

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 435 Administrative Procedures
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:** SB 718

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

SUMMARY ANALYSIS

The Administrative Procedure Act (APA) provides uniform procedures for the exercise of specified administrative authority. The bill amends 8 provisions of the APA to enhance the opportunities for substantially affected parties to challenge rules, and be awarded attorney fees in certain successful administrative matters. Specifically, the bill makes the following changes to the APA, including, but not limited to:

- Revising rulemaking procedures based on petitions to initiate rulemaking alleging an unadopted rule;
- Expanding the listing of information that must be published on the Florida Administrative Register to include rules filed for adoption in the previous seven days and a listing of all rules filed for adoption but awaiting legislative ratification;
- Revising the pleading requirements and burden of going forward with evidence in challenges to proposed and unadopted rules;
- Removing a defense to an award of fees and costs that an agency did not know or should not have known that an agency statement or policy was an unadopted rule in cases where notice is actually provided;
- Extending the time to appeal certain final orders when notice to the party was delayed;
- Authorizing rule challenges in challenges to agency actions on similar terms as petitions challenging rules and unadopted rules, including the award of reasonable attorney fees to prevailing challengers;
- Requiring agencies to identify and certify all of the rules the violation of which would be a minor violation.

The bill also provides conditions for when an agency action is not substantially justified for purposes of an award of attorney fees under the Florida Equal Access to Justice Act.

The bill may have an indeterminate minimal fiscal impact to the state. See Fiscal Comments section for further discussion.

The bill has an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current situation

Rulemaking

The Administrative Procedure Act (APA)¹ sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency.² Rulemaking authority is delegated by the Legislature through statute and authorizes an agency to "adopt, develop, establish, or otherwise create" a rule.³ Agencies do not have discretion whether or not to engage in rulemaking.⁴ To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.⁵ The grant of rulemaking authority itself need not be detailed. The specific statute being implemented or interpreted through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.

Petitions to Initiate Rulemaking

The APA authorizes a substantially interested party to file a petition to adopt, amend or repeal a rule.⁶ The agency must initiate rulemaking or provide a written explanation why the petition is denied. If the petition is directed to an unadopted rule, the agency must hold a workshop before it may deny the petition.⁷ If, after the workshop, the agency does not initiate rulemaking, the agency is required to publish in the Florida Administrative Register (F.A.R.) a notice explaining why the agency is denying the petition and explaining any changes it will make in the scope or application of the statement asserted in the petition to be an unadopted rule.⁸ However, the APA does not require rulemaking before an agency has had sufficient time to acquire the knowledge and experience reasonably necessary, or otherwise resolved matters sufficiently to address a statement by rulemaking.⁹ The clear implication is that an agency may apply law and establish procedures by statements of general applicability without adopting the statement as a rule until adoption is feasible and practicable.¹⁰

Small Business

The APA provides certain accommodations for small businesses¹¹ 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,¹² but agencies are authorized to define "small business" to include 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 of no more than \$2 million.¹³

Notice of Rules

¹ Chapter 120, F.S.

² 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).

³ Section 120.52(17), F.S.

⁴ Section 120.54(1)(a), F.S.

⁵ Section 120.52(8) and 120.536(1), F.S.

⁶ Section 120.54(7)(a), F.S.

⁷ Section 120.54(7)(b), F.S.

⁸ Section 120.54(7)(c), F.S.

⁹ Section 120.54(1)(a)1., F.S.

¹⁰ *See* s. 120.52(16), F.S.

¹¹ Sections 120.54, 120.541, and 120.74, F.S.

¹² Section 120.54(3)(b), F.S., incorporates by reference the definition of "small business" in s. 288.703(6), F.S.

¹³ Section 57.111, F.S.

Presently, the only notice of adopted rules is the filing with the Department of State (DOS). DOS publishes such rules in the Florida Administrative Code (F.A.C.). A rule requiring ratification as a condition of effectiveness¹⁴ is not published in the F.A.C. until ratified. However, as a courtesy, DOS, once each week, lists newly adopted rules in the F. A. R., and includes a cumulative list of rules filed for adoption pending legislative ratification.

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, 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.¹⁵ These attorney fee provisions supplement the attorney fee provisions provided by other laws.¹⁶

In addition, the APA authorizes attorney fees awards when the non-prevailing party challenged an agency action for an "improper purpose".¹⁷ It establishes a rebuttable presumption of improper purposes in certain circumstances involving 3 or more, unfounded, administrative challenges.¹⁸ "Improper purpose" means participation primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of administrative action.¹⁹

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

Attorney fees are also awardable in administrative proceedings for baseless or frivolous litigation on the same grounds as in civil court cases.²⁰

Burden of Proof

In general, laws carry a presumption of validity; and as such, 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 that a rule constitutes an invalid exercise of delegated authority.²¹ 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.²² In addition, a proposed rule may not be filed for adoption until any pending challenge is resolved.²³

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.²⁴

Proceedings Involving Rule Challenges

The APA presently applies different procedures when proposed rules, existing rules and statements defined as rules ("unadopted rules") are challenged by petition, as compared to a challenge to the validity of an existing rule or an unadopted rule when raised defensively in a proceeding initiated as a result of agency action. In addition to the attorney fees awardable to small businesses under the Equal

¹⁴ See s. 120.541(3), F.S. (requiring ratification of rules having an economic impact beyond a particular threshold).

¹⁵ Section 120.595, F.S.

¹⁶ See, for example, ss. 57.105 and 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.

¹⁷ Section 120.595(1), F.S.

¹⁸ Section 120.595(1)(c), F.S.

¹⁹ Section 120.595(1)(e)1., F.S.

²⁰ Section 57.105(5), F.S.

²¹ Section 120.56(3), F.S. Section 120.52(8), F.S., defines "invalid exercise of delegated legislative authority."

²² Section 120.56(2), F.S.

²³ Section 120.54(3)(e)2., F.S.

²⁴ Section 120.56(4), F.S.

Access to Justice Act, the APA provides attorney fee awards when a party petitions for invalidation of a rule, proposed rule or unadopted rule, but not when the same successful legal case is made in defense of an enforcement action or challenging a grant or denial of a permit or license.

The APA does provide that a Division of Administrative Hearings (DOAH) judge may determine that an agency has attempted to rely on an unadopted rule in proceedings initiated by agency action. However, this is qualified by a provision that an agency may overrule the DOAH determination if clearly erroneous, and if the agency rejects the DOAH determination and is later reversed on appeal, the challenger is awarded attorney fees for the entire proceeding.²⁵ Additionally, in proceedings initiated by agency action, when a DOAH judge determines that a rule constitutes an invalid exercise of delegated legislative authority, the agency has full de novo authority to reject or modify such conclusions of law, provided the final order states with particularity the reasons for rejecting or modifying such determination.²⁶

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

Final Orders

An agency has 90 days to render a final order in any proceeding after the hearing if the agency conducts the hearing, or after the recommended order is submitted to the agency if DOAH conducts the hearing (excepting the rule challenge proceedings described above in which the DOAH judge enters the final order).

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.²⁷ 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 in some agency situations. By contrast, the Internal Revenue Service and the Florida Department of Revenue each frequently issue binding opinions upon request of taxpayers. Profession and trade licensing boards, for example, the Construction Industry Licensing Board and Board of Architecture, have shown a willingness to issue declaratory statements to clarify matters relating to compliance with the rules and laws enforced by those Boards.²⁸

Declaratory statements are considered final agency action, subject to judicial review. Declaratory statements have the effect of stare decisis.

Judicial Review

A notice of appeal of an appealable order under the APA must be filed within 30 days of the rendering of the order.²⁹ An order, however, is rendered when filed with the agency clerk.³⁰ On occasion, a party may not receive notice of the order in time to meet the 30 day appeal deadline. Under the current statute, a party may not seek judicial review of the validity of a rule by appealing its adoption but authorizes an appeal from a final order in a rule challenge.³¹

²⁵ Section 120.57(1)(e)3., F.S.

²⁶ Section 120.57(1)(k-l), F.S.

²⁷ Section 120.565, F.S.

²⁸ See, e.g., Notice of Declaratory Statement, Department of Business and Professional Regulation, Board of Architecture, vol. 40, no. 3, F.A.R. (Feb. 13, 2014), Notice of Declaratory Statement, Department of Business and Professional Regulation, Construction Industry Licensing Board, vol. 40, no. 27 (Feb. 10, 2014).

²⁹ Section 120.68(2)(a), F.S.

³⁰ Sections 120.52(7), 120.68(2)(a), F.S.

³¹ Section 120.68(9), F.S.

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.³² 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 challenge under the APA but may be subject to review and revision by the Governor or Governor and Cabinet.³³ An agency under the direction of a cabinet officer has the discretion not to use the "notice of noncompliance" once each licensee is provided a copy of all rules upon issuance of a license, and annually thereafter.

Rules Ombudsman

Section 288.7015, F.S., requires the Governor to appoint a rules ombudsman in the Executive Office of the Governor, for considering the impact of agency rules on the state's citizens and businesses. The rules ombudsman must carry out the duties related to rule adoption procedures with respect to small businesses; review state agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses; and make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to business. Each state agency must cooperate fully with the rules ombudsman in identifying such rules, and take the necessary steps to waive, modify, or otherwise minimize such adverse effects of any such rules.

Effect of the Bill

Agency Action

Section 1 amends s. 57.111(3), F.S., which awards attorney fees and costs to small businesses that prevail in an administrative proceeding when the agency was not substantially justified. The bill provides particular circumstances when an agency proceeding is not substantially justified. The bill provides that an agency may not establish that its action is substantially justified if it acts in contradiction to its own declaratory statement or the agency denies a petition for declaratory statement and thereafter pursues enforcement on facts submitted in the petition. This will only apply when the agency is wrong on the application of the law. While agencies do not like to issue declaratory statements on facts that have already occurred, the change should motivate an agency to review its legal position carefully before denying the petition and thereafter attempting to punish the circumstances raised by the petition.

Petition to Initiate Rulemaking

Section 2 amends s. 120.54(7) to add new rulemaking requirements when an agency initiates rulemaking after a workshop on a petition to initiate rulemaking that alleges an unadopted rule. The provision will require the agency to file its Notice of Rule Development within 30 days of a mandatory hearing on the petition. Unless the agency publishes a notice explaining the reasons it cannot do so, the Notice of Proposed Rule must be filed within 180 days after the Notice of Rule Development. Lastly, unless the agency publishes a statement explaining why rulemaking is not feasible or practicable under s. 120.54(1), the bill prohibits the agency from relying on the unadopted rule until rulemaking is complete. This limitation mirrors that applicable when an agency loses a formal challenge to an unadopted rule.³⁴

Rulemaking Publication and Notification Requirements

Section 3 amends s. 120.55, F.S., to expand the list of information that must be published on the Florida Administrative Register. The bill requires DOS to publish in the Florida Administrative Register a listing of rules filed for adoption in the previous seven days and a listing of all rules filed for adoption but pending legislative ratification.

³² 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."

³³ 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.

³⁴ See, s. 120.56(4)(c) and (e), F.S.

The bill also requires those agencies with e-mail alert services that provide regulatory information to interested parties to use such services to notify recipients of each notice required under s. 120.54(2) and (3)(a), F.S., including, but not limited to, notice of rule development, notice of proposed rules, and notice of adoption of rules. The notices must provide Internet links to either the rule page on the Secretary of State's website or an agency website that contains the proposed rule or final rule.

Challenges to Rules

Section 4 amends s. 120.56(1), (2) and (4), F.S., relating to petitions challenging the validity of rules, proposed rules and statements defined as rules ("unadopted rules"). The changes clarify the pleading requirements for the petitions. It also clarifies the parties' respective burdens of proof in challenges to proposed rules and unadopted rules.

The Committee Substitute preserves the presumption of validity in challenges to existing adopted rules. (The original bill proposed to change the burden of proof in such cases to the agency.)

Final Orders

Section 5 amends s. 120.569(2)(l)2., F.S., to extend the 90 day time for entry of final orders in proceedings relating to agency actions to allow, at the agency's discretion, for the completion of any appeal of an order on a rule challenge which may be concurrent with the enforcement action. An agency will have 10 days after the determination of the appeal to enter the final order on the related matter. The provisions of Section 6 make this extension of time beneficial to a clear final resolution of certain matters.

Disputes

Section 6 amends s. 120.57, F.S., relating to DOAH hearings of agency-initiated actions involving disputed issues of material fact. The bill incorporates many of the rule challenge provisions of s. 120.56, F.S., allowing the administrative law judge to enter a final order on a challenge to the validity of a rule or to an unadopted rule in all contests before DOAH. This would treat a challenge to a rule in defending against or attacking an agency action much as a challenge in an action initiated solely to challenge the rule. Notably, the decision on the rule challenge in the DOAH proceeding would be binding on the agency.

The bill allows the agency, within 15 days of notice of the rule challenge in such matters, to waive its reliance on an unadopted rule or a rule alleged to be invalid, and thereby eliminate that aspect of the litigation, without prejudice to the agency reasserting its position in another matter or rule challenge. This will help an agency advance a proceeding beyond a weak legal position on the rule issue, particularly in matters initiated by field investigators who often do not enjoy the benefit of legal deliberation by counsel prior to initiation of the action.

The bill also revises the procedures for raising challenges to the validity of rules and unadopted rules in many proceedings where there is no dispute of material fact, staying the agency's non-DOAH proceeding during a related DOAH challenge to a rule.

Attorney Fees

Section 7 amends s. 120.595, F.S., relating to attorney fees in APA proceedings, to clarify the statute respecting participating in a proceeding for improper purposes. The bill amends s. 120.595(1)(c) to increase the clarity of the paragraph. The bill adds a new paragraph (d) to s. 120.595(1), F.S., extending the capped attorney fee awards available for successful rule challenges under s. 120.56, F.S., to rule challenges in other cases when the agency does not waive its reliance on the challenged rule or unadopted rule. This provision would obviate any necessity to file separate rule challenge petitions to gain an attorney fee award while challenging an agency action that relies on an invalid or unadopted rule. It also reinforces the changes to s. 120.57 in Section 6 of the CS authorizing rule challenges in particular proceedings.

The bill also recodifies the right to fees for improper purposes when an agency prevails in a rule challenge by deleting 3 duplicative sentences³⁵ and adding the affected cases to the scope of the improper purposes provision. The revision does not change the substance of the law.

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

The bill adds a new subsection (6) to s. 120.595, F.S., revising the provisions for pre-petition notice of an invalid rule or proposed rule, or of an unadopted rule for rule challenges under s. 120.56, F.S. The bill requires notice 30 days prior to filing of a petition challenging a rule or unadopted rule, and five days prior to filing the petition challenging a proposed rule. Reasonable costs and attorney fees may be awarded only for the period beginning after notice. The agency may avoid an award of attorney fees and costs if, within the notice period provided, the agency provides notice that it will not adopt the proposed rule or will not rely upon the adopted rule or statement challenged as an unadopted rule until after the agency has complied with the rulemaking procedures of the APA to ensure its rules conform to the law. The bill also provides that taking such steps to cure its faults would constitute "special circumstances" protecting the agency from an attorney fees judgment on the rule challenge.

The bill does not impose pre-petition notice provisions to rule challenges included in other challenges to agency actions, those challenges authorized in Section 6 of the CS.

The bill adds a new subsection (7) to s. 120.595 providing that reasonable costs and reasonable attorney fees incurred in proving and prosecuting a claim for attorney fees under the statute are not subject to the fee cap applicable to costs and fees awardable in an underlying action. Agencies are excluded from such supplemental awards. This provision may deter some agencies from aggressively litigating attorney fees due to increased risk of incurring additional fees when the fee cap has otherwise been exceeded.

Appeals

Section 8 alters the appellate provisions to clarify that a final order on a rule challenge litigated with other challenges to agency action under s. 120.57(1)(e), F.S. will be directly appealable in the same manner as a final order in a petition challenging a rule under s. 120.56, F.S.. The section also allows 10 additional days to file an appeal if the appellant did not receive notice of the rendering of the final order within 25 days. The section also makes conforming technical changes.

Minor Violations

Section 9 amends s. 120.695, F.S., to direct each agency to timely review its rules and certify to the President of the Senate, the Speaker of the House of Representatives, the Administrative Procedures Committee, and the rules ombudsman those rules that have been designated as rules the violation of which would be a minor violation no later than June 30, 2014. Each agency that fails to timely complete the review and file the certification will be reported by the rules ombudsman to the Governor, the President of the Senate, the Speaker of the House of Representatives and the Administrative Procedures Committee.

Beginning July 1, 2015, each agency will be required to publish all rules of that agency designated as rules the violation of which would be a minor violation either as a complete list on the agency's Internet webpage or by incorporation of the designations in the agency's disciplinary guidelines adopted as a rule. Each agency must ensure that all investigative and enforcement personnel are knowledgeable of the agencies designations of these rules. The agency head must certify for each rule filed for adoption whether any part of the rule is designated as one the violation of which would be a minor violation and update the listing on the webpage or disciplinary guidelines.

³⁵ See s. 120.595(2) (next to last sentence), s. 120.595(3) (next to last sentence), and s. 120.595(4)(d) (final sentence)(this sentence also contains a provision that is unnecessarily duplicative of s. 57.105(5), F.S.).

Effective Date

The bill provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

Section 1 amends s. 57.111(3)(e), F.S.

Section 2 amends s. 120.54(7)(c), F.S., and creates paragraph (7)(d) of that section.

Section 3 amends s. 120.55, F.S.

Section 4 amends s. 120.56(1), (2) and (4), F.S.

Section 5 amends s. 120.569(2)(l), F.S.

Section 6 amends s. 120.57(1)(e) and (h), F.S. and subsection (2) of that section.

Section 7 amends s. 120.595, F.S.

Section 8 amends s. 120.68(1), (2) and (9), F.S.

Section 9 amends s. 120.695, F.S.

Section 10 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The private sector may benefit slightly by the increased incentives for agencies to conform their rules to the law, thereby increasing clarity and certainty in the application of the law.

D. FISCAL COMMENTS:

The bill allows for the recovery of reasonable attorney fees and reasonable costs incurred in litigating entitlement to, and the determination or quantification of, attorney fees and costs. This could potentially have a negative fiscal impact to the state when a state agency is the non-prevailing party. However, the appellate courts have already upheld awards of fees and costs incurred in litigating fees and costs, so the bill conforms the APA to existing case law. The fiscal impact to the state would be limited to those

few cases in which the fees and costs are capped by the authorizing law but litigating fees and costs result in supplemental awards above those caps.

The bill also allows attorney fees for successfully challenging invalid rules or unadopted rules in cases that arise outside s. 120.56, F.S. Those fees, however, are only awardable when the agency has notice of the challenge and persists in relying on the invalid rule to support an agency action. Thus, the costs are generally avoidable by taking heed to diligent legal counsel and diligence in maintaining the validity of rules. Note also that the same exposure to fee awards would be incurred under current law by the challenger filing a separate challenge under s. 120.56, F.S.

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:

B. RULE-MAKING AUTHORITY:

The bill enhances the procedures provided by the APA for challenging rules, particularly in the defense against agency actions that are not based on valid rules. As such, it provides incentives and opportunities for private parties to keep agency rulemaking accountable under the law. The bill also increases requirements relating to identifying rules the violation of which should be classified as minor violations.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

The Rulemaking Oversight & Repeal Subcommittee adopted a strike-all amendment, as amended by one technical amendment, deleting two sections of the original bill relating to declaratory statements and mediation. The amendment also altered four other sections of the bill. The substance of the strike-all is explained in the full analysis above.