Pursuant to the intention of the Legislature to

provide safe and sanitary facilities and healthful programs, the agency in conjunction with the Division of Children's Medical Services of the Department of Health ~~shall~~may adopt ~~and publish~~ rules to implement the provisions of this part and part II of chapter 408~~, which shall include reasonable and fair standards~~. Any conflict between these standards and those that may be set forth in local, county, or city ordinances shall be resolved in favor of those having statewide effect. ~~Such standards shall relate~~Rules shall specify, but not be limited to, reasonable and fair standards relating to:

(a) The assurance that PPEC services are family centered and provide individualized medical, developmental, and family training services.

(b) The maintenance of PPEC centers, not in conflict with the provisions of chapter 553 and based upon the size of the structure and number of children, relating to plumbing, heating, lighting, ventilation, and other building conditions, including adequate space, which will ensure the health, safety, comfort, and protection from fire of the children served.

(c) The appropriate provisions of the most recent edition of the "Life Safety Code" (NFPA-101) shall be applied.

(d) The number and qualifications of all personnel who have responsibility for the care of the children served.

(e) All sanitary conditions within the PPEC center and its surroundings, including water supply, sewage disposal, food handling, and general hygiene, and maintenance thereof, which will ensure the health and comfort of children served.

(f) Programs and basic services promoting and maintaining

the health and development of the children served and meeting the training needs of the children's legal guardians.

(g) Supportive, contracted, other operational, and transportation services.

(h) Maintenance of appropriate medical records, data, and information relative to the children and programs. Such records shall be maintained in the facility for inspection by the agency.

(2) ~~The agency shall adopt rules to ensure that:~~

(a) No child may attend~~s~~ a PPEC center for more than 12 hours within a 24-hour period.

(b) No PPEC center may provide~~s~~ services other than those provided to medically or technologically dependent children.

Note.—Former s. 391.214.

Section 11. Subsection (2) of section 483.245, Florida Statutes, is amended to read:

483.245 Rebates prohibited; penalties.—

(2) The agency ~~shall adopt rules that~~ may establish and assess administrative penalties for acts prohibited by subsection (1). In the case of an entity licensed by the agency, such penalties may include any disciplinary action available to the agency under the appropriate licensing laws. In the case of an entity not licensed by the agency, such penalties may include:

(a) A fine not to exceed $1,000;

(b) If applicable, a recommendation by the agency to the appropriate licensing board that disciplinary action be taken.

Section 12. This act shall take effect July 1, 2013.

OTHER BUSINESS