

# 1994 PROPOSALS FOR RULEMAKING REFORM

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The quest for an ideal administrative procedure is a hardy perennial. It is evidence of the American faith in law reform as a means of making progress.<sup>1</sup>

## I. INTRODUCTION

During the 1994 Regular Session, the Florida Legislature considered a number of proposed measures that would have amended the Florida Administrative Procedure Act (APA).<sup>2</sup> Although some of these measures received considerable attention, no significant changes

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1. Arthur E. Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U. L. REV. 617 (1991).

2. The APA is codified in chapter 120, *Florida Statutes*. For a brief overview of the rule-making process in Florida, see Stephen Maher, *Rulemaking in Florida: An Opportunity for Reflection*, FLA. B.J., Jan. 1990, at 48.

were enacted. This Article describes the proposals that received the most attention by the Legislature during the 1994 Regular Session, since they are likely to be introduced again in 1995.

## II. THE CALL FOR RULEMAKING REFORM

Administrative agencies have become the principal institutions for creating and implementing governmental policy.<sup>3</sup> This is evidenced in part by the significant increase in the number of administrative rules over the last twenty years.<sup>4</sup> It is not the sheer number of rules, however, but the wisdom of these rules and the process used to adopt them that has led to increasingly frequent criticisms.<sup>5</sup> These criticisms recently drew the attention of key legislative leaders, who in turn appointed select committees to investigate the rulemaking process.<sup>6</sup> The committees took extensive testimony from the public and from repre-

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3. Johnny C. Burris, *Administrative Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 7 (1991); see also Johnny C. Burris, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking*, 18 FLA. ST. U. L. REV. 661 (1991).

4. On January 1, 1975, the effective date of the Administrative Procedure Act, Florida's administrative agencies administered 9442 rules. By early 1994, state agencies enforced 27,912 rules. See Sally Bond Mann, *Reforming the APA: Legislative Adventures in the Labyrinth*, 22 FLA. ST. U. L. REV. 307, 309 (1994). Administrative agencies also continually add new rules or change existing rules. For example, in 1993, state agencies published 5886 new administrative rules or changes to existing rules. JT. ADMIN. PROCS. COMM., STATUS REPORT 1975-1994 (1994) (on file with comm.); see also *The Red Tape Tax*, FLORIDA TREND 31, 32-33 (Aug. 1993) (noting that the *Florida Administrative Code* is expanding at a rate of approximately 1000 pages a year).

5. See, e.g., Fla. S. Select Comm. on Govtl. Reform, tape recording of proceedings (Jan. 13, 1994) (on file with comm.) [hereinafter Fla. S. Govtl. Reform Tape] (testimony of Myron Holmes, City Manager of Live Oak, noting the difficulty that cities have meeting various deadlines and how agencies should be required to give notice to parties subject to certain rules); *id.* (testimony of Marjorie Turnbull, Leon County Commissioner, noting that agencies do not adequately listen to input during the rulemaking process); *id.* (testimony of Byrd Mapoles, Santa Rosa County Commissioner, noting that certain state agencies exceed their statutorily granted authority); *id.* (testimony of Robert G. Harris, Glades County Building and Civil Defense Director, asserting that the rulemaking process is out of control and is being misused); see also Dan R. Stengle & James P. Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 FLA. ST. U. L. REV. 415, 434 (1993).

6. As Speaker of the House, 1992-1994, Representative Bolley "Bo" Johnson, Democrat, Milton, 1978-1994 created the House Select Committee on Agency Rules and Administrative Procedures in November 1992 "for the purposes of investigating allegations of agency abuse of delegated authority and recommending any necessary modifications to [the APA]." Sally Bond Mann, *Legislative Reform of the Administrative Procedure Act: A Tale of Two Committees*, FLA. B.J., July/Aug. 1994, at 57. Senator Pat Thomas, Democrat, Quincy, President of the Florida Senate, 1993-1994 established the Senate Select Committee on Governmental Reform in September 1993 to improve "the effectiveness and efficiency of state government." *Id.* Senator Thomas specifically asked that the committee "ensure that all agency rules are based on statutory authority and that the rules do no more than the law requires." *Id.*; see also Mann, *supra* note 4, at 310, 318.

sentatives of state agencies.<sup>7</sup> Based on these investigations, the committees developed recommendations for changing the APA.<sup>8</sup>

Florida's business community has been aware of the problems with the rulemaking process used by some administrative agencies,<sup>9</sup> and the Florida Chamber of Commerce (Florida Chamber) saw this as an opportunity to promote the enactment of constructive rulemaking reforms.<sup>10</sup>

### III. THE PROPOSED REFORMS

The Florida Chamber developed a set of proposed reforms that were incorporated into House Bill 237 during the 1994 Regular Session.<sup>11</sup> Representatives Sam Mitchell<sup>12</sup> and Ken Pruitt<sup>13</sup> were prime sponsors of the bill. Virtually all 120 members of the House co-spon-

7. See Mann, *supra* note 4, at 310-12, 318-19 (describing the committees' extensive investigations).

8. The House Select Committee's recommendations took the form of several bills, including House Bills 833, 835, 837 and 2429. See FLA. H.R. SELECT COMM. ON AGENCY RULES AND ADMIN. PROCS., PRELIMINARY REPORT OF THE HOUSE OF REPRESENTATIVES' SELECT COMMITTEE ON AGENCY RULES AND ADMINISTRATIVE PROCEDURES 1-2 (1994) (on file with comm.). Many of these same recommendations also were ultimately incorporated into Committee Substitute for House Bill 237. The Senate Select Committee's recommendations ultimately took the form of Senate Bill 1440. See also STAFF OF FLA. S. SELECT COMM. ON GOVTL. REFORM, RECOMMENDATIONS FOR ADMINISTRATIVE RULEMAKING (Feb. 28, 1994) (on file with comm.) [hereinafter RECOMMENDATIONS FOR ADMINISTRATIVE RULEMAKING].

9. See, e.g., *First No-Biz, Pro-Biz Awards: Chamber Skewers Red Tape Agencies*, PULSE OF FLORIDA BUSINESS (Florida Chamber of Commerce, Tallahassee, Fla.), Oct. 25, 1993, at 1 (criticizing elements of the rulemaking process). A survey by the Florida Chamber found that a significant number of respondents thought that government regulation was one of the biggest obstacles to profitability. Many respondents expressed "outrage at the arrogance of government and the increasing number of regulations that businesses must comply with." *Id.* A subsequent survey by the Florida Chamber reaffirmed that a large number of respondents think governmental regulation and red tape are a problem, and most thought the problem is more serious now than it was five years ago. FLORIDA CHAMBER OF COMMERCE/MASON-DIXON BUSINESS POLL, MEMBERS ISSUES SURVEY (Aug. 1994). See also *A Chill in the Air*, MIAMI HERALD, Aug. 12, 1994, at A20; *The Red Tape Tax*, *supra* note 4.

10. See *Chamber Skewers Red Tape Agencies*, *supra* note 9; *The Red Tape Tax*, *supra* note 4.

11. The proposed reforms were the work of the Florida Chamber's Governmental Reform Committee. The Florida Chamber's proposed reforms were influenced in part by the work of the House Select Committee's APA Task Force Rulemaking Work Group. See Sally Bond Mann, *APA Task Force Convenes*, XV ADMIN. L. NEWSL. 22 (Oct. 1993).

Members of the Governmental Reform Committee included Wade Hopping (Chair), Dan Berger, Bill Hunter, Marcelle Kinney, Chuck Littlejohn, Doug Mann, Kurt Wenner, Bill Williams, and the author. Many of these members have substantial experience and expertise in administrative law.

12. Dem., Vernon, 1956-1960, 1978-1994. Representative Mitchell's support for the legislation was recognized when the bill was later renamed the "Sam Mitchell Good Government Act." FLA. H.R. JOUR. 1041 (Reg. Sess. 1994).

13. Repub., Port St. Lucie.

sored the legislation, so it ultimately proved to be the measure receiving the most consideration by the Legislature during the 1994 Regular Session.<sup>14</sup> Although House Bill 237 did not become law,<sup>15</sup> it proposed reform in three key areas: legislative oversight of rulemaking,<sup>16</sup> limitations on rulemaking authority,<sup>17</sup> and changes to the rulemaking process.<sup>18</sup> Each of these areas is discussed below.

### A. Legislative Oversight of Rulemaking

Florida already has in place several mechanisms by which the Legislature may oversee agency rulemaking.<sup>19</sup> However, from the outset, many agreed that agency rulemaking would benefit from additional legislative oversight.<sup>20</sup> A number of critics noted that some of the more objectionable administrative rules were the result of an agency's efforts to implement legislation that contained insufficient indications of the Legislature's intent.<sup>21</sup> They therefore suggested that the Legisla-

14. Twenty-four bills dealing with substantive changes to the APA were filed during the 1994 Regular Session. Only one of these bills became law, and it did not affect the provisions governing rulemaking. See ch. 94-161, § 1, 1994 Fla. Laws 954 (amending FLA. STAT. § 120.58 (1993)). Other bills would have clarified that only final orders are required to be indexed (House Bill 837), made changes to the current rulemaking procedure (House Bill 835), created a summary hearing process (House Bill 833 and House Bill 2429), required the Department of Environmental Protection to prepare a risk assessment analysis of any proposed rule (House Bill 1127 and Senate Bill 2086), and required agencies to consider the impact of a proposed rule upon small counties (House Bill 135 and Senate Bill 174). None of these bills became law.

15. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1994 REGULAR SESSION, HISTORY OF HOUSE BILLS at 21, HB 237.

16. See *infra* part III.A.

17. See *infra* part III.B.

18. See *infra* part III.C.

19. These mechanisms include: (1) exercising plenary oversight of agency activities by giving legislative committees jurisdiction over them; (2) scheduling programs for mandated reviews and repeals; (3) authorizing the Auditor General to audit and evaluate state agencies and programs; and (4) requiring that proposed rules be submitted to a rule oversight committee. See Stengle & Rhea, *supra* note 5, at 417. In addition to oversight, the Legislature may check the exercise of delegated authority by a variety of methods, including revising the enabling law, subjecting an adopted rule to legislative ratification or amendment by statute, and refusing to appropriate or limiting the funds necessary to implement the rule. *Id.*

20. See, e.g., Memorandum from the Office of the Governor to Senator Charles Williams, Dem., Live Oak (March 14, 1994) (on file with the *Florida State University Law Review*) [hereinafter Williams memorandum] (noting that "[b]etter defining the Legislature's intent is the most important aspect of addressing the problems cited by the Legislature").

21. See, e.g., David Gluckman, *1994 APA Legislation: The History, the Reasons and the Results*, 22 FLA. ST. U. L. REV. 349, 351 (1994); see also Fla. S. Select Comm. on Govtl. Reform, tape recording of proceedings (Nov. 30, 1993) (on file with comm.) (testimony of Sen. Curt Kiser, Repub., Dunedin, 1972-1994).

One example of a broadly written statute is section 373.413, *Florida Statutes*, which authorizes the agency to

require such permits and impose such reasonable conditions as are necessary to ensure

ture had only itself to blame if the agencies adopted implementing rules that were not exactly what certain legislators intended.<sup>22</sup> In addition, representatives of the business community expressed the view that there may be areas where additional and continuing legislative oversight should be required.<sup>23</sup> For example, it was suggested that certain implementing rules should become effective only after they have been ratified by the Legislature or only if adopted in accordance with additional rulemaking requirements.<sup>24</sup>

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that [certain construction] will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district.

FLA. STAT. § 373.413(1) (1993). Not surprisingly, proposed rules implementing this statute proved controversial and resulted in legislation deferring the effective date of the proposed rule pending legislative review. See ch. 94-122, § 15, 1994 Fla. Laws 661, 687 (amending FLA. STAT. § 373.019 (1993)); see also *supra* note 24.

The Florida Legislature is not the only state legislature to hear concerns about the scope of authority granted to agencies. The Minnesota Commission on Reform and Efficiency recently issued a report concluding that "[t]he biggest problem associated with rules and rulemaking is the scope of authority granted to agencies by the Legislature." MINNESOTA COMM. ON REFORM AND EFFICIENCY, REFORMING MINNESOTA'S ADMINISTRATIVE RULEMAKING SYSTEM, DETAILED REPORT 19 (1993). The Commission urged legislators not to continue to make excessive delegations:

The Legislature has often delegated its policymaking responsibilities to agencies to be carried out through rulemaking. Consequently, agencies may spend many months or years in rulemaking trying to resolve issues that should have been settled by elected officials. [The Commission] recommends, therefore, that the Legislature limit its delegation of rulemaking powers.

MINNESOTA COMM. ON REFORM AND EFFICIENCY, REFORMING MINNESOTA'S ADMINISTRATIVE RULEMAKING SYSTEM, SUMMARY REPORT 1 (1993).

22. The Supreme Court of Florida has interpreted the Florida Constitution to prohibit the standardless delegation of authority to administrative agencies. *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978). Pursuant to the "nondelegation doctrine," statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the delegated powers to preclude the agency from acting through whim, showing favoritism, or exercising unbridled discretion. *Lewis v. Bank of Pasco County*, 346 So. 2d 53, 55-56 (Fla. 1976). See also Carl J. Peckinpugh, *Florida's Adherence to the Doctrine of Nondelegation of Legislative Power*, 7 FLA. ST. U. L. REV. 541 (1979). However, at least one appellate judge has suggested that exceptions to the nondelegation doctrine have practically swallowed the rule. See *In the Interest of A.A. v. State*, 605 So. 2d 106 (Fla. 1st DCA 1992) (Ervin, J. concurring); see also Johnny C. Burris, *The 1988 Survey of Florida Law, Administrative Law*, 13 NOVA L. REV. 727, 729-30 (1989); Johnny C. Burris, *The 1989 Survey of Florida Law, Administrative Law*, 14 NOVA L. REV. 583, 586 (1990); Johnny C. Burris, *The 1991 Survey of Florida Law, Administrative Law*, 16 NOVA L. REV. 7, 10-13 (1991).

23. See Fla. H.R. Select Comm. on Agency Rules & Admin. Procs., tape recording of proceedings (Feb. 8, 1994) (on file with comm.) (testimony of William James from the Florida Chamber of Commerce).

24. Legislative ratification of administrative rules is not a new concept in Florida. For example, any changes to the Administration Commission rule establishing statewide guidelines and standards to determine whether particular projects must undergo development-of-regional-impact review do not become effective unless approved by the Legislature. FLA. STAT. § 380.06(2)(a) (1993). Similarly, a new rule describing the unified statewide methodology for delineating wetlands became effective only after ratification by the Legislature. FLA. STAT.

### 1. Additional Legislative Oversight

The initial version of House Bill 237 attempted to provide for additional legislative oversight by requiring each house of the Legislature, before enactment of any general or special law, to consider whether any rules authorized by or implementing such law should be subject to additional legislative oversight or additional or less-restrictive rule-making requirements.<sup>25</sup> In essence, the bill established a "menu" of rules or rulemaking requirements from which the Legislature might select.

The "menu" approach was eventually replaced in favor of a provision that required each house of the Legislature to consider and identify the appropriate degree of delegation of legislative authority to the executive branch.<sup>26</sup> This provision identified several specific factors that should be considered.<sup>27</sup> In this fashion, the bill sought to address the complaint that legislation often failed to contain an appropriate degree of specificity, as well as the view that there are cases where additional opportunities for public participation should be provided or where the ultimate policies should be adopted only by the Legislature.

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§ 373.421 (1993). The Legislature amended and ratified the rule in 1994. See ch. 94-122, § 1, 1994 Fla. Laws 661, 662 (to be codified at FLA. STAT. § 373.4211).

A measure introduced in 1994 also would have required legislative ratification of recently enacted amendments to the State Water Policy Rule. See Fla. SB 1346, § 13 (1994). Ultimately, however, this legislation provided that the amendments would not become effective until July 1, 1995. Ch. 94-122, § 13, 1994 Fla. Laws 661, 687 (amending FLA. STAT. § 403.031 (1993)). In the interim, the Land Use and Water Policy Planning Task Force is to review and make recommendations to the Legislature regarding state water policy. *Id.*

25. Fla. HB 237, § 1 (1994) (proposed amendment to FLA. STAT. § 11.075 (1993)); *id.* § 4 (proposed FLA. STAT. § 120.542); *id.* § 6 (proposed FLA. STAT. § 120.546). Professor Bonfield also has suggested the creation of several distinct classes of agency rulemaking, each of which would be subject to different procedural requirements specially tailored to the needs and circumstances of that particular class. Bonfield, *supra* note 1, at 655-57. These requirements would be designed to insure that the procedures imposed on state agencies are proportional to the relative significance of the varying substantive and process matters at stake in rulemaking proceedings. *Id.*

26. Fla. CS for HB 237, § 1 (1994).

27. Each house of the Legislature was to consider the following: (a) the appropriate degree of specificity contained in the delegation of authority to the executive branch; (b) the scope and breadth of such delegation to the agency; (c) the degree of specialized expertise required to develop detailed standards to be imposed on members of the affected community; (d) the degree of additional public input that should be considered by an agency in preparing to adopt implementing rules; (e) the degree of legislative review, beyond that provided by the Joint Administrative Procedures Committee, that is appropriate for the implementing rules adopted by an agency; and (f) whether it is advisable to request an agency to prepare a detailed legislative proposal for consideration at a subsequent legislative session as an alternative to the adoption of administrative rules pursuant to a broader delegation of legislative authority. *Id.*

## 2. *The Role of the Joint Administrative Procedures Committee*

The APA provides for limited legislative oversight by the Joint Administrative Procedures Committee (JAPC).<sup>28</sup> JAPC undertakes a continuing review of agency rules, and is empowered to object to proposed or adopted rules that exceed the grant of rulemaking authority or do not meet certain other requirements.<sup>29</sup> While most agencies recognize the wisdom of avoiding the JAPC's ire, however, an objection technically has no legal effect on the validity of the rule.<sup>30</sup> There were several proposals to expand JAPC's role in reviewing agency rules. Some suggested that JAPC be authorized to suspend an agency rule,<sup>31</sup> and legislation to this effect was filed.<sup>32</sup> Others claimed that these measures would be unconstitutional.<sup>33</sup>

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28. FLA. STAT. § 120.545 (1993).

29. *Id.*

30. *Id.*

31. See RECOMMENDATIONS FOR ADMINISTRATIVE RULEMAKING, *supra* note 8.

32. See Fla. HB 569 (1994); Fla. SB 1250 (1994); Fla. SB 1440 (1994). Several states authorize one or both legislative chambers to void, by nonstatutory means, a proposed or adopted agency rule. See ALASKA STAT. § 44.62.320(a) (1993); IDAHO CODE § 67-5218 (1989); KAN. STAT. ANN. § 77-426(c) (1989); MICH. COMP. LAWS § 24.251 (1981); OHIO REV. CODE ANN. § 119.03(I)(1)(d) (Anderson 1990). Some of these statutes have been struck down as unconstitutional because they do not require bicameral action and gubernatorial presentment, or because they violate the separation of powers provisions of the applicable state constitution. See *infra* note 33. The Idaho Supreme Court, however, has upheld a provision which allows the legislature to rescind agency rules by concurrent resolution. *Mead v. Arnell*, 791 P.2d 410, 420 (Idaho 1990). In addition, Connecticut and Iowa have constitutional provisions that specifically authorize a legislative veto of agency rules. CONN. CONST. of 1965, art. II (1988); IOWA CONST. of 1857, art. III, § 40 (1989).

33. Several state supreme courts have held various forms of the legislative veto unconstitutional. See, e.g., *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772-73 (Alaska 1980) (holding that repeal of rules by the legislature is a legislative act that requires compliance with the bill enactment procedures of the Alaska Constitution); *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 635-36 (Kan. 1984) (holding that legislative power to modify, revoke, or veto rules is an unconstitutional usurpation of executive powers); *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984) (holding that legislative veto provisions are unconstitutional as violative of the separation of powers doctrine); *Opinion of the Justices*, 431 A.2d 783 (N.H. 1981) (holding unconstitutional proposed statute that would require administrative rules be approved or rejected by legislative committees); *General Assembly v. Byrne*, 448 A.2d 438, 449 (N.J. 1982) (holding legislature may not void a rule by concurrent resolution because this would violate the presentment clause of state constitution and the doctrine of separation of powers); *Gilliam County v. Department of Env'tl. Quality*, 849 P.2d 500 (Or. 1993) (holding that statute unconstitutionally permitted veto of rules without majority vote of each chamber of the legislature), *rev'd and remanded on other grounds*, 114 S. Ct. 1345 (1994). *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981) (holding that provisions which prohibit rule from becoming effective until approved by legislative rulemaking committee violate the separation of powers doctrine). For a review of these and other relevant cases, see Stengle & Rhea, *supra* note 5, at 450-65.

The initial version of House Bill 237 sought to avoid this contentious (although interesting) debate<sup>34</sup> by reflecting the approach identified in the Model State Administrative Procedure Act.<sup>35</sup> Under this approach, the burden of proof to establish the validity of a rule would be shifted to the agency in those cases in which JAPC objects to a rule.<sup>36</sup> In addition, if JAPC objects to a rule, a person challenging the rule would be entitled to attorney's fees if a hearing officer or court determines the rule is invalid.<sup>37</sup>

Later versions of the bill reflected a more modest approach, providing that when JAPC objects to a rule there is no presumption that the rule is a valid exercise of delegated legislative authority.<sup>38</sup> The bill also enlarged the membership of JAPC and expanded its authority.<sup>39</sup>

### B. Limitations on Rulemaking Authority

JAPC is already authorized to object to, and hearing officers may invalidate, a rule that constitutes an "invalid exercise of delegated legislative authority."<sup>40</sup> Later versions of House Bill 237 amended the

34. For an overview of this debate, see K. M. Disbennett, *Legislative Oversight of Administrative Rulemaking: A Preview of Potential Reform*, XV ADMIN. L. SEC. NEWSL. 2 (Jan. 1994).

35. MODEL STATE ADMIN. PROC. ACT § 3-204(d)(5) (1981 & Supp. 1993).

36. Fla. HB 237, § 5 (1994) (proposed amendment to FLA. STAT. § 120.545(8) (1993)). Professor Bonfield favors this shifting of the burden of persuasion to an agency when the rule has been objected to by JAPC, which he characterizes as "a body that has special competence to review the legality of agency rulemaking, that represents the legislature from which all agency powers flow, and that is independent of the agency and directly accountable to the people through the electoral process." Bonfield, *supra* note 1, at 652.

37. Fla. HB 237, § 5 (1994) (proposed amendment to FLA. STAT. § 120.545(8) (1993)). Professor Bonfield explained that:

[t]his unusual remedy might be justified under these circumstances because the filing of such an objection by a politically responsible body independent of the agency lends special credibility to the claim that the agency rule in question is illegal, and it would remove one obstacle—financial expense—that discourages persons from seeking judicial review of unlawful agency rules.

Bonfield, *supra* note 1, at 653 (citation omitted).

38. Fla. CS for HB 237, § 6 (1994) (proposed FLA. STAT. § 120.545(9)).

39. *Id.* § 2 (proposed FLA. STAT. § 11.60(1)).

40. FLA. STAT. § 120.545 (1993) (providing for JAPC review of agency rules); FLA. STAT. § 120.54(4) (1993) (authorizing hearing officer to invalidate a *proposed* rule that constitutes an invalid exercise of delegated legislative authority); FLA. STAT. § 120.56(3) (1993) (authorizing hearing officer to invalidate an *adopted* rule that constitutes an invalid exercise of delegated legislative authority). The phrase "invalid exercise of delegated legislative authority" is defined as:

action which goes beyond the powers, functions and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:

- (a) The agency has materially failed to follow the applicable rulemaking proce-



definition of this quoted phrase to make clear that legislative intent is to be considered in the determination of whether the rule is valid.<sup>41</sup> In addition, later versions of the bill amended this definition to effectively reverse prior appellate decisions that have given agencies wide discretion in the interpretation of implementing statutes.<sup>42</sup> These later versions provided that a rule does not acquire a presumption of validity solely because it has been through the rulemaking process or solely because it is within the range of permissible interpretations of the implemented statute.<sup>43</sup>

### C. Changes to the Rulemaking Process

A central purpose of the APA was to insure that basic fairness be provided to all those persons affected by governmental activities. Such fairness includes the opportunity for adequate and full notice of agency activities, the right to present viewpoints and to challenge the views of others, the right to develop a record that is capable of court review, and the right to know the factual basis and policy reasons for agency action.<sup>44</sup>

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dures set forth in s. 120.54;

(b) The agency had exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or

(e) The rule is arbitrary or capricious.

FLA. STAT. § 120.52(8) (1993).

41. Fla. CS for HB 237, § 3 (1994) (proposed amendment to FLA. STAT. § 120.52(8)(c) (1993)). In addition, a new provision was added to authorize the admission of certain items as evidence of legislative intent. *Id.* § 9 (proposed FLA. STAT. § 120.58(4)).

42. These provisions were expressly crafted to overrule the decision in *Department of HRS v. Framat Realty, Inc.*, 407 So. 2d 238, 242 (Fla. 1st DCA 1981) ("Permissible interpretations of a statute must and will be sustained, though other interpretations are possible and may even seem preferable according to some views."). See also Staff of Fla. H.R. Select Comm. on Agency Rules and Admin. Procs., Fla. CS for HB 237, Staff Analysis 9 (final Apr. 21, 1994) (on file with comm.).

43. Fla. CS for HB 237, § 3 (1994) (proposed amendment to FLA. STAT. § 120.52(8) (1993)). A Senate bill would have provided that a grant of rulemaking authority is not, in and of itself, sufficient to allow an agency to adopt a rule; rather, an agency may only adopt rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. See Fla. CS for SB 1440, § 5 (1994) (proposed FLA. STAT. § 120.534). Similar legislation has also failed to pass in previous years. See Stengle & Rhea, *supra* note 5, at 434-35.

Another House bill sought to discourage agencies from exceeding their grant of legislative authority by making the head of an agency who knowingly approves a rule in excess of delegated legislative authority guilty of a second degree misdemeanor. See Fla. HB 375 (1994).

44. See, e.g., *Singer Island Civic Ass'n, Inc. v. Department of Env'tl. Reg.*, 636 So. 2d 723, 725 (Fla. 4th DCA 1994); *Friends of the Hatchineha, Inc. v. Department of Env'tl. Reg.*, 580 So. 2d 267, 271 (Fla. 1st DCA 1991).

Consistent with this central purpose, House Bill 237 also incorporated a number of proposed reforms to the rulemaking *process*. The proposed reforms sought to encourage agencies to provide meaningful opportunities for public participation,<sup>45</sup> to evaluate the economic impacts<sup>46</sup> of the proposed rule as well as reasonable alternatives,<sup>47</sup> and to establish the rationale for their rules before adoption.<sup>48</sup> In many cases, the proposed reforms were modeled after rulemaking procedures already employed by some of the more prolific rulemaking agencies to insure that the proposals would not unduly discourage rulemaking<sup>49</sup> or impair the balance between efficiency and accountability in the rulemaking process.<sup>50</sup>

### 1. *Additional Notice Requirements*

One of the major purposes of the APA was to expand public access to activities of governmental agencies.<sup>51</sup> To further encourage informed public participation, House Bill 237 would have required the initial rulemaking notice to include certain additional information. Among other things, an agency would have been required to indicate whether it had prepared an economic impact statement and, if not, to describe the procedure for requesting the preparation of such a statement.<sup>52</sup> The bill also would have required that the notice describe the procedure for requesting a public hearing.<sup>53</sup> A similar change was incorporated in the provisions describing the content of the notice of rule development.<sup>54</sup>

### 2. *Public Workshops and Response to Comments*

The APA authorizes agencies to conduct public workshops<sup>55</sup> and receive public comment following publication of a proposed rule.<sup>56</sup>

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45. See *infra* notes 51-54 and accompanying text.

46. See *infra* notes 63-74 and accompanying text.

47. See *infra* notes 75-79 and accompanying text.

48. See *infra* notes 80-87 and accompanying text.

49. In 1991, the Legislature enacted section 120.535, *Florida Statutes*, to encourage agencies to adopt their policies as rules. See Patricia Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U. L. REV. 437 (1991); see also Stephen T. Maher, *Administrative Procedure Act Amendments: The 1991 and 1992 Amendments to the Florida Administrative Procedure Act*, 20 FLA. ST. U. L. REV. 367 (1992).

50. For one commentator's view of this balance, see Stephen T. Maher, *We're No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U. L. REV. 767 (1991) [hereinafter Maher, *Angels*].

51. See *Florida Homebuilders Ass'n v. Department of Labor & Employ. Sec.*, 412 So. 2d 351, 352-53 (Fla. 1982).

52. Fla. CS for HB 237, § 4 (1994) (proposed amendment to FLA. STAT. § 120.54(1) (1993)).

53. *Id.*

54. *Id.* § 4 (proposed amendment to FLA. STAT. § 120.54(1)(c) (1993)).

55. FLA. STAT. § 120.54(1)(d) (1993).

56. FLA. STAT. § 120.54(3)(a) (1993).

However, there is no express requirement that agencies conduct workshops or even respond to written comments or other evidence that is submitted.

Many state agencies recognize the benefit of holding one or more public workshops as part of the rulemaking process. These agencies routinely consider oral and written comments submitted during or following the public workshops, and they often respond to the comments by incorporating appropriate changes in the proposed rule that is ultimately published. Not surprisingly, these agencies realize that providing this kind of early opportunity for public participation generally results in better rules, or at least rules subject to much less controversy. However, other agencies provide little or no meaningful opportunity for public participation and seemingly ignore what public comment they do receive. Frequently, these agencies find that this seemingly quicker rulemaking process is, in reality, made more time-consuming by formal and expensive rule challenges that could have been avoided if the agency had provided for more public participation at an earlier stage in the rulemaking.<sup>57</sup>

The initial version of House Bill 237 would have required agencies to hold a public workshop in certain cases, if requested.<sup>58</sup> In addition, the bill would have required agencies to prepare a written report responding to the evidence, arguments and materials submitted on the proposed rule.<sup>59</sup> These materials and the agency's written report were then to be made a part of the record of the rulemaking proceeding.<sup>60</sup>

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57. Administrative challenges to proposed rules are trial-type proceedings, and may involve extensive discovery, the preparation and presentation of numerous witnesses, and the filing of lengthy post-hearing pleadings. See FLA. STAT. § 120.54 (1993).

58. Fla. HB 237, § 4 (1994) (proposed FLA. STAT. § 120.542).

59. Fla. HB 237, § 3 (1994) (proposed amendment to FLA. STAT. § 120.54 (1993)). The federal Administrative Procedure Act includes similar requirements. 5 U.S.C. § 553 (1988). Some commentators appear especially sensitive to efforts to amend or interpret the Florida APA like the federal act, quickly characterizing these efforts as the "federalization" of the Florida APA. See, e.g., Stephen T. Maher, *Getting Into the Act*, 22 FLA. ST. U. L. REV. 277, 295 (1994); Maher, *Angels*, *supra* note 50, at 769. Of course, not all of the provisions in the federal act are less preferable than the Florida APA. Indeed, the federal provisions requiring agencies to respond to written comments have been lauded frequently. See, e.g., *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1470 (7th Cir.) ("The opportunity under the APA to comment on proposed rules is 'meaningless unless the agency responds to significant points raised by the public.'" (quoting *Home Box Office, Inc. v. FCC.*, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977))), *cert. denied* 474 U.S. 902 (1985).

Professor Bonfield also has recommended that agencies be required to formally and clearly articulate the grounds for overruling arguments made against a rule. Bonfield, *supra* note 1, at 639.

60. Fla. HB 237, § 3 (1994) (proposed amendment to FLA. STAT. § 120.54(6) (1993)).

Later versions of House Bill 237 would have required an agency to conduct a public workshop if requested in writing by any affected person, unless the agency states in writing why a workshop is not necessary.<sup>61</sup> In addition, these later versions would have required an agency to provide a written response to written comments, if requested.<sup>62</sup> These measures were intended to make the agency more accountable and to provide the agency with an opportunity, and an inducement, to seek and consider public comment early in the rulemaking process, thereby avoiding later delays resulting from litigation.

### 3. *Economic Impact Statement*

From 1975 to 1992, the APA required agencies to prepare economic impact statements for virtually every proposed rule.<sup>63</sup> While the business community believed that an analysis of the economic impact should play a key role in the rulemaking process, early court decisions limited the effectiveness of this requirement,<sup>64</sup> and the quality and utility of these statements have varied greatly.<sup>65</sup> In addition, agencies often lack (or fail to commit) adequate resources to provide meaningful analyses of the economic impacts of proposed rules.<sup>66</sup>

In 1992, the Legislature sought to address some of the problems with economic impact statements by limiting the requirement that they be prepared for every rule.<sup>67</sup> Instead, agencies were to prepare mean-

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61. Fla. CS for HB 237, § 4 (1994) (proposed amendment to FLA. STAT. § 120.54(1)(d) (1993)).

62. Fla. CS for HB 237, § 4 (proposed amendment to FLA. STAT. § 120.54(3)(a) (1993)).

63. See FLA. STAT. § 120.54(2)(b) (1991).

64. See, e.g., *Florida-Texas Freight, Inc. v. Hawkins*, 379 So. 2d 944 (Fla. 1979) (requiring only substantial compliance with the economic impact statement requirement, absent a showing of prejudice).

65. See Patricia A. Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 FLA. ST. U. L. REV. 703, 723-24 (1991). Another commentator noted:

[I]t is hard to deny that the economic impact statement requirement, as followed by many agencies, has often proven to be a waste of effort. Agencies have sometimes assigned the task of preparing economic impact statements to unqualified individuals[,] and the quality, and hence the value, of many economic impact statements is suspect.

Maier, *supra* note 49, at 413-14.

66. See Dore, *supra* note 65, at 724. Some agencies, however, make considerable efforts to evaluate the economic impacts of a proposed rule. For example, the Florida Department of Environmental Protection has developed a two-page questionnaire that it routinely distributes to interested persons to analyze the economic effects of a proposed rule. See FLA. DEP'T OF ENVTL. PROTECTION, ECONOMIC INFORMATION QUESTIONNAIRE FOR AFFECTED PARTIES (on file with agency).

67. Ch. 92-166, § 4, 1992 Fla. Laws, 1670, 1673-76 (codified at FLA. STAT. § 120.54(2) (1993)). For a discussion of this legislation, see Maier, *supra* note 49, at 422-27; see also David W. Nam, *1992 Amendments to the Florida Administrative Procedure Act*, FLA. B.J., July/Aug. 1992, at 55.

ingful statements for only those rules that would result in substantial economic impact, or when requested by at least 100 people, an organization representing at least 100 people, or any domestic nonprofit corporation or association.<sup>68</sup>

These legislative changes proved to be ineffective in improving the quality of economic analyses,<sup>69</sup> and the business community again sought reforms in this area.<sup>70</sup> In fact, the initial version of House Bill 237 included a number of changes to make the economic impact statement more meaningful. For example, the initial version of the bill eliminated certain restrictions on challenges to the economic impact statement in an effort to provide for the enforcement of these requirements.<sup>71</sup>

Later versions of House Bill 237 reflect only some of these proposed reforms. These versions would have replaced the economic impact statement with a "statement of estimated regulatory cost."<sup>72</sup> This statement must include an estimate of direct, readily ascertainable costs associated with implementation of the rule.<sup>73</sup> In addition, a proposed rule could be determined invalid if the agency failed to prepare the required statement.<sup>74</sup>

#### 4. *Lowest Cost Alternative*

In adopting a rule, all agencies are required to evaluate alternative approaches to any regulatory objective and, to the extent allowed by

68. Ch. 92-166, § 4, 1992 Fla. Laws, 1670, 1673-76 (codified at FLA. STAT. § 120.54(2) (1993)).

69. Legislative committees heard repeated complaints regarding agency failure to consider the cost of complying with a proposed rule. See RECOMMENDATIONS FOR ADMINISTRATIVE RULEMAKING, *supra* note 8; see also FLORIDA TAXWATCH, INC., RESEARCH REPORT: STRENGTHENING ECONOMIC CONSIDERATIONS IN RULEMAKING (Feb. 1994) (on file with *The Florida State University Law Review*) [hereinafter TAXWATCH REPORT]; Williams memorandum, *supra* note 20 (noting that public testimony before legislative committees evidenced the failure of economic impact statements to provide any real assistance to the public); *A Chill in the Air*, MIAMI HERALD, Aug. 12, 1994, at A20 (commenting that state and local officials "mulling" new rules need to do a better job assessing the impact of the rule changes).

70. See, e.g., MARCELLE KINNEY, THE STATE OF FLORIDA'S ECONOMIC IMPACT STATEMENT PREPARATION PROCESS (1993); TAXWATCH REPORT, *supra* note 69.

71. Fla. HB 237, § 3 (1994) (proposed amendment to FLA. STAT. § 120.54 (1993)). One of these restrictions limits those persons who have standing to challenge an agency rule based upon an economic impact statement or lack thereof to certain described persons who filed a written request for preparation of a economic impact statement within a prescribed period. See FLA. STAT. § 120.54(2)(b),(d) (1993). In some instances, this restriction has foreclosed a challenge to an economic impact statement. See *Fla. East Coast Industries, Inc. v. Department of Comm'y Aff.*, 16 Fla. Admin. L. Rep. 1631, 1659-60 (1994). For a criticism of this restriction, see Maher, *supra* note 49, at 426-27.

72. Fla. CS for HB 237, § 4 (1994) (proposed amendment to FLA. STAT. § 120.54(2) (1993)).

73. *Id.*

74. *Id.*

law, choose the alternative that imposes the lowest net cost to society based upon the factors that are to be considered by the agency in preparing an economic impact statement, *or* provide a statement of the reasons for rejecting that alternative in favor of the proposed rule.<sup>75</sup> There is no sanction for an agency's failure to comply with the requirement,<sup>76</sup> however, so it often is ignored.

The business community felt that the intent of this requirement was laudable, and that a more careful evaluation of alternatives would result in better rules.<sup>77</sup> Accordingly, the initial version of House Bill 237 sought to put some teeth into this requirement by making an agency's failure to comply with this requirement grounds for determining that the rule constitutes an invalid exercise of delegated legislative authority.<sup>78</sup> In response, agencies complained that they could not possibly identify and evaluate *all* of the possible alternatives. Later versions of House Bill 237 addressed this complaint by authorizing an affected person to provide an agency with a written proposal for a lower cost alternative, and requiring the agency to either adopt the proffered alternative or to provide a written explanation of the agency's reasons for rejecting the alternative.<sup>79</sup>

### 5. Rulemaking Record

Some agencies employ rulemaking procedures that clearly document the rationale for a proposed rule. For example, certain agencies often use technical advisory committees and provide ample opportunity for public participation to establish the technical and factual underpinnings of a rule *before* the rule is adopted.<sup>80</sup> In other cases, however, agencies attempt to document the rationale for a rule *after* it becomes the subject of an administrative challenge, and in some instances seek

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75. FLA. STAT. § 120.54(12)(b) (1993).

76. *Id.*

77. For example, the Florida Department of Environmental Protection included in its economic impact statement on the proposed revisions to its Solid Waste Management Facilities Rule an analysis of the alternatives suggested by certain proponents of more stringent liner requirements. See FLA. DEP'T OF ENVTL. PROTECTION, ECONOMIC IMPACT STATEMENT FOR THE PROPOSED REVISIONS TO RULE 17-701, F.A.C., SOLID WASTE MANAGEMENT FACILITIES (Feb. 1994) (on file with agency). Accordingly, the agency head (here, the Environmental Regulation Commission) had before it an economic analysis of the proposed rule as well as other proffered alternatives.

78. Fla. HB 237, § 3 (1994) (proposed amendment to FLA. STAT. § 120.54(12)(b) (1993)).

79. Fla. CS for HB 437, § 4 (1994) (proposed amendment to FLA. STAT. § 120.54(12) (1993)).

80. For example, the Florida Department of Environmental Protection recently used a technical advisory committee comprised of recognized experts from outside the agency in considering suggested amendments to its rule governing solid waste management facilities. See FLA. DEP'T OF ENVTL. PROTECTION, SUMMARY REPORT ON FLORIDA'S LANDFILL LINER REGULATIONS (Feb. 25, 1994) (on file with agency). The agency also held a number of public workshops on this subject.

to defend the challenge based on a rationale not established, much less presented, when the agency head adopted the rule.<sup>81</sup>

The initial version of House Bill 237 would have required administrative agencies to establish a rationale for their rules *before* adoption.<sup>82</sup> In particular, the initial version of House Bill 237 would have required an agency to assemble the appropriate rulemaking record, and the bill provided that in defending challenges to a proposed rule the agency may offer only that rationale made part of the rulemaking record and relied on by the agency when it approved the proposed rule.<sup>83</sup>

Later versions of House Bill 237 reflected a more modest approach. They would have required the agency to compile a rulemaking record that would serve as a "legislative history" for the rule.<sup>84</sup> Among other things, the record would have included a written summary of workshops and hearings on the proposed rule, any written comments and the agency's response thereto, and a statement of estimated regulatory cost.<sup>85</sup> The rulemaking record would have included a detailed statement of the facts and circumstances justifying the proposed rule.<sup>86</sup> In addition, when a workshop is held, an agency would be required to ensure that appropriate personnel are available to explain the agency's proposal and to respond to appropriate questions or comments regarding the rule being developed.<sup>87</sup>

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81. In one case, the agency head adopted a new requirement over the recommendations of its technical staff and based only on a "gut reaction." *Waste Management of Fla., Inc. v. Department of Env'tl. Reg.*, 12 Fla. Admin. L. Rep. 2522, 2527-28 (1990). The agency's attorney thus was left with a challenging (and ultimately unsuccessful) task in defending the agency head's decision. *Id.*

82. Fla. HB 237, § 3 (1994) (proposed amendment to FLA. STAT. § 120.54(6) (1993)).

83. *Id.* (proposed amendment to FLA. STAT. § 120.54(4)(c) (1993)). One commentator suggests that the drawout proceeding in section 120.54(17), *Florida Statutes*, accomplishes the same result. See Maher, *Angels*, *supra* note 50, at 799. However, Maher concedes that this proceeding is rarely available. *Id.* at 805-11. See also George L. Waas, *The Limits Upon the Administrative Procedure Act's Drawout Remedy*, FLA. B.J., Dec. 1978, at 815.

84. Fla. CS for HB 237, § 4 (1994) (proposed amendment to FLA. STAT. § 120.54(6) (1993)). The APA was amended in 1992 to greatly restrict direct appeals from the adoption of administrative rules, and thereby eliminate the need for a rulemaking record for purposes of judicial review. See ch. 92-166, § 10, 1992 Fla. Laws 1670, 1679 (codified at FLA. STAT. § 120.68(15) (1993)); see also Maher, *supra* note 49, at 430-35.

85. Fla. CS for HB 237, § 4 (1994) (proposed amendment to FLA. STAT. § 120.54(6) (1993)).

86. *Id.* The rulemaking record would have included materials filed with JAPC pursuant to section 120.54(11)(a), and materials filed with the Department of State pursuant to section 120.54(11)(b). *Id.* These materials would have also included a detailed written statement of the facts and circumstances justifying the rule. *Id.*

87. *Id.* (proposed amendment to FLA. STAT. § 120.54(1)(d) (1993)). Cf. FLA. STAT. § 120.55(3) (1993) (the publication of a proposed rule must include the name of the person originating the rule and the name of the supervisor who approved the rule).

### 6. Time for Filing Challenges to Proposed Rules

Under existing law, administrative challenges to proposed rules must be filed within twenty-one days after the proposed rule is published.<sup>88</sup> An administrative agency may adopt a rule that is different from the proposed rule under certain circumstances.<sup>89</sup> Consequently, there have been instances in which an administrative agency has approved a rule that includes provisions that were not included in the proposed rule and were therefore not subject to an administrative challenge prior to adoption.<sup>90</sup>

The initial version of House Bill 237 sought to address this issue by extending the time for filing challenges to a proposed rule until after the agency head had determined whether to approve or modify the proposed rule.<sup>91</sup> Subsequent versions of House Bill 237 addressed this issue by requiring the agency to prepare both an initial notice of rule-making and a final notice.<sup>92</sup> The final notice would have been provided after the final public hearing on the rule, and would have contained the final text of the proposed rule as approved by the agency head. Administrative challenges could then be filed within twenty-one days after publication of the final text.<sup>93</sup> This provision

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88. FLA. STAT. § 120.54(4)(b) (1993).

89. After publication of a proposed rule, the agency may make: (1) such changes in the rule as are supported by the record of public hearings held on the rule, (2) technical changes that do not affect the substance of the rule, (3) changes in response to written material relating to the rule received by the agency within 21 days after the notice and made a part of the record of the proceeding, or (4) changes in response to a proposed objection by the committee. FLA. STAT. § 120.54(13)(b) (1993).

90. See, e.g., *Northern Palm Beach County Water Control Dist. v. Loxahatchee River Envtl. Control Dist.*, 16 Fla. Admin. L. Rep. 120 (1994); *Shellfish Farmers Ass'n, Inc. v. Florida Marine Fisheries Comm'n.*, 12 Fla. Admin. L. Rep. 39 (1989); *Organized Fishermen of Fla. v. Marine Fisheries Comm'n.*, 11 Fla. Admin. L. Rep. 1258 (1988), *aff'd*, 544 So. 2d 204 (Fla. 1st DCA 1989); *Sierra Club v. Department of Envtl. Reg.*, 11 Fla. Admin. L. Rep. 114 (1989); see also James W. Linn, *Rulemaking and Incipient Policy: When is a Rule Not a Rule, When is a Rule Change a New Rule, and Who Cares?*, FLA. B.J., Mar. 1990, at 63, 65-66.

91. Fla. HB 237, § 3 (1994) (proposed amendment to FLA. STAT. § 120.54(4)(b) (1993)).

92. Fla. CS for HB 237, § 4 (1994) (proposed amendment to FLA. STAT. § 120.54(1)(b) (1993)). One commentator has criticized the approach reflected in the subsequent versions of House Bill 237, and questioned why Florida business interests would endorse the proposal. See Stephen T. Maher, *Getting Into the Act*, 22 FLA. ST. U. L. REV. 277, 301 (1994). In fact, business interests did not "endorse" this approach; rather, business groups recognized the need to address a genuine problem and suggested the simpler method described in the initial version of House Bill 237. See *supra* note 91 and accompanying text. The approach requiring seemingly duplicative filing was developed by the committee staff and initially approved by the House in the form of House Bill 835. See Fla. H.R. Select Comm. on Agency Rules and Admin. Procs., HB 835 (1994) Final Bill Analysis 3-5 (Apr. 21, 1994) (on file with comm.) [hereinafter Select Committee Final Bill Analysis].

93. Fla. CS for HB 237, § 4 (1994) (proposed amendment to FLA. STAT. § 120.54(4)(b) (1993)).



was designed to minimize unnecessary challenges to proposed rules and provide a clear opportunity to challenge changes in proposed rules.<sup>94</sup>

#### 7. Failure to Comply with Rulemaking Procedures

As can be seen, the initial version of House Bill 237 would have added several new requirements that were designed to improve the rulemaking process.<sup>95</sup> Agency personnel and others expressed concern that the inadvertent failure to comply with these requirements would have created new grounds for administrative challenges to proposed rules based on mere "technicalities."<sup>96</sup>

Later versions of House Bill 237 sought to balance these competing interests by providing that an agency's failure to address the required procedures creates a rebuttable presumption that the agency materially failed to follow the rulemaking procedure,<sup>97</sup> which in turn provides a basis for invalidating a rule.<sup>98</sup> Thus, the rule would not be determined invalid if the agency met its burden of demonstrating that the noncompliance was not material.

### IV. PROSPECTS FOR THE FUTURE

The need for rulemaking reform is well documented.<sup>99</sup> The reforms proposed during the 1994 session were carefully developed.<sup>100</sup> Indeed,

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94. *Id.*; Select Committee Final Bill Analysis, *supra* note 92.

95. *See supra* notes 11-18 and accompanying text.

96. *See, e.g.*, Fla. H.R. Select Comm. on Agency Rules and Admin. Procs., tape recording of proceedings (Feb. 8, 1994) (on file with comm.) (testimony of David Gluckman, representing Florida Wildlife Federation, the Florida League of Anglers, and Save Our Manatee Club).

97. New language creating this rebuttable presumption is included in the provisions requiring an agency: (1) to include certain items in the notice of rule development; (2) to respond to a request for a public workshop; (3) to provide the required notice 21 days before a workshop and to ensure that appropriate personnel are available at the workshop; (4) to provide a written response to written comments; (5) to consider alternatives offered by the Small Business Ombudsman; and (6) to provide a written explanation of its reasons for rejecting a written proposal for a lower-cost regulatory alternative to a proposed rule that substantially accomplishes the statutory directive. *See* Fla. CS for HB 237, § 3 (1994) (proposed amendment to FLA. STAT. § 120.54(1)(c)-(d), (3)(a)-(b), (12) (1993)).

The creation of this rebuttable presumption also reflects the approach Judge Zehmer advocated in his dissent in *Carter v. Department of Pro. Reg.*, 613 So. 2d 78, 91 (Fla. 1st DCA 1993) (Zehmer, J., dissenting) (the agency should have the burden of showing that demonstrated violations ought to be excused for good cause or other lawfully sufficient reasons, and further, notwithstanding these violations, that the other party has not suffered any substantial prejudice as a result thereof), *aff'd*, 633 So. 2d 3 (Fla. 1994).

98. *See* FLA. STAT. § 120.52(8)(a) (1993) (defining "invalid exercise of legislative authority"); *see also supra* note 97.

99. *See supra* notes 3-10 and accompanying text.

100. *See supra* part III.

some of the proposed reforms were modelled after procedures already in use by state agencies,<sup>101</sup> some proposed reforms were similar to those suggested by administrative law scholars,<sup>102</sup> and another proposal was borrowed from the Model State Administrative Procedure Act.<sup>103</sup>

Both the House and Senate repeatedly passed measures that contained some version of these proposed reforms,<sup>104</sup> and this legislation failed to become law only because the two chambers could not agree on precisely how *much* reform was appropriate.<sup>105</sup> The business community and key legislators remain committed to legislation with some or all of these reforms,<sup>106</sup> however, so watch for similar measures to be considered again in 1995.

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101. See *supra* notes 63-74 and accompanying text.

102. See *supra* notes 36-37 and accompanying text.

103. See *supra* note 59 and accompanying text.

104. Committee Substitute for House Bill 237 first passed the House as amended on April 4. FLA. H.R. JOUR. 1071 (Reg. Sess. 1994). It then passed the Senate as amended four days later. FLA. S. JOUR. 1026, 1058 (Reg. Sess. 1994). Later that day, the House concurred in the Senate amendments as amended, and requested that the Senate concur. FLA. H.R. JOUR. 1649, 1667 (Reg. Sess. 1994). On the final day of the extended Regular Session, the Senate amended the House amendments, concurred in the House amendments as amended, and requested the House concur. FLA. S. JOUR. 1445-46, 1658 (Reg. Sess. 1994). The House concurred in one amendment and refused to concur in the other three Senate amendments. FLA. H.R. JOUR. 2130-31 (Reg. Sess. 1994). The bill then died in returning messages to the Senate. The House and Senate "communicate with each other by messages. Each bill is transmitted from one house to the other by a document which tells what action has been taken." THE LANGUAGE OF LAWMAKING IN FLORIDA 45 (Allen Morris ed., 1984). A bill may remain in messages either because one chamber does not have time to take up the measure, or chooses not to as a bargaining technique.

105. In the end, the Senate and the House disagreed on only a few issues. The Senate continued to insist on the addition of a new provision expressly providing that a grant of rulemaking authority is not, in and of itself, sufficient to allow an agency to adopt a rule; rather, an agency may only adopt rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. See amendment 1 to Fla. CS for HB 237, § 5 (1994) (proposed FLA. STAT. § 120.534); FLA. S. JOUR. 1016, 1018 (Reg. Sess. 1994). The House and Senate also disagreed as to whether bill analyses should be admissible as evidence of legislative intent. Compare Fla. CS for HB 237, § 9 (1994) (proposed amendment to FLA. STAT. § 120.58(4) (1993)) (providing that admissible evidence of legislative history shall include floor debates, House and Senate bill analyses, economic impact statements, and fiscal notes) with Senate amendment 1 to Fla. CS for HB 237, § 11 (1994) (proposed amendment to FLA. STAT. § 120.58(4) (1993)) (excluding floor debates, House and Senate bill analyses, economic impact statements, and fiscal notes as evidence of legislative history).

106. Similar legislation also was filed, but not considered, during the brief special session on health care held June 7-9, 1994. See Fla. HB 87-D (1994).