# THE THIRD TIME'S THE CHARM: FLORIDA FINALLY ENACTS RULEMAKING REFORM

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## I. INTRODUCTION

> 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.[1]

So began an article on the 1994 proposals for rulemaking reform in Florida.[2] And, indeed, recently the quest in Florida for an ideal administrative procedure has been a hardy perennial: in 1994, the Florida Legislature extensively debated a comprehensive measure to amend Florida's Administrative Procedure Act (APA);[3] in 1995, it passed a similar measure[4] that was vetoed by Governor Lawton

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

2. Lawrence E. Sellers, Jr., *1994 Proposals for Rulemaking Reform*, 22 FLA. ST. U. L. REV. 327, 327 (1994).

3. Fla. CS/HB 237 (1994).

4. Fla. CS/CS/SB 536 (Reg. Sess. 1995).

Chiles;[5] and in 1996, it ultimately enacted APA reform legislation that was signed by the Governor.[6]

This Article reviews the development of the changes to the rulemaking process that were ultimately enacted in 1996 as part of comprehensive revisions to Florida's APA.[7] Part II provides a brief legislative history of the evolution of these changes. Part III includes a detailed description of these rulemaking reforms. Part IV describes the new and revised avenues for those challenging agency rules.

## II. BRIEF LEGISLATIVE HISTORY

### A. *1994: Close, But No Cigar*

The Legislature's latest effort to reform the APA began in earnest in 1994.[8] Armed with the recommendations of select legislative commit-

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5. Letter from Governor Lawton Chiles to Secretary of State Sandra Mortham (July 12, 1995) (announcing veto of Florida Committee Substitute for Committee Substitute for Senate Bill 536) [hereinafter Governor's Veto Message].

6. 1996 Fla. Laws ch. 96-159.

7. The 1996 APA legislation also addressed a number of subjects other than rulemaking. For a detailed discussion of some of these other topics, see Donna E. Blanton & Robert M. Rhodes, *Loosening the Chains that Bind: The New Variance and Waiver Provision in Florida's Administrative Procedure Act*, 24 FLA. ST. U. L. REV. 353 (1997) [hereinafter *New Variance*]; F. Scott Boyd, *Legislative Checks on Rulemaking Under the New APA*, 24 FLA. ST. U. L. REV. 309 (1997); Wade L. Hopping & Kent Wetherell, *The Legislature Tweaks* McDonald *Again: The New Restrictions in Florida's Administrative Procedure Act on the Use of "Unadopted" Rules and "Incipient Policies" by Agencies*, 48 FLA. L. REV. 135 (1996); Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 FLA. ST. U. L. REV. 283 (1997). For a general discussion of the 1996 legislation, see Donna E. Blanton & Robert M. Rhodes, *Florida's Revised Administrative Procedure Act*, 70 FLA. B.J. 30 (July/Aug. 1996) (outlining the history and development of Florida's APA) [hereinafter *Revised APA*]; James P. Rhea & Patrick L. "Booter" Imhof, *An Overview of the 1996 Administrative Procedure Act*, 48 FLA. L. REV. 1 (1996).

A special issue of the *Florida Bar Journal*, 71 FLA. B.J., Mar. 1997, also contains a number of articles reviewing various subjects covered by the 1996 APA legislation, including: Linda M. Rigot & Ralph A. Demeo, *Florida's 1996 Administrative Procedure Act*, at 12; Lawton Chiles, *On Rules Reduction and Rational Executive Branch Reform*, at 16; Wade L. Hopping, Lawrence E. Sellers & Kent Wetherell, *Rulemaking Reforms and Nonrule Policies: A "Catch-22" for State Agencies?*, at 20; Patrick L. "Booter" Imhof & James P. Rhea, *Legislative Oversight*, at 28; Donna E. Blanton & Robert M. Rhodes, *The New Variance and Waiver Provision*, at 35; Dan R. Stengle & S. Curtis Kiser, *Adjudicatory Proceedings and Pending Proceedings*, at 40; William E. Williams & Vikki R. Shirley, *Legislative Reform of Disputed Competitive Procurement Decisions*, at 45; Deborah K. Kearney & Kent Wetherell, *The Practitioner's "Road Maps" to Revised APA*, at 53; Martha Edenfield, *Attorneys' Fees and Costs*, at 73; and Carol A. Forthman, *Resolving Administrative Disputes*, at 77.

8. Both houses of the Legislature began to lay the groundwork even before 1994. The Florida House of Representatives Select Committee on Agency Rules & Administrative

tees[9] and the support of the business community,[10] both houses developed comprehensive proposals for revisions to the APA. Representatives Sam Mitchell[11] and Ken Pruitt[12] were the primary sponsors of the principal House bill, House Bill 237.[13] Senator Charles Williams[14] was the primary sponsor of the principal Senate bill.[15] House Bill 237 was co-sponsored by virtually all of the 120 members of the House, so it ultimately received the most consideration by the Legislature during the 1994 Regular Session.[16]

Although House Bill 237 did not become law,[17] it proposed reforms in three key areas: legislative oversight of rulemaking,[18] limitations on

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Procedures was created 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*, 68 FLA. B.J. 57, 57 (July/Aug. 1994). The Florida Senate Select Committee on Governmental Reform was established in September 1993 to improve "the effectiveness and efficiency of state government" and "to ensure that all agency rules are based on statutory authority and that the rules do no more than the law requires." *Id.*

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

10. The Florida Chamber and other business groups actively promoted legislative changes. *See* Sellers, *supra* note 2, at 329 (referencing the support of Florida's administrative bodies in regard to APA reform); Sally Bond Mann, *Reforming the APA: Legislative Adventures in the Labyrinth*, 22 FLA. ST. U. L. REV. 307, 319-22 (1994) (discussing the intensive lobbying efforts of the Florida Chamber with regard to regulatory reform).

11. Dem., Vernon, 1956-60, 1978-94. Representative Mitchell's support for this legislation was recognized when the bill was later renamed the "Sam Mitchell Good Government Act." FLA. H.R. JOUR. 1041 (Reg. Sess. 1994).

12. Repub., Port St. Lucie.

13. FLA. LEGIS., HISTORY OF LEGISLATION, 1994 REGULAR SESSION, HISTORY OF HOUSE BILLS at 21, HB 237.

14. Dem., Tallahassee.

15. *See* FLA. LEGIS., HISTORY OF LEGISLATION, 1994 REGULAR SESSION, HISTORY OF SENATE BILLS at 125, SB 1440.

16. Twenty-four bills dealing with substantive changes to the APA were filed during the 1994 Regular Session. Sellers, *supra* note 2, at 330, n.14.

17. FLA. LEGIS., HISTORY OF LEGISLATION, 1994 REGULAR SESSION, HISTORY OF HOUSE BILLS at 21, HB 237.

18. *See* Fla. CS/HB 237, § 1 (Reg. Sess. 1994).

rulemaking authority,[19] and changes to the rulemaking process.[20] Changes to the rulemaking process were designed "to encourage agencies to provide meaningful opportunities for public participation, to evaluate the economic impacts of the proposed rule as well as reasonable alternatives, and to establish the rationale for their rules before adoption."[21] Specific proposals for rulemaking reform included: (1) additional notice requirements;[22] (2) provisions regarding public workshops;[23] (3) changes to the economic impact statement requirement;[24] (4) provisions that would put some teeth into the requirement that agencies consider the lowest cost alternative;[25] (5) requirements that an agency develop a rulemaking record that would serve as a "legislative history" for the rule;[26] (6) changes in the time for filing challenges to proposed rules;[27] and (7) provisions specifying that the agency's failure to comply with rulemaking requirements created a rebuttable presumption that the rule is invalid.[28]

In 1994, both the House and the Senate repeatedly passed measures that contained some version of the reforms proposed in House Bill 237. These measures failed to pass only because the two chambers could not agree on precisely how much reform was appropriate.[29]

## B. *1995: Still No Cigar*

### 1. The Governor Gets on the Bandwagon

Key legislators and the business community remained committed to these proposed reforms, and similar legislation was again filed during the 1995 legislative session.[30] In addition, Governor Lawton Chiles

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19. *See id.* § 3.
20. *See id.* §§ 3-4.
21. *See* Sellers, *supra* note 2, at 336.
22. *See* Fla. CS/HB 237, § 4 (Reg. Sess. 1994).
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.* § 3.
29. *See supra* note 11. In the end, the Senate and the House disagreed on only a few issues. Sellers, *supra* note 2, at 344 n.105. The Senate continued to insist on the addition of a new provision designed to limit an agency's administrative rulemaking authority. *Id.* The House wanted a provision that allowed floor debates, House and Senate bill analyses, economic impact statements, and fiscal notes to serve as admissible evidence of legislative history. *Id.* For an excellent description of the 1994 legislative effort, including the final deliberations on the bill, see Mann, *supra* note 10.
30. In the Senate, the Committee on Governmental Reform and Oversight and Senator

jumped on the regulatory reform bandwagon. He sought to bring common sense back to government, and he specifically called for a 50% reduction in the number of agency rules.[31] Governor Chiles even issued an executive order implementing his rule reduction program.[32]

The Governor renewed this call for rule reduction in his opening day address to the Legislature.[33] He specifically asked the Legislature to enact a measure that would sunset all of the executive branch rules by the end of the 1996 session of the Legislature, with an exception for those rules found to be necessary either by the Governor or the Legislature.[34] Significantly, the Governor also called for the repeal of Florida Statutes section 120.535,[35] a provision enacted in 1991 that

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Charles Williams developed Senate Bill 536. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 68, SB 536. In the House, the principal work product was House Bill 2543, by the House Select Committee on Streamlining Government and Representative Ken Pruitt. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF HOUSE BILLS at 376, HB 2543. Both measures contain provisions that were very similar to those in the ill-fated 1994 APA legislation. *See supra* note 11.

The 1995 legislation also contained a number of provisions, including proposed rulemaking reforms, that were developed and supported by the Florida Chamber and other business groups. *See, e.g.*, Lucy Morgan, *Legislators Take Aim at Rules*, ST. PETERSBURG TIMES, Jan. 10, 1995, at B4.

31. Governor Lawton Chiles, Inaugural Address (Jan. 3, 1995), *in Government Don't Work—People Work*, TALLAHASSEE DEMOCRAT, Jan. 4, 1995, at A11 [hereinafter Inaugural Address]; *see also* Diane Hirth & Michael Griffin, *Chiles Promises Less Bureaucracy, More Ambition*, SUN-SENTINEL (Ft. Lauderdale), Jan. 4, 1995, at 1A.

The Governor readily admitted that his call for common sense in government was influenced by his reading of a book on the subject, PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994). Governor Lawton Chiles, State of the State Address, *in* FLA. H.R. JOUR. 23-24 (Reg. Sess. Mar. 7, 1995) [hereinafter State of the State Address]. The book and the Governor's call for rule reduction have been criticized by at least one commentator. Stephen T. Maher, *The Death of Rules: How Politics Is Suffocating Florida*, 8 ST. THOMAS L. REV. 313, 318-21 (1996).

32. Fla. Exec. Order No. 95-74 (Feb. 27, 1995). Among other things, the executive order directed each agency to conduct a review of its rules and to repeal immediately any rules that were determined to be obsolete. *Id.*

33. State of the State Address, *supra* note 31, at 24; *see also* Craig S. Palosky, *Politicians Vow to Slash Bureaucracy*, TAMPA TRIB., Mar. 11, 1995, at 10; Diane Hirth, *Chiles Talks of Cutting Red Tape but Tax Reform Still on Agenda*, ORLANDO SENTINEL, Mar. 8, 1995, at A6; Meg James & Larry Kaplow, *Chiles' Refrain: Cut Rules*, PALM BEACH POST, Mar. 8, 1995, at 1A.

34. State of the State Address, *supra* note 31, at 25. A few weeks later, the Governor reiterated a proposal made in his State-of-the-State speech to repeal all state rules and regulations except those protecting public health and safety, and he proposed to repeal most of the APA. *Chiles Seeks to Repeal Act in Effort to Slice Red Tape*, ORLANDO SENTINEL, Mar. 31, 1995, at C5. The Governor's proposal to repeal the APA was never heard in either house.

35. State of the State Address, *supra* note 31, at 25.

requires agencies to adopt their policies as written, published rules.[36] This latter proposal ultimately proved to be very controversial with both the Legislature and the business community.[37]

### 2. The 1995 Legislation

Both the House and the Senate again developed legislative measures that were designed to make comprehensive changes to the APA.[38] The 1995 legislation included many measures very similar to those developed in 1994. A number of these provisions made changes to the rulemaking process. As in 1994, these changes were designed to help agencies make better rules by encouraging agencies to provide meaningful opportunities for public participation[39] and by requiring agencies to evaluate the economic impact of proposed rules as well as reasonable alternatives.[40] The 1995 legislation also included some new features which were intended to level the playing field in disputes between

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36. FLA. STAT. § 120.535 (1991). In 1991, the Legislature enacted § 120.535, Florida Statutes, to encourage administrative agencies to adopt their policies as rules. *See* Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudications and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U. L. REV. 437 (1991); 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); *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); David W. Nam & Barry Kling, *Agency Implementation of Delegated Authority: Toward Compliance with Legislative Intent*, 65 FLA. B.J. 64 (Feb. 1991).

37. For a detailed description of the controversy over § 120.535, see Hopping & Wetherell, *supra* note 7. For another commentator's views on this controversy, see Stephen T. Maher, *Why Florida Needs Section 120.535, Florida Statutes*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Dec. 1995, at 2.

38. In the Senate, the Committee on Governmental Reform and Oversight and Senator Charles Williams developed Senate Bill 536. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 68, SB 536. In the House, the principal work product was House Bill 2543, by the House Select Committee on Streamlining Government and Representative Ken Pruitt. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF HOUSE BILLS at 376, HB 2543.

39. Fla. CS/CS/SB 536, § 6, at 14-16 (1995). The 1995 legislation sought to provide meaningful opportunities for public participation by: (1) requiring agencies to publish notice of rule development before the proposed rule is published; (2) requiring agencies to hold public workshops, if requested; (3) authorizing agencies to use negotiated rulemaking in an effort to develop consensus on a proposed rule before it is published; and (4) requiring the notice of proposed rule to include certain additional information. *Id.*

40. *Id.* at 17-18. The 1995 legislation would have required agencies to prepare a new statement of estimated regulatory costs that specifically considers the costs likely to be incurred by those required to comply with the proposed rule. *Id.* The legislation also would have required the agency to consider reasonable alternative methods for achieving the purpose of the proposed rule. *Id.*

government and the public[41] or to advance the Governor's rule-reduction efforts.[42]

Significantly, however, the legislation did not repeal section 120.535, principally because both the Legislature and the business community strongly opposed the repeal of its mandate that agency policies by adopted as published rules.[43] While the Legislature and the business community clearly supported the Governor's efforts to reduce the regulatory burden,[44] they did not wish to return to the days of "phantom government."[45] Instead, the Legislature and the business communi-

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41. Fla. CS/CS/SB 536, § 6, at 32 (Reg. Sess. 1995). The 1995 legislation sought to level the playing field in rule challenges in several respects. For example, the legislation would have removed the judicially-created presumption that a rule is valid; rather, the challenger would have been required to identify its objections to the proposed rule, and the agency then had the burden to prove the validity of the rule as to the objections raised. *Id.* If the agency failed to meet its burden of proof, then it could be required to pay the challenger's costs and attorneys fees. *Id.*; *see also* Michael Griffin, *New Bill Designed to Streamline Rules; Measure Would Make Regulation Simpler*, SUN-SENTINEL (Ft. Lauderdale), Mar. 17, 1995, at 14A.

42. Fla. CS/CS/SB 536, § 8, at 44 (Reg. Sess. 1995). The 1995 legislation would have created an expedited repeal process to facilitate the Governor's stated desire to repeal a large number of agency rules. *Id.* The 1995 legislation also would have required each agency to review its rules and to file a report with the Legislature and the Governor. *Id.* The report must identify ways to simplify and clarify rules and regulatory schemes, identify rules that are appropriate for variance or waivers or special circumstances, and identify rules that the agency determines should be reviewed by the Legislature for clarification of legislative authority or intent. *Id.* at 45-46.

43. *Id.* at 18. Technically speaking, the 1995 legislation would have repealed § 120.535. *Id.* However, most of § 120.535 simply would have been transferred to a new section, § 120.547, and this new section would have continued to expressly state that rulemaking is the preferred method of implementing policy. *Id.* at 51.

44. Lucy Morgan, *Campaign to Rein in Rules Is on Its Way*, ST. PETERSBURG TIMES, Mar. 29, 1995, at B5 (stating that "the Governor's words fell on sympathetic ears in the Legislature and at the Florida Chamber of Commerce, where officials are fighting what they say are excessive regulations that hamstring the state's businesses"); Randolph Pendleton, *Getting Rid of State Regulations a Slow Process*, FLORIDA TIMES-UNION, May 28, 1995, at B1 (stating that "[r]emoving superfluous verbiage from the administrative code may be laudable, but it does not solve the problems of businesses that say they are over regulated").

The Governor's rule reduction efforts were intended to reduce the regulatory burden on Florida's citizens and businesses. Morgan, *supra*, at 5B. However, some state agencies have sought to achieve the Governor's 50% rule reduction goal in ways that do not really reduce this regulatory burden. In several cases, agencies sought to achieve the rule reduction goal by consolidating many existing rules into a smaller number of rules. Bill Cotterell, *About Pay Hikes, Watchdogs and Cutting Red Tape*, TALLAHASSEE DEMOCRAT, July 8, 1996, at B1. For example, the Department of Transportation proposed to repeal 15 rules and adopt one single rule that incorporates word-for-word all of the repealed rules. *Id.*

45. "It would be the worst kind of phantom government. . . . It would take us back to the day when what we had was totally arbitrary government. Agencies were totally controlled by good ol' boy politics and citizens couldn't get a fair shake from their government." Morgan,

ty continued to take the position that, if government were going to impose requirements on its citizens, then these requirements should be both published where citizens can find them[46] and developed through a rulemaking process that encourages public participation, analyzes the economic impacts of the proposed rule, and considers lower cost alternatives.[47]

Later in the 1995 legislative session, the Legislature passed Committee Substitute for Committee Substitute for Senate Bill 536 (hereinafter CS/CS/SB 536) with little dissent[48] and then sent it to the Governor on June 27, 1995.[49]

### 3. The Governor's Veto

On July 12, 1995, the Governor vetoed the bill.[50] In his veto message, the Governor recognized the Legislature's considerable efforts,[51] but expressed disagreement with the "fundamental approach" taken by CS/CS/SB 536 to the Executive Branch of government.[52] Specifically, he found fault with the bill because it failed to address two legislative proposals he had suggested: the repeal of section 120.535 and the sunset of all Executive Branch rules by the end of the 1996 legislative session, with an exception for those rules found essential to the protection of public health and safety either by the Governor or the

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*supra* note 44, at B5 (quoting Tom Pelham).

"Phantom government" was a phrase used by Senator Dempsey Barron to describe the time before the enactment of the 1974 APA. Maher, *supra* note 31, at 329. "At that time, rules were kept in bureaucrats' desk drawers and only agency insiders knew them. Everyone else found out about the rules the hard way, for example, by running afoul of them." *Id.*; *see also* Stephen T. Maher, *Getting Into the Act*, 22 FLA. ST. U. L. REV. 277, 280 (1994).

46. *E.g.*, Kevin Metz, *Lobbyists Impel Legislature to Snip Red Tape Cautiously: Lawmakers Accept Chiles' Challenge to Reduce Government Bureaucracy*, TAMPA TRIB., Jan. 10, 1995, at 6.

47. *E.g.*, Morgan, *supra* note 30, at 4B; Mark Hollis, *Cutting Rules Proves Tricky*, GAINESVILLE SUN, Dec. 31, 1995, at B1.

48. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS, SB 536, at 68.

49. *Id.*

50. *Id.*; *see also* Craig Quintana, *Chiles Scuttles Regulatory-Reform Bill*, ORLANDO SENTINEL, July 13, 1995, at C1; Kevin Metz, *Red Tape Legislation Rejected*, TAMPA TRIB., July 13, 1995, Florida/Metro, at 1.

51. Governor's Veto Message, *supra* note 5, at 2. The Governor praised much of the 1995 legislation, and he commended key legislators, including Senator Williams and Representative Pruitt. *Id.* He also expressed his gratitude to the members of the Florida House of Representatives Select Committee on Streamlining Government Regulations, chaired by Representative Bud Bronson (Dem., Kissimee). *Id.*

52. *Id.*

Legislature.[53] The Governor also faulted the bill because it provided neither for flexibility in decisionmaking nor for a simplified APA.[54] The Governor was particularly critical of proposed changes to the rulemaking process, characterizing them as making the process "more convoluted, involved and tangled than ever before."[55]

### 4. The Governor's APA Review Commission

On the same day that he vetoed CS/CS/SB 536, the Governor issued a second executive order.[56] In that executive order, the Governor reaffirmed his commitment to rules reduction,[57] and he directed administrative agencies to take immediate steps to repeal those rules described in the prior executive order.[58]

The second executive order also established the Governor's APA Review Commission.[59] Among other things, the Commission was directed to review the impact of the present APA, the impact of section 120.535, and the compatibility of the present APA with the Governor's efforts both to reduce the number of rules in state government and to restore common sense to government decisionmaking.[60] The Commission was directed to report its findings by no later than February 1, 1996.[61]

The Governor's APA Review Commission held six meetings and then issued its report.[62] The Commission included six legislators, representatives of interest groups that had been actively involved in the development of the 1994 and 1995 legislation, and the Governor's own chief of staff.[63] The Commission's deliberations therefore provided a

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53. *Id.*

54. *Id.* at 3.

55. *Id.*

56. Fla. Exec. Order No. 95-256 (July 12, 1995).

57. *Id.* at 2.

58. *Id.* § 2, at 2-3. Florida Executive Order No. 95-74 requires each agency to conduct a review of its rules and to repeal immediately any rules determined to be obsolete. *See supra* note 32.

59. *Id.* § 7, at 6-7.

60. *Id.* at 6.

61. *Id.* at 7.

62. GOVERNOR'S ADMIN. PROC. ACT REV. COMM'N, FINAL REPORT (Feb. 20, 1996) [hereinafter APA COMM'N REPORT]. For a brief description of some of the Commission's recommendations, see Blanton & Rhodes, *Revised APA, supra* note 7, at 30.

63. APA COMM'N REPORT, *supra* note 62. The six legislators included Representatives Ken Pruitt (Repub., Port St. Lucie), Bud Bronson (Dem., Kissimee), David Bitner (Repub., Port Charlotte) and Dean Saunders (Dem., Lakeland), and Senators Locke Burt (Repub., Ormond Beach) and Rick Dantzler (Dem., Winter Haven). The Governor's chief of staff, Linda Loomis Shelley, also served on the Commission. *Id.*

meaningful opportunity to address the principal issues that had caused the Governor to veto the 1995 bill.

The Commission's final report addressed a number of these difficult issues, including the Governor's request to repeal section 120.535.[64] The Commission recommended that this section be retained,[65] but that the Legislature create a new provision in the APA that gives agencies flexibility by authorizing them, under certain circumstances, to grant variances and waivers to their own rules.[66] The Commission also considered some of the proposed changes to the rulemaking process contained in the vetoed 1995 legislation. The Commission recommended that most of these be enacted with only relatively minor changes.[67]

### C. *1996: The Third Time's the Charm*

The Commission's recommendations were released just prior to the 1996 Regular Session. In his opening address to the 1996 Regular Session of the Legislature, the Governor expressed his support for these recommendations and urged the Legislature to pass the proposed reforms.[68] The Commission's recommendations, including many of the elements of the vetoed 1995 legislation, were ultimately incorporated within legislation introduced in 1996.[69]

As in previous years, Senator Charles Williams and Representative Ken Pruitt served as key sponsors of the agency reform legislation,[70]

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64. *Id.* at 18.

65. *Id.* at 19.

66. *Id.* at 9-15. For a detailed description of the new variance and waiver provision, see Blanton & Rhodes, *New Variance, supra* note 7.

67. *See* APA COMM'N REPORT, *supra* note 62, at app. F (minutes of Feb. 8, 1996, meeting). The Commission was advised that most of the proposed rulemaking reforms were noncontroversial items from the 1995 legislation that the Governor did not oppose. *See id.* (referring to Memorandum dated Feb. 5, 1996, from Dan Stengle, Deputy Chief of Staff for Governor Lawton Chiles, to Donna E. Blanton, Executive Director of the Governor's Administrative Procedure Act Review Commission, regarding non-controversial elements of 1995 APA bill). The Commission did recommend certain changes to some of the rulemaking reforms, such as those relating to presumptions, costs, and attorneys' fees and regulatory costs. *Id.* at 27-33; *see also infra* notes 120, 134 & 182.

68. State of the State Address, FLA. H.R. JOUR. 10, 12 (Reg. Sess. Mar. 5, 1996).

69. *E.g.*, House Bill 1179 and Senate Bills 2288 & 2290. There also was much talk of efforts to override the Governor's veto of the 1995 legislation. Meg James, *High Priority Rules Reform Bill Advances*, PALM BEACH POST, Apr. 4, 1996, at 11A.

70. Senator Williams was the primary sponsor of Senate Bill 2290. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS, at 174, SB 2290. Representative Pruitt was one of the many primary sponsors of House Bill 1179, the principal APA legislation in the House. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 317, HB 1179. Representative Pruitt also served on the Governor's APA Review Commission. *See supra* note 63.

which also enjoyed the strong support of the business community.[71] The legislation proceeded through each house with little debate or dissent and finally passed the Legislature in the form of Committee Substitute for Senate Bills 2290 and 2288 (hereinafter CS/SB 2290)[72] on April 25, 1996.[73] The measure was subsequently presented to the Governor, who signed it with great fanfare at a well-attended bill signing ceremony on May 1, 1996.[74] Governor Chiles stated that he was "pleased" with the legislation,[75] although a careful review of the 1996 legislation reveals that it still contains some of the same features that were criticized by the Governor in his 1995 veto message, including the retention of section 120.535[76] and the same proposed changes to the rulemaking process.[77] The law became effective on October 1, 1996.[78]

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71. As in the prior two years, the Florida Chamber and its Governmental Reform Committee were actively involved in the development of the 1996 APA legislation. Members of the Florida Chamber's Governmental Reform Committee during 1996 included Doug M. Mann (chair), Wade L. Hopping, William D. Hunter, William E. Williams and Lawrence E. Sellers, Jr.

The Administrative Law Section of The Florida Bar also took an active role in the development of the 1996 APA legislation. *See* Rigot & DeMeo, *supra* note 7, at 14. The Section's efforts were led by Linda M. Rigot (chair), a hearing officer with the Division of Administrative Hearings, and William E. Williams (chair-elect), a former hearing officer and experienced private practitioner. *See, e.g.*, Linda M. Rigot, *From the Chair*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, May 1996, at 1; Linda M. Rigot, *From the Chair*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Mar. 1996, at 1, 17; *Section Adopts Position on APA Reform*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Dec. 1995, at 12; *Administrative Law Section Ideological and Legislative Position on APA "Reform," id.* at 13.

72. Senate Bill 2290 was originally sponsored by Senator Charles Williams (Dem., Tallahassee). Senate Bill 2288 was originally sponsored by Senator Rick Dantzler (Dem., Winter Haven), who also served on the Governor's APA Review Commission. The two bills were combined after introduction as Senate Bill 2290. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 174, SB 2290. For a more detailed discussion of the history of the 1996 legislation, see Rhea & Imhof, *supra* note 7.

73. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 174, SB 2290; *see also Bill Makes It Easier for Citizens to Challenge Government Red Tape*, PALM BEACH POST, Apr. 26, 1996, at 11B.

74. FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 174, SB 2290; *see also* Bill Cotterell, *Law Provides Scissors for Red Tape*, TALLAHASSEE DEMOCRAT, May 2, 1996, at 2B.

75. STATEMENT BY GOVERNOR LAWTON CHILES REGARDING FINAL PASSAGE OF THE ADMINISTRATIVE PROCEDURE ACT LEGISLATION (Apr. 25, 1996).

76. Technically speaking, § 120.535 was repealed. 1996 Fla. Laws ch. 96-159, § 8, at 159. However, the key requirements of that section simply were transferred to another section. 1996 Fla. Laws ch. 96-159, § 10, at 160-61 (codified at FLA. STAT. § 120.54(1) (Supp. 1996)).

77. The 1996 legislation includes many of the same rule adoption procedures that the Governor characterized in 1995 as making the rulemaking process "more convoluted, involved and tangled than ever before." Governor's Veto Message, *supra* note 5, at 3; *see supra* note 55 and accompanying text.

## III. 1996 CHANGES TO RULEMAKING PROCESS

The 1996 legislation made a number of significant changes to Florida's APA.[79] This section discusses the principal changes to the rulemaking process.[80]

The changes in the rulemaking process are primarily designed to help agencies make *better* rules by encouraging agencies to provide early and meaningful opportunities for public participation[81] and by requiring

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In addition, the 1996 legislation does not include the rule reduction provisions that the Governor had requested, including a provision that would have sunset all executive branch rules. *See supra* notes 34 and 53 and accompanying text. However, by the time the 1996 legislation was signed into law, the Governor's agencies already were well on their way to meeting the Governor's 50% rule reduction goal. *See* Bill Cotterell, *State's Spool of Red Tape Is Unwinding*, TALLAHASSEE DEMOCRAT, Jan. 23, 1996, at A1, A9 (reporting that 5778 rules were shed in 1995, representing 39.3% of the Governor's goal of cutting rules by half); *Getting Rid of Ridiculous Rules*, TAMPA TRIB., June 30, 1996, at 2; *The Rule Against Rules*, PALM BEACH POST, July 6, 1996, at A14 (reporting that the Governor's agencies had cut 38% of the rules).

78. 1996 Fla. Laws ch. 96-159, § 44, at 213. The law does not indicate whether it applies to proceedings begun but not yet completed prior to the effective date. By comparison, the version of the APA originally enacted in 1974 included provisions intended to address the effect of the new act on pending adjudicative proceedings. *See* 1974 Fla. Laws ch. 74-310, § 3, at 728, 744 (codified at FLA. STAT. § 120.72).

The general rule is that a statute that relates only to procedure or remedy applies to all pending cases. *See, e.g.*, Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475, 477 (Fla. 1995). However, in Florida there can be no retroactive application of substantive law without a clear directive from the Legislature. *See, e.g.*, Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 425 (Fla. 1994). "A substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights." Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994). For example, Florida courts previously have held that the right to collect attorneys' fees may be substantive in nature and therefore may not be applied retroactively. Love v. Jacobson, 390 So. 2d 782, 783 (Fla. 3d DCA 1980). In one of the first appellate decisions interpreting the 1996 APA legislation, the court concluded that the provisions of the 1996 legislation are "means and methods" by which the administrative determination is rendered, and therefore are procedural in nature. Life Care Centers of Am., Inc. v. Sawgrass Care Center, Inc., 683 So. 2d 609, 614 (Fla. 1st DCA 1996). One of these provisions repealed FLA. STAT. § 120.59, thus excising the mandate that there be rulings on each of the proposed findings of fact. 1996 Fla. Laws ch. 96-159, § 24, at 48.

79. *See supra* note 7.

80. For a brief overview of the rulemaking process in Florida, see Stephen T. Maher, *Rulemaking in Florida: An Opportunity for Reflection*, 64 FLA. B.J. 48 (Jan. 1990). *See also* Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U. L. REV. 965, 988 (1986); ARTHUR J. ENGLAND, JR. & L. HAROLD LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL ch. 9, Rulemaking (1996).

81. *See infra* pts. III.A.-E., K. & L.

It long has been recognized that "[agency] knowledge is rarely complete, and [the agency] must learn the . . . viewpoints of those whom its regulations will affect. . . . [Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests." FINAL REPORT OF

agencies to evaluate the economic impacts of the proposed rule as well as consider suggested lower cost alternatives.[82] Notably, to ensure that these changes would not unduly discourage rulemaking[83] or upset the balance between efficiency and accountability in the rulemaking process,[84] many of these changes were modeled after rulemaking procedures *already* employed by some of the more prolific rulemaking agencies.[85]

### A. *Agencies Must Publish Notice of Rule Development*

One of the principal purposes of the APA was to expand public access to the activities of governmental agencies.[86] The 1996 legislation makes several changes that are designed to further encourage informed public participation in the rulemaking process,[87] particularly during the early stages of that process. One of these changes requires agencies to provide advance notice of the development of proposed rules by publishing a "notice of rule development" in the *Florida Administrative Weekly*.[88]

Many administrative agencies spend considerable time *internally* developing a proposed rule before it is published. Affected persons and other members of the general public, however, often are not aware of these activities and are not informed of agency efforts until an agency has settled on and published a proposed rule. Other agencies, however,

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THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURES 103 (1941) (quoted in Senate Comm. on the Judiciary, Administrative Procedure Act: Legislative History. S. Doc. No. 248, 79th Cong., 2d Sess. 20 (1946)); *see also* Arthur E. Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 316 (1986).

82. *See infra* pts. III.F.-J.

83. Agencies generally are required to adopt their policies as rules, unless it is not practicable or feasible. FLA. STAT. § 120.535(1) (1995); *see supra* note 36 and accompanying text.

84. For one author'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, 769 (1991). For another author's view of federal efforts at regulatory reform, see Jerry Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 405-06 (1996) (arguing that Congress' attempts to increase legal constraints on agency actions is a tactic designed to hamstring procedurally agency decisionmaking and to destroy efficacy).

85. *See, e.g., infra* notes 88 & 96.

86. *See* Florida Home Builders Ass'n v. Department of Labor & Employment Sec., 412 So. 2d 351, 352-53 (Fla. 1982).

87. *See infra* pts. III.A.-E.

88. FLA. STAT. § 120.54(2)(a) (Supp. 1996). The *Florida Administrative Weekly* is a weekly publication published by the Department of State. FLA. STAT. § 120.55(1)(b) (1995). The publication is required to contain many of the notices described in the APA. *Id.*

have recognized the benefits of early public participation and use various measures to provide notice of rule development activities.[89]

The new requirement of notice of rule development is designed to facilitate early public participation, so the notice must be published *before* the proposed rule is published.[90] The notice must describe the subject area to be addressed, and it must include a short "explanation of the purpose and effect of the rule development, cite the specific legal authority for rule development, and include the preliminary text of the proposed rules, if available."[91] The notice of rule development thus provides the public with considerable information at an early stage, and it affords interested persons an opportunity to learn more about the proposal. Perhaps just as importantly, the advance notice provides interested persons with an opportunity to seek to inform the agency of relevant matters while the agency is still developing its proposed rule.

### B. *Agencies May Be Required to Hold Public Workshops*

Public workshops historically have been one of the principal public forums used by some agencies in developing their proposed rules. Public workshops provide agencies with an opportunity to explore alternatives and gather necessary information in an informal setting with interested persons. Agencies have long been authorized to conduct public workshops;[92] however, agencies were not expressly required to conduct public workshops.

The state agencies that recognize the benefit of holding one or more public workshops as part of the rulemaking process routinely consider the oral and written comments submitted during or following the workshops. They often respond to these comments by incorporating appropriate changes in the proposed rule. These agencies realize that providing this kind of early opportunity for public participation generally results in better rules.

However, other agencies often provide little or no meaningful opportunity for public participation prior to the publication of a

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89. For example, some agencies voluntarily publish notices of rule development in the *Florida Administrative Weekly* or employ extensive mailing lists to inform affected persons of rule development activities.

90. FLA. STAT. § 120.54(2)(a) (Supp. 1996).

91. *Id.* In 1997, this provision was revised in two respects. 1997 Fla. Laws ch. 97-176, § 3, at 2053 (amending FLA. STAT. § 120.54(2)(a) (Supp. 1996)). First, this provision was revised to eliminate the requirement to publish the notice of rule development when the intended action is the repeal of a rule. *Id.* Second, the provision was revised to require that the notice "include the preliminary text of the proposed rules, if available *or* a statement of how a person may obtain, without cost, a copy of any preliminary draft, if available." *Id.* (emphasis added).

92. FLA. STAT. § 120.54(1)(d) (1995).

proposed rule. Not surprisingly, these agencies sometimes have found that this seemingly quicker rulemaking process is, in reality, more time-consuming by subsequent formal and expensive rule-challenge proceedings[93] that could have been avoided had the agency provided for more public participation at an earlier stage.

The 1996 legislation recognizes the benefits of providing an early opportunity for public participation by requiring an agency to hold public workshops if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary.[94] The 1996 legislation also recognizes that meaningful public participation is best accomplished when knowledgeable agency personnel are present to explain the agency's proposal and to respond to questions or comments regarding the rule being developed. The legislation requires that, "[w]hen a workshop or public hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the rule being developed."[95]

### C. *Agencies May Choose to Use Negotiated Rulemaking*

Just as some administrative agencies have long recognized the benefits of using public workshops to develop proposed rules, so too have other agencies routinely made use of variously-constituted advisory committees,[96] working groups or other forms of negotiated rulemaking[97] to generate consensus among interested parties prior to

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93. Administrative challenges to proposed rules involve a determination of whether the proposed rules constitute an "invalid exercise of delegated legislative authority." FLA. STAT. § 120.54(4)(a) (1995). Administrative challenges to proposed rules may involve trial-type proceedings, including extensive discovery, the preparation and presentation of numerous witnesses, and the filing of lengthy, post-hearing pleadings. *See id.* § 120.54(4)(b)-(d).

94. FLA. STAT. § 120.54(2)(c) (Supp. 1996). The explanation of why a workshop is unnecessary "is not final agency action subject to review pursuant to ss. 120.569 and 120.57. The failure to provide the explanation when required may be a material error in procedure pursuant to s. 120.56(1)(c)." *Id.*

95. *Id.*

96. For example, the Florida Department of Environmental Protection used a technical advisory committee comprised of recognized experts from outside the agency in developing 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.

97. "Negotiated rulemaking" has been described by some as an open process in which all interested parties to a proposed regulation work together to find a solution to the problem facing the agency. DAVID M. PRITZKER & DEBORAH S. DALTON, OFFICE OF THE CHAIRMAN, ADMIN. CONF. OF THE UNITED STATES, NEGOTIATED RULEMAKING SOURCEBOOK (1990). In a negotiated rulemaking, the agency convenes a committee composed of representatives of parties whose

promulgating a proposed rule.[98] Many of these agencies have found that negotiated rulemaking often results in faster rulemaking, greater consensus among interested parties and less litigation.[99] Such negotiated rulemaking also serves to enhance public awareness of rulemaking at an early stage, since it seeks to involve interested persons even before a proposed rule is published.[100]

The 1996 legislation authorizes agencies to use negotiated rulemaking in developing and adopting rules and encourages agencies to utilize negotiated rulemaking when rules are complex or controversial.[101] The legislation recognizes that "negotiated rulemaking" requires a committee of designated representatives to draft a mutually acceptable proposed rule. Therefore, the agency must consider "whether a balanced committee of interested persons who will negotiate in good faith can be assembled, whether the agency is willing to support the work of a negotiating committee, and whether the agency can use the group consensus as a basis for its proposed rule."[102]

An agency that intends to utilize this specific negotiated rulemaking process[103] must publish notice of the representative groups that will be

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interests are implicated by the rule an agency seeks to develop. *Id.* at 7. Along with the agency, and with the help of an outside facilitator, the committee members negotiate in an attempt to formulate a proposed rule that all find acceptable. *Id.*

98. *Id.*

99. *Id.* at 3. Similar findings were made by the National Performance Review. *See* AL GORE, NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS 118-19, 167 (1993). However, others have suggested that the benefits of negotiated rulemaking have been exaggerated and that other incentive-based systems deserve greater emphasis. *See* Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1211-12, 1219-20 (1994). Similarly, others have argued that negotiated rulemaking tends to subvert the public interest to the benefit of private interests. *See* William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiations and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 96 (1987).

100. *See* PRITZKER & DALTON, *supra* note 97, at 3.

101. FLA. STAT. § 120.54(2)(d) (Supp. 1996).

102. *Id.* The 1996 legislation is similar to the federal Negotiated Rulemaking Act of 1996, 5 U.S.C. §§ 561-570 (1994).

103. The Legislature recognized that administrative agencies already employ various forms of negotiated rulemaking, many of which are informal yet effective. *Id.* The Legislature did not wish to stifle the use of these other forms of negotiated rulemaking by requiring strict adherence to the requirements of the specific negotiated rulemaking process described in the 1996 law. *Id.* Accordingly, the 1996 legislation requires an agency to comply with these new requirements only if it chooses to use "the negotiated rulemaking process described in" the 1996 law. *Id.* In this fashion, the Legislature sought to avoid litigation like that resulting from the Federal Advisory Committee Act, 5 U.S.C. app. 2. *See* USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 715 (7th Cir. 1996); *see also* Dover A. Norris-York, *The Federal Advisory Committee Act: Barrier or Boon to Effective Natural Resource Management?*, 26 ENVTL. L. 419, 431-32 (1996).

invited to participate in the process.[104] Other persons may apply to participate.[105] All meetings of the negotiating committee must be noticed and open to the public.[106] The negotiating committee must be chaired by a neutral facilitator or mediator.[107]

### D. *All Rules Must Be Written in Readable Language*

At least one legislator[108] expressed concern that public participation in agency rulemaking, as well as compliance with agency rules, was often made unnecessarily difficult because agencies failed to write the rules in a fashion that is easy to read and understand. Accordingly, the 1996 legislation provides that all rules should be drafted in readable language.[109] The language is readable if it avoids the use of obscure words and unnecessarily long or complicated constructions, and if it avoids the use of unnecessarily technical or specialized language understood only by members of particular trades or professions.[110]

### E. *Notice of Proposed Rule Must Include Additional Information*

Once an agency settles on the form its proposed rule should take, the agency publishes notice of its intended action.[111] The notice includes a short, plain explanation of the purpose and effect of the proposed action, the full text of the proposed rule or amendment, and a summary thereof.[112]

In another effort to enhance public participation in the rulemaking process, the 1996 legislation requires this rulemaking notice to include certain additional information. The notice must include a summary of the agency's statement of the estimated regulatory costs, if one has been

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In 1997, the Legislature revised the negotiated rulemaking provision in a further effort to avoid litigation by making clear that "[t]he agency's decision to use negotiated rulemaking, its selection of the representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action." 1997 Fla. Laws ch. 97-176, § 3, at 2054 (amending FLA. STAT. § 120.54(2)(d)3. (Supp. 1996)).

104. FLA. STAT. § 120.54(2)(d)2. (Supp. 1996).

105. *Id.*

106. *Id.*

107. *Id.*

108. Representative Jerry Melvin (Repub., Ft. Walton Beach).

109. FLA. STAT. § 120.54(2)(b) (Supp. 1996).

110. *Id.* This description of what constitutes "readable language" is considerably less specific (but substantially more readable) than the statutory requirements for "readable language" in insurance policies. FLA. STAT. § 627.4145 (1995).

111. FLA. STAT. § 120.54(b)(1) (1995).

112. *Id.* § 120.54.

prepared.[113] Significantly, the notice also must include "a statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative . . . must do so in writing within 21 days after publication of the notice."[114] Finally, the notice must include a description of the procedure for requesting a public hearing on a proposed rule.[115] In this fashion, potentially interested persons are provided with information regarding additional opportunities for participating in a regulatory process.

### F. *Agencies Required to Choose Lower Cost Alternative*

Since 1992, agencies engaged in rulemaking have been required to evaluate alternative approaches to any regulatory objective.[116] To the extent allowed by law, agencies have also been required to choose the alternative that imposes the lowest net cost to society[117] *or* to provide a statement of the reasons for rejecting that alternative in favor of the proposed rule.[118] However, because there was no sanction for an

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113. FLA. STAT. § 120.54(3)(a)1. (Supp. 1996). The new statement of estimated regulatory costs is described in Part III.G.

114. *Id.* The procedure for submitting a lower cost regulatory alternative is described in Part III.F.

115. *Id.*

116. FLA. STAT. § 120.54(12)(b) (1995). For a brief discussion of this requirement, see Maher, *supra* note 36, at 424-25.

117. FLA. STAT. § 120.54(12)(b) (1995). In determining the lowest net cost to society, the agency was to consider the costs identified by the agency in preparing the economic impact statement. *Id.* § 120.54(2)(a). These costs include

> [a]n estimate of the cost to the agency, and to any other state or local government entities, of implementing and enforcing the proposed action, . . . and any anticipated effect on state or local revenues; [a]n estimate of the cost or the economic benefit to all persons directly affected by the proposed action . . . [a]n estimate of the impact of the proposed action on competition and the open market for employment, if applicable; [a]n analysis of the impact on small business as defined in the Florida Small and Minority Business Assistance Act of 1985; [and, a] comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of not adopting the rule.

*Id.* § 120.54(2)(c).

The 1996 legislation replaced the old economic impact statement with the requirement to prepare a statement of estimated regulatory costs. *See infra* pt. III.G.

118. FLA. STAT. § 120.54(12)(b) (1995).

agency's failure to comply with the requirement, it was often ignored.[119]

The Legislature continued to believe that the purpose of this requirement was laudable and that a more careful evaluation of regulatory alternatives would result in better rules.[120] Accordingly, the 1996 legislation seeks to put some teeth into this requirement by *requiring* the agency to consider a good faith written proposal for a lower cost regulatory alternative to the agency's proposal that substantially accomplishes the objectives of the law being implemented.[121] The alternative proposal must be submitted by a substantially affected person within 21 days of publication of the notice of proposed

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119. *Id.* ("this paragraph shall not provide a basis for challenging a rule").

120. The Governor's APA Review Commission recommended that, "in adopting rules, agencies should choose the regulatory alternative that does not impose excessive regulatory costs on the regulated person, county, or municipality which could be reduced by less costly alternatives that substantially accomplish the statutory objectives." APA COMM'N REPORT, *supra* note 62, at 32.

The Water Management District Review Commission also recommended that all substantive rules represent the least costly alternative while accomplishing the goals of the statute being implemented and taking into consideration the benefit to the public at large and the cost to the regulated community. BRIDGE OVER TROUBLED WATER: RECOMMENDATIONS OF THE WATER MANAGEMENT DISTRICT REVIEW COMMISSION 26 (Dec. 29, 1995) (Recommendation No. 39).

121. FLA. STAT. § 120.541(1)(a) (Supp. 1996). This new requirement is actually made enforceable by another provision, which provides that a proposed or existing rule constitutes an "invalid exercise of delegated legislative authority" if "the rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives." FLA. STAT. § 120.52(8)(g) (Supp. 1996); *see also infra* pt. IV. However, there are limitations on the enforceability of the new requirement:

> (c) No rule shall be declared invalid because it imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives, and no rule shall be declared invalid based upon a challenge to the agency's statement of estimated regulatory costs, unless:
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> 1. The issue is raised in an administrative proceeding within 1 year after the effective date of the rule; and
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> 2. The substantial interests of the person challenging the agency's rejection of, or failure to consider, the lower cost regulatory alternative are materially affected by the rejection; and
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> 3.a. The agency has failed to prepare or revise the statement of estimated regulatory costs as required by [§ 120.541(1)(b)] or
>
> b. The challenge is to the agency's rejection under [§ 120.541(1)(b)] of a lower cost regulatory alternative submitted under paragraph (a).

FLA. STAT. § 120.541(1)(c) (Supp. 1996).

rulemaking.[122] "The proposal may include the alternative of not adopting any rule, so long as the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule."[123]

The submission of the lower cost regulatory alternative triggers a requirement that the agency prepare a statement of estimated regulatory costs[124] or revise any previously prepared statement of estimated regulatory costs.[125] The agency then must adopt the proposed "alternative or give a statement of the reasons for rejecting the alternative in favor of the proposed rule."[126]

### G. *New Statement of Estimated Regulatory Costs*

Administrative rules often impose significant regulatory burdens on affected persons.[127] For this reason, the APA has long required agencies to prepare economic impact statements for virtually every proposed

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122. *Id.*

123. *Id.* This provision only expressly requires the proposal to include an explanation of how the lower cost and objectives of the law will be achieved for a proposal that includes the alternative of not adopting any rule. There is no similar requirement to explain the proposal if the proposal is for a different rule. Of course, as a practical matter, the proposer is less likely to convince the agency to adopt the proposed lower cost regulatory alternative if the proposal is not accompanied by an appropriate explanation of how the lower cost and objectives of the law will be achieved.

124. *Id.* The requirement to prepare a statement of estimated regulatory costs is discussed more fully in Part III.G.

125. *Id.*

126. *Id.* In addition, the statement of estimated regulatory cost must include "a description of any good faith written proposals submitted . . . and either a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule." *Id.* For a critical analysis of this new lower cost regulatory alternative requirement, see Rossi, *supra* note 7, at 297-302.

127. The Competitive Enterprise Institute recently found that federal regulations will cost taxpayers $677 billion in 1996 and as much as $721 billion by 2000, and that the regulatory burden will remain reasonably constant at about 9% of the nation's gross domestic product. WAYNE CREWS, TEN THOUSAND COMMANDMENTS: A POLICYMAKER'S SNAPSHOT OF THE FEDERAL REGULATORY STATE (1996); *see also* Carl F. Horowitz, *Study Says Congress to Blame for Regulatory Burden*, INVESTOR'S BUS. DAILY, Sept. 5, 1996, at A4.

In an effort to assess this federal regulatory burden, Congress recently enacted a measure that requires the Office of Management and Budget to submit to Congress by September 30, 1997, a report that provides: estimates of the total annual cost and benefits of each rule that is likely to have a gross annual effect on the economy of $100 million or more in increased costs; an assessment of the direct and indirect impacts of federal rules on the private sector, state and local government, and the federal government; and recommendations for reforming or eliminating any federal regulatory program that is inefficient, ineffective, or is not a sound use of the nation's resources. S.R. RES. 63, 104th Cong. § 645 (1996).

rule.[128] The quality and utility of these economic impact statements varied greatly,[129] no doubt in part because agencies have often lacked, or failed to provide, adequate resources to prepare meaningful analyses of the economic impacts of proposed rules.[130]

In 1992, the Legislature sought to address some of the problems with economic impact statements by removing the requirement that they must be prepared for every rule.[131] Instead, agencies were required to prepare statements only for those rules that would result in substantial economic impact or when a statement has been requested by at least 100 people, an organization representing at least 100 people, or any domestic non-profit corporation or association.[132]

The 1992 legislative changes again failed to improve the quality of economic analysis,[133] and the Legislature soon began to consider reforms in this area. The 1996 legislation replaces the old "economic impact statement" with a new "statement of regulatory costs" (SERC).[134] Like the 1992 legislation, the 1996 legislation requires agencies to prepare statements only in certain limited cases: agencies are encouraged to prepare a statement in appropriate cases,[135] and they must prepare a statement if a substantially affected person submits a good faith written proposal for a lower cost regulatory alternative to a proposed rule.[136]

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128. *See, e.g.*, FLA. STAT. § 120.54(2)(b) (1991). For a discussion of the development of the economic impact statement requirement in the APA, see Patricia A. Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 FLA. ST. U. L. REV. 703, 703-07 (1991).

129. *See* Maher, *supra* note 36, at 413-14 (noting that the economic impact statement requirement often proved to be a waste of effort); Dore, *supra* note 128, at 723-24.

130. *See* Dore, *supra* note 128, at 704.

131. 1992 Fla. Laws ch. 92-166, § 4, at 1674-76 (codified at FLA. STAT. § 120.54(2) (1993)). For a detailed discussion of this legislation, see Maher, *supra* note 36, at 422-27. *See also* David W. Nam, *1992 Amendments to the Florida Administrative Procedure Act*, 66 FLA. B.J. 55 (July/Aug. 1992).

132. 1992 Fla. Laws ch. 92-166, § 4, at 1674-76 (codified at FLA. STAT. § 120.54(2) (1995)).

133. *See, e.g.*, FLORIDA TAXWATCH, INC., RESEARCH REPORT: STRENGTHENING ECONOMIC CONSIDERATIONS IN RULEMAKING (Feb. 1994); MARCELLE KINNEY, THE STATE OF FLORIDA'S ECONOMIC IMPACT STATEMENT PREPARATION PROCESS (1993). The Governor's APA Review Commission found the quality of economic analyses of proposed rules prepared by state agencies is not adequate, and "existing law requirements concerning preparation of economic impact statements are ineffective." APA COMM'N REPORT, *supra* note 62, at 31.

134. FLA. STAT. § 120.54(3)(b)1. (Supp. 1996); *id.* § 120.54(1). The new SERC requirements are fairly similar to those contained in the 1995 legislation, and they are very similar to those recommended by the Governor's APA Review Commission. *See* APA COMM'N REPORT, *supra* note 62, at 31-33.

135. FLA. STAT. § 120.54(3)(b)1. (Supp. 1996).

136. FLA. STAT. § 120.541(1)(b) (Supp. 1996).

The 1996 legislation also seeks to make the new SERC more meaningful by narrowing the scope of the required economic analysis.[137] For example, the new SERC requires an analysis of specific "transactional costs"[138] likely to be incurred by those required to comply with the requirements of the proposed rule.[139] The old economic impact statement required information that was often difficult to obtain, such as a "comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of not adopting the rule. . . ."[140] Thus, the 1996 legislation seeks to make the new statement of estimated regulatory costs more meaningful by narrowing the required analysis to the cost to those directly affected by the rule. This information should be more readily ascertainable and more relevant to those affected.

### H. *New Statements Are Subject to Legal Challenge*

The 1996 legislation also seeks to make the required economic analysis more meaningful by making it easier for affected persons to enforce the requirement that the agency prepare the new SERC. The 1996 legislation seeks to accomplish this by expressly providing that the failure of the agency to prepare or revise the SERC as required is a

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137. *See id.* If prepared, the new statement must include:

> (a) A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule.
>
> (b) A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues.
>
> (c) A good faith estimate of the transactional costs likely to be incurred by [those] required to comply with the requirements of the rule.
>
> (d) An analysis of the impact on small businesses, . . . small counties and small cities. . . .
>
> (e) Any additional information that the agency determines may be useful.
>
> (f) A description of any good faith written proposal . . . a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule.

*Id.* § 120.541(2).

138. " 'Transactional costs' are direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, and the cost of monitoring and reporting." FLA. STAT. § 120.541(2)(c) (Supp. 1996).

139. *Id.*

140. FLA. STAT. § 120.54(2)(c)5. (Supp. 1996).

material failure to follow the applicable rulemaking procedures or requirements of the APA[141] and therefore grounds for invalidating the resulting rule.[142] This language is intended to essentially overrule earlier court decisions that limited the effectiveness of the economic impact statement requirement by requiring only substantial compliance, absent a showing of prejudice by the affected person.[143]

The 1996 legislation also seeks to make the new SERC more meaningful by removing some, but not all, of the restrictions on challenging these statements. These restrictions previously were interpreted in a fashion that limited standing to challenge an agency rule based upon an economic impact statement, or the lack thereof, to those persons who had previously filed a timely written request for preparation of the statement.[144] This restriction foreclosed a challenge to an economic impact statement by one person when the statement had been requested by another.[145] The 1996 legislation removes this restriction. If one substantially affected person timely requests the preparation of a

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141. FLA. STAT. § 120.541(1)(b) (Supp. 1996). This provision is to be distinguished from another provision that provides that the failure of an agency to follow the applicable rulemaking procedures or requirements set forth in the APA is simply presumed to be material and that expressly allows the agency to rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired. FLA. STAT. § 120.56(1)(c) (Supp. 1996). For a discussion of this latter section, see *infra* pt. IV.B.4.

142. An administrative law judge is authorized to determine a proposed or adopted rule to be invalid if it constitutes an "invalid exercise of delegated legislative authority." FLA. STAT. § 120.54(4) (1995) (proposed rule); FLA. STAT. § 120.56 (Supp. 1996) (adopted rule) (both provisions are now to be codified at FLA. STAT. § 120.56). A proposed or existing rule is an invalid exercise of delegated legislative authority if, inter alia, the agency has materially failed to follow the applicable rulemaking procedures or requirements of the APA. FLA. STAT. § 120.52(8)(a) (1995).

143. *See, e.g.*, Florida-Texas Freight, Inc. v. Hawkins, 379 So. 2d 944, 946 (Fla. 1979) (requiring only substantial compliance with economic impact statement requirement, absent a showing of prejudice); Cataract Surgery Ctr. v. Health Care Cost Containment Bd., 581 So. 2d 1359, 1364 (Fla. 1st DCA 1991) (the harmless error doctrine will be applied unless the challenging party can show that the deficiencies impair the fairness of the rulemaking proceedings); Humana, Inc. v. Department of Health & Rehab. Servs., 469 So. 2d 889, 890 (Fla. 1st DCA 1985).

Congress also recently enacted comparable changes to a similar federal law in an effort to put some teeth into the requirement that agencies must conduct regulatory impact analyses. Specifically, Congress amended the Regulatory Flexibility Act to make agency determinations and analyses under the Act subject to judicial review. *See* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 242 (Mar. 29, 1996).

144. *See* FLA. STAT. § 120.54(2)(b), (d) (1995).

145. Florida E. Coast Indus., Inc. v. Department of Community Affairs, 16 FLA. ADMIN. L. REP. 1631, 1659-60 (1994), *rev'd*, Florida E. Coast Indus., Inc. v. Department of Community Affairs, 677 So. 2d 357 (Fla. 1st DCA 1996). For a criticism of this restriction, see Maher, *supra* note 36, at 426-27.

statement, then another person may bring a challenge, provided the substantial interests of that other person are materially affected by the agency's rejection of, or failure to consider, the proposed lower cost regulatory alternative.[146]

### I. *Agencies Must Consider Impact on Small Counties and Small Cities*

Agencies already are required to consider the impact of a proposed rule on small businesses.[147] Whenever possible, agencies are required to tier a proposed rule to reduce disproportionate impacts on small business and to avoid regulating businesses that do not contribute significantly to the problem the rule is designed to regulate.[148] Agencies are specifically required to consider five methods for reducing the impact of the proposed rule on small businesses, including:

> 1. [e]stablishing less stringent compliance or reporting requirements in the rule for small business[;]
> 2. [e]stablishing less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business;
> 3. [c]onsolidating or simplifying the rule's compliance or reporting requirements for small business[;]
> 4. [e]stablishing performance standards to replace design or operational standards in the rule for small business[; and]

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146. FLA. STAT. § 120.541(1)(c)2 (Supp. 1996). Note, however, that the 1996 legislation continues to impose some significant restrictions on challenges to the new statements of regulatory costs. *See supra* 121 and accompanying text.

147. FLA. STAT. § 120.54(2)(a) (1995). The economic impact statement also is required to include an analysis of the impact on small business. *Id.* § 120.54(2)(c)4. An agency's failure to provide an adequate analysis of these impacts in the economic impact statement is a ground for holding a rule invalid. Stuart Yacht Club & Marina, Inc. v. Department of Natural Resources, 625 So. 2d 1263, 1269 (Fla. 4th DCA 1993).

A "small business" is defined as follows:

> [A]n independently owned and operated business concern that employs 100 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than $3 million and an average net income after federal income taxes, excluding any carryover losses, for the preceding two years of not more than $2 million. As applicable to sole proprietorships, the $3 million net worth requirement shall include both personal and business investments.

FLA. STAT. § 288.703(1) (1995).

148. FLA. STAT. § 120.54(2)(a) (1995).

5. [e]xempting small business from any or all requirements of the rule.[149]

At the urging of representatives of local governments, the 1996 legislation also requires agencies to consider the impact of the proposed rule on small counties and small cities.[150] As with small businesses, agencies must consider the impact of a proposed rule on small counties and small cities, and whenever practicable, the agency must tier its rules to reduce disproportionate impacts on small counties or small cities to avoid regulating those that do not contribute significantly to the problem the rule is designed to address.[151] The agency must consider the same five methods of reducing the rule's impact on small counties and small cities that it must consider to reduce the rule's impact on small businesses.[152]

### J. *Rules Ombudsman Also to Consider Impact*

The 1996 APA legislation was not the only measure enacted last year that sought to provide rulemaking reform. The Legislature and Governor Chiles recognized that Florida's regulatory environment was perceived as having a significant adverse effect on Florida's effort to attract and maintain jobs.[153] In an effort to change this perception, economic

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149. *Id.* § 120.54(2)(a)1.-5. On the federal level, Congress also has enacted legislation that requires federal agencies to describe the nature of the rule, its impact on small entities, and regulatory alternatives that would have less economic impact on small entities. *See* The Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1988).

150. FLA. STAT. § 120.54(3)(b)2.a. (Supp. 1996). A small county is defined as a county with an unincarcerated population of 75,000 or less. FLA. STAT. § 120.52(17) (Supp. 1996). A small city is any municipality that has an unincarcerated population of 10,000 or less. *Id.* § 120.52(16). However, an agency is expressly authorized to define "small business" to include businesses employing more than 100 persons, to define "small county" to include those with populations of more 75,000, and to define "small city" to include those with populations of more than 10,000, "if it finds that such a definition is necessary to adapt a rule to the needs and problems of small businesses, small counties, or small cities." FLA. STAT. § 120.54(3)(b)2.a. (Supp. 1996).

151. FLA. STAT. § 120.54(3)(b)2.a. (Supp. 1996).

152. *Id.* The agency must consider: (1) establishing less stringent compliance or reporting requirements in the rule; (2) establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements; (3) consolidating or simplifying the rule's compliance or reporting requirements; (4) establishing performance standards or best management practices to replace design or operational standards in the rule; and (5) exempting these entities from any or all requirements of the rule. *Id.* § 120.54(3)(b)2a.

153. State of the State Address, *supra* note 31, at 24-25 ("send a bipartisan message: Florida is no longer the home of red tape and bureaucratic stagnation"). *See, e.g.*, Sellers, *supra* note 2, at 329 n.9 (survey found that a significant number of respondents thought that government regulation was one of the biggest obstacles to profitability); Christina Binkley, *South*

development legislation enacted in 1996 requires the Governor to appoint a rules ombudsman in the Executive Office of the Governor.[154] The rules ombudsman is to consider the impact of agency rules on the state's citizens and businesses, and to review state agency rules that adversely or disproportionately impact businesses.[155] In an effort to alleviate unnecessary or disproportionate adverse effects to businesses, the ombudsman also is to make recommendations on any existing or proposed rules.[156]

This same economic development legislation also directs the Office of Tourism, Trade and Economic Development to improve the state's regulatory environment by considering the impact of agency rules on businesses.[157] In consultation with the Governor's rules ombudsman, the Office also is to make recommendations for alleviating unnecessary or disproportionate adverse effects on businesses of existing and proposed rules.[158]

### K. *New Public Hearing Requirements*

After the agency publishes notice of the proposed rule, the agency may schedule a public hearing for the purpose of giving affected persons an opportunity to present evidence and argument.[159] If requested by any affected person, the agency must schedule a public hearing.[160] The agency head is not required to attend or conduct the public hearing, and in many cases, the agency head does not do so. Some agencies have viewed the public hearing as simply providing a formal opportunity for affected persons to present their comments and get them on the record. These agencies have rarely provided the opportunity for any meaningful dialogue with informed agency personnel. Additionally, they typically

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*Georgia Discovers Gold Mine in Hunt for Manufacturing: Florida*, WALL ST. J., June 12, 1996, at F1.

154. 1996 Fla. Laws ch. 96-320, § 5, at 1516-17.

155. *Id.*

156. *Id.*

157. 1996 Fla. Laws ch. 96-320, § 2, at 1513-15 (codified at FLA. STAT. § 14.2015(6) (Supp. 1996)).

158. *Id.* In addition, the Florida Legislature enacted a measure during the 1996 Regular Session amending the APA to require an agency to consider, before adopting a rule, any impacts that the rule may have on the formation, maintenance, and general well-being of families. Fla. CS/SB 424 (1996) (creating FLA. STAT. § 120.54(2)(e)). However, Governor Lawton Chiles vetoed the measure partly because it was enacted "outside of the debate and extensive review given other changes to the APA." Letter from Governor Lawton Chiles to Secretary of State Sandra Mortham (May 31, 1996) (announcing veto of Fla. CS/SB 424 (1996)).

159. FLA. STAT. § 120.54(3)(a) (1995).

160. *Id.* The request must be received within 21 days after the date of publication of the notice of intended action.

made no effort to explain the agency's proposal or to respond to questions or comments regarding the proposal. Other agencies have recognized the benefits of using the required public hearing to explain the agency's proposal. At such public hearings, these agencies have responded to questions or comments about the proposal and discussed changes to the proposal that would make it more acceptable to affected persons.

The 1996 legislation recognizes that this latter approach is the far preferable one. It provides that, if a public hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the rule being developed.[161]

### L. *Agencies Required to Publish Adopted Changes to Proposed Rules*

Agencies have always been authorized to make certain changes to a proposed rule before filing the final rule for adoption.[162] Agencies often make changes to a proposed rule, typically as the result of comments at a public hearing or in response to written comments. However, agencies were not expressly required to publish notice of these changes. Rather, agencies simply were required to give notice to any person who requested it in writing at the public hearing.[163]

Many agencies nonetheless have realized the benefits of informing the public of these changes, and they regularly publish these notices in the *Florida Administrative Weekly*. The 1996 legislation recognizes the wisdom of this approach, and it now expressly requires agencies to publish notice of these changes.[164] This new requirement is particularly

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161. FLA. STAT. § 120.54(2)(c) (Supp. 1996).

162. An agency

> may make such changes in the rule as are supported by the record of public hearings held on the rule, technical changes which do not affect the substance of the rule, 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 changes in response to a proposed objection by the [Joint Administrative Procedures] [C]ommittee.

FLA. STAT. § 120.54(13)(b) (1995).

163. *Id.* § 120.54(11)(a).

164. FLA. STAT. § 120.54(3)(d)1. (Supp. 1996) If the rule has not been changed, the agency is required to file a notice to that effect with the Joint Administrative Procedures Committee at least seven days prior to filing the rule for adoption. *Id.*

significant since affected persons also will be given a new opportunity to challenge these changes before they become effective.[165]

## IV. NEW AND REVISED REMEDIES FOR CHALLENGING AGENCY RULES

In addition to improving the rulemaking process, the 1996 legislation also seeks to upgrade the "impressive arsenal of varied and abundant remedies for administrative error"[166] provided by Florida's APA.

### A. *Additional Time to Challenge Proposed Rules*

One of the existing remedies authorizes challenges to proposed rules.[167] Under the existing law, administrative challenges to proposed rules must be filed within 21 days after the proposed rule is published.[168] In addition to preserving this existing time for filing challenges, the 1996 legislation establishes three new "windows" for filing these challenges: (1) within 20 days of preparation of a SERC (2) within 10 days after the final public hearing is held on the proposed rule; and (3) within 21 days after publication of a notice of change in the proposed rule.[169] The rationale for the establishment of each of these new "windows" is briefly described below.

#### 1. Within 20 Days After Preparation of a SERC

Recall that the 1996 legislation only requires the preparation of a SERC if a substantially affected person submits a good faith written proposal for a lower cost regulatory alternative.[170] Also recall that the proposal must be submitted within 21 days after publication of the notice of the proposed rule.[171] Finally, recall that one may challenge a proposed rule based on the failure to prepare the required SERC.[172]

There is no specifically prescribed time by which the agency must prepare the requested SERC. As a practical matter then, it would be virtually impossible to challenge a proposed rule based on the failure to prepare the required SERC if the challenge must be filed within 21 days after publication of the proposed rule. Accordingly, the 1996 legislation

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165. *See infra* pt. IV.A.

166. State *ex rel.* Dep't of Gen. Servs. v. Willis, 344 So. 2d 580, 590 (Fla. 1st DCA 1977).

167. FLA. STAT. § 120.54(4) (1995).

168. *Id.* § 120.54(4)(b).

169. FLA. STAT. § 120.56(2)(a) (Supp. 1996).

170. FLA. STAT. § 120.541(1)(a) (Supp. 1996); *see also supra* note 124 and accompanying text.

171. FLA. STAT. § 120.541(1)(a) (Supp. 1996).

172. *See supra* pt. III.H.

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168. *Id.* § 120.54(4)(b).

169. FLA. STAT. § 120.56(2)(a) (Supp. 1996).

170. FLA. STAT. § 120.541(1)(a) (Supp. 1996); *see also supra* note 124 and accompanying text.

171. FLA. STAT. § 120.541(1)(a) (Supp. 1996).

172. *See supra* pt. III.H.

the time for filing challenges to a proposed rule until 20 days after publication of this notice.[179]

### B. *Leveling the Playing Field in Proposed Rule Challenges*

The opportunity provided by the Florida APA to challenge a proposed rule before the rule becomes effective is unique among state administrative procedure acts.[180] It has been characterized as a powerful remedy.[181] However, there was a perception that administrative agencies had come to enjoy too much of an advantage in these rule challenge proceedings and that the proceedings therefore were not serving their intended purpose of discouraging the adoption of invalid rules. The 1996 legislation makes several changes in an effort to "level the playing field" in these proceedings.[182]

#### 1. Presumptions

Under the existing APA, a person challenging a proposed rule (or an existing rule) has the burden of proving the invalidity of the rule by a preponderance of the evidence.[183] This, of course, is consistent with the general principle of law that, unless otherwise provided by statute, the burden of proof is on the party asserting the affirmative of an issue.[184] However, courts often have applied a heavier burden to challengers by also deferring to an agency's construction of a statute the agency is charged with enforcing, or by otherwise indicating that the agency's interpretation is entitled to "great weight" and therefore is not

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179. FLA. STAT. § 120.56(2)(a) (Supp. 1996). The 1996 legislation extends the time for filing challenges to a proposed rule by "any substantially affected person" if the agency approves a change in the proposed rule that requires publication of notice. *Id.* The legislation expressly authorizes a person who is substantially affected by a change in the proposed rule to seek a determination of the validity of such change. *Id.* In addition, any person not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of the change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule. *Id.*

180. *See, e.g.*, Maher, *supra* note 45, at 280.

181. *Id.*

182. These portions of the 1996 legislation were recommended by the Governor's APA Review Commission. The stated goal of the Commission in approving these provisions was to "create a more level playing field in administrative proceedings." APA COMM'N REPORT, *supra* note 62, at 23.

183. *See, e.g.*, Agrico Chem. Co. v. Department of Envtl. Reg., 365 So. 2d 759, 763 (1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979).

184. *See, e.g.*, Young v. Department of Community Affairs, 625 So. 2d 831, 833 (Fla. 1993); McDonald v. Department of Prof'l Reg., 582 So. 2d 660, 670 (Fla. 1st DCA 1991).

to be overturned unless "clearly erroneous."[185] Courts also have held that an agency's interpretation of a statute "need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations."[186] In addition, courts occasionally have suggested that a rule enjoys a "presumption" of correctness or validity.[187]

Numerous judicial decisions applied these principles, but one particular decision was frequently cited as an example of the great deference courts had extended to agency rules. In *State Department of Health & Rehabilitative Services v. Framat Realty, Inc.*,[188] the court held that an agency's interpretation "acquire[s] legitimacy through the rulemaking process," and therefore is entitled to this substantial deference, even though other interpretations may be preferable.[189] The *Framat Realty* decision thus came to symbolize the advantage that agencies enjoyed in defending their rules, and many sought to reverse this decision (and similar decisions) by legislative changes that remove any presumption of correctness or validity.[190]

The 1996 legislation seeks to "level the playing field" by expressly providing that a proposed rule is not presumed to be valid or invalid.[191] The legislation also seeks to ease the burden on the challenger by simply requiring the challenger to "state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority."[192] The agency then has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.[193]

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185. *See, e.g.*, D.A.B. Constructors, Inc. v. Department of Transp., 656 So. 2d 940, 944 (Fla. 1st DCA 1995).

186. Department of Labor & Employment Sec. v. Bradley, 636 So. 2d 802, 807 (Fla. 1st DCA 1994).

187. *See, e.g.*, Board of Trustees of Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1363 (Fla. 1st DCA 1995).

188. 407 So. 2d 238 (Fla. 1st DCA 1981).

189. *Id.* at 241.

190. APA COMM'N REPORT, *supra* note 62, app. N, at 2.

191. FLA. STAT. § 120.56(2)(c) (Supp. 1996). The statutory provisions governing challenges to adopted rules were not amended in a similar fashion. As such, existing rules continue to enjoy a presumption of validity. This differing treatment of proposed and adopted rules is consistent with the recommendations of the Governor's APA Review Commission. APA COMM'N REPORT, *supra* note 62, at 27-28.

192. FLA. STAT. § 120.56(2)(a) (Supp. 1996). However, the legislation does *not* also impose on the challenger the "initial burden of producing evidence," as suggested by the administrative law judge in Consolidated-Tomoka Land Co. v. St. Johns River Water Mgmt. Dist., DOAH Case No. 97-0870RP, at 39 (June 27, 1997), *appeal docketed*, No. 97-2996 (Fla. 1st DCA July 25, 1997).

193. *Id.* This change in the burden of proof could make a difference in the outcome of

This new process may work well in those cases where, once the challenger stated the reasons why the proposed rule is an invalid exercise of delegated legislative authority,[194] it will be more reasonable to require the agency to prove that the proposed rule is not an invalid exercise of delegated legislative authority.[195] For example, it may make

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some cases. For example, in *Board of Trustees of the Internal Improvement Trust Fund v. Levy*, the hearing officer determined the challenged rule to be arbitrary, and therefore invalid, because the agency failed to provide evidence of the relationship between the requirements of the proposed rule and the statutory objectives. 656 So. 2d 1359 (Fla. 1st DCA 1995). However, the court reversed the hearing officer's ruling, stating that "[t]he burden of proving abuse of agency discretion is upon the challenger of the rule, who must meet that burden with a preponderance of the evidence." *Id.* at 1363 (citations omitted).

Similarly, in *Dravo Basic Materials Co. v. Department of Transp.*, the court concluded that the challenger failed to meet its "difficult" burden of proof before the hearing officer, and upheld the hearing officer's order dismissing the challenge to the proposed rule. 602 So. 2d 632, 634-35 (Fla. 2d DCA 1992). In *Dravo*, the court considered a challenge to a proposed rule that restricts the percentage of fine material in limestone aggregate used for road construction. *Id.* at 633-34. The proposed rule required that limestone aggregate have 3.75% or less fine material at its point of use. *Id.* at 633. The proposed rule also established different inspection and testing procedures for each of three types of mines. *Id.* at 633-34. The agency anticipated that limestone would further degrade when it is transported from the mine or redistribution terminal to the point of use, so the proposed rule required limestone to meet the 1.75% standard at the mine and at any redistribution terminal. *Id.* at 634. The challenger claimed that the agency had performed no scientific test to conclude that the 1.75% standard is necessary at the terminal in order to meet the 3.75% standard at the point of use. *Id.* at 635. The court rejected this claim, concluding that, to invalidate the proposed rule, it was incumbent upon the challenger to provide evidence establishing, at a minimum, that a less restrictive standard could be employed at the terminal without significant risk to the supplier's ability to meet the 3.75% standard at the point of use. *Id.*

194. FLA. STAT. § 120.56(2)(a) (Supp. 1996).

195. The term "invalid exercise of delegated legislative authority" is defined as "action which goes beyond the powers, functions and duties delegated by the Legislature." FLA. STAT. § 120.52(8) (Supp. 1996). Furthermore, the legislation provides:

> A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious;
>
> (f) The rule is not supported by competent substantial evidence; or
>
> (g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially

more sense to require the agency—rather than the challenger—to show: that the agency is authorized to adopt the challenged rule (and that it therefore has not exceeded its grant of rulemaking authority); that the rule does not enlarge, modify, or contravene the specific provisions of law being implemented; that the challenged rule is supported by competent substantial evidence; and that the agency followed the applicable rulemaking procedures and requirements.

In other cases, this new process may not work as well. For example, it may be more difficult for the agency to show: that the rule is not arbitrary or capricious; that the rule is not vague, does not fail to establish adequate standards for agency decisions, or does not vest unbridled discretion in the agency; or that the rule does not impose regulatory costs that could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.[196]

### 2. Limitations on Rulemaking Authority

Before the 1996 legislation, Florida courts interpreted the existing law as granting administrative agencies "wide discretion in the exercise of their rulemaking authority, [whether] clearly conferred or fairly implied[, so long as that authority is] consistent with the agencies' general statutory duties."[197]

The 1996 legislation seeks to overrule these decisions by expressly providing that: "A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required."[198]

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accomplish the statutory objectives.

*Id.* § 120.52(8)(a)-(g).

196. For a critical analysis of this change in which party has the burden to prove that the proposed rule is an invalid exercise of delegated legislative authority, see Rossi, *supra* note 7, at 302-04.

197. Department of Labor & Employment Sec. v. Bradley, 636 So. 2d 802, 807 (Fla. 1st DCA 1994) (quoting Department of Prof'l Reg., Bd. of Med. Exam'rs v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984)). *See, e.g.*, General Motors Corp. v. Department of Highway Safety & Motor Vehicles, 625 So. 2d 76, 77 (Fla. 1st DCA 1993); Florida League of Cities v. Department of Ins., 540 So. 2d 850, 857 (Fla. 1st DCA 1989).

198. FLA. STAT. § 120.52(8) (Supp. 1996). A "grant of rulemaking authority" is statutory language by which the Legislature authorizes the agency to adopt rules. For example, the Legislature frequently grants this rulemaking authority by the use of language such as "the Board shall have the authority to make rules, consistent with law, as necessary to carry out the provisions of this part." FLA. STAT. § 489.507(3) (1995). A "specific law to be implemented" is the specific statute that is implemented, interpreted, or made specific by the rule being promulgated. For example, the Legislature has directed the Department of Highway Safety and Motor Vehicles to "prescribe a form upon which motor vehicle owners may record odometer

The 1996 legislation also seeks to make clear that a rule will be determined to be invalid for *any* of the seven reasons set out in the definition of "invalid exercise of delegated legislative authority."[199] Several judicial decisions, beginning with *Agrico Chemical Co. v. Department of Environmental Regulation*,[200] had appeared to require the agency's rules to be sustained as long as they are merely "reasonably related to the purpose of the enabling legislation . . . [and] are [not] arbitrary or capricious."[201] The 1996 legislation seeks to effectively overrule these cases by expressly stating that: "No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious. . . ."[202]

The addition of this new standard could well change the outcome of some cases. For example, in *General Motors Corp. v. Department of Highway Safety & Motor Vehicles*,[203] the appellate court applied the now-rejected "reasonably related" test to sustain a rule against a claim that is constituted an invalid exercise of delegated legislative authority. The challenged rule provided for the automatic expiration of a previous-

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readings when registering their motor vehicles." FLA. STAT. § 320.02(2)(b) (1995). For an excellent discussion of this new rulemaking standard, see Boyd, *supra* note 7, at 338-42.

In one of the first rule challenge cases following the enactment of the 1996 APA legislation, the administrative law judge applied this new rulemaking standard to find the challenged rule invalid. Consolidated-Tomoka Land Co. v. St. Johns River Water Mgmt. Dist., DOAH Case No. 97-0870RP, at 59 (June 27, 1997), *appeal docketed*, No. 97-2996 (Fla. 1st DCA July 25, 1997). The administrative law judge said:

> [T]he new law no longer sanctions the concept that a statement of legislative policy or purpose coupled with a broad grant of rulemaking authority constitute sufficient authorization for agency rulemaking. Rather, the law now contemplates that rules must implement statutes which describe more specific programs. Indeed, the new law uses the term "particular powers and duties," and this clearly implies that the specific law to be implemented must detail "particular" powers and duties, and not just "general" ones, in order to support rulemaking.

*Id.* at 47-48.

199. *See supra* note 195.

200. 365 So. 2d 759, 763 (1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979).

201. *Id.* at 763. The court's holding in *Agrico* is arguably understandable, because the decision predated the enactment in 1987 of a statutory definition of "invalid exercise of delegated legislation authority." *See* FLA. STAT. § 120.52 (1987). However, in spite of the existence, since 1987, of a statutory definition, courts continued to recite this limited test. *See, e.g.*, Marine Indus. Ass'n of S. Fla. v. Department of Envtl. Protection, 672 So. 2d 878, 882 (Fla. 4th DCA 1996); Cortes v. State Bd. of Regents, 655 So. 2d 132, 137 (Fla. 1st DCA 1995); Department of Labor & Employment Sec. v. Bradley, 636 So. 2d 802, 807 (Fla. 1st DCA 1994).

202. FLA. STAT. § 120.52(8) (Supp. 1996).

203. 625 So. 2d 76 (Fla. 1st DCA 1993).

ly-approved application for a franchise motor vehicle license.[204] The statute set forth in considerable detail the procedure and evidentiary findings necessary for the agency to determine whether to grant or deny the application,[205] but no statutory provision specifically authorized the agency to impose a time limit on an application it chose to grant.[206] Nonetheless, the court upheld the challenged rule because it was "reasonably related to the purpose of the enabling legislation, and [was] not arbitrary or capricious."[207] The 1996 legislation expressly rejects this rationale.[208]

The 1996 legislation recognizes that it imposes more restrictions on an agency's rulemaking authority than heretofore have been imposed on these agencies in the exercise of their rulemaking powers.[209] The legislation therefore establishes a procedure by which each agency is to identify its previously-adopted rules that exceed the rulemaking authority as now limited.[210] The 1996 legislation also "shields" those listed existing rules that do not meet this new test until the Legislature may consider whether specific authorizing legislation should be enacted.[211]

### 3. Attorneys' Fees and Costs

Private parties seeking to challenge proposed rules often are faced with the prospect of incurring considerable expense in the form of attorneys' fees and costs. Government agencies typically defend these challenges with the use of existing personnel and resources and therefore do not incur comparable fees and costs. In addition, government agencies usually have substantially more resources than private parties. As such, government agencies were perceived to enjoy a considerable advantage in these proceedings, and there was little disincentive to

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204. FLA. ADMIN. CODE r. 15C-1.008.

205. FLA. STAT. § 320.642 (1989).

206. *General Motors Corp.*, 625 So. 2d at 79 (Booth, J., dissenting) (no statutory provision "even remotely implies" that the agency has the authority to impose such a limitation).

207. *Id.* at 78 (quoting Florida Beverage Corp. v. Wynne, 306 So. 2d 200, 202 (Fla. 1st DCA 1975)).

208. FLA. STAT. § 120.536(8) (1996). In one of the first rule challenge cases decided under the 1996 legislation, the administrative law judge applied this new rulemaking standard to invalidate a rule even though the predecessor of the rule had been upheld as "reasonably related to" the agency's broad duties. Calder Race Course, Inc. v. Department of Bus. & Prof'l Reg., DOAH Case No. 96-0343RP, at 15 (June 13, 1997), *appeal docketed*, No. 97-2704 (Fla. 1st DCA July 11, 1997). The administrative law judge found that there was no specific legislative authority for the challenged rule, and she invalidated it. *Id.*

209. FLA. STAT. § 120.536(2), (3) (Supp. 1996).

210. *Id.*

211. *Id.* For a more detailed description of the required review process and the rule challenge "shields," see Rhea & Imhof, *supra* note 7, at 54-56, 78-79; Boyd, *supra* note 7, at 343-44.

prevent administrative agencies from forcing private parties to pursue challenges to administrative rules.

The 1996 legislation again seeks to "level the playing field" in administrative rule challenges by requiring the agency to pay reasonable costs and reasonable attorneys' fees if the proposed rule or a portion thereof is determined to be invalid, "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."[212]

If the agency prevails in the proceeding, then it is entitled to an award for reasonable costs and reasonable attorneys' fees against a party if the court or administrative law judge determines that the party participated in the proceedings for an "improper purpose."[213] The phrase "improper purpose" is defined as "participation in a proceeding . . . primarily to harass or to cause unnecessary delay or for frivolous purpose. . . ."[214] Attorneys' fees are limited to $15,000, but there is no similar monetary limitation on the amount of "reasonable" costs that may be awarded.[215]

### 4. Failure to Comply with Rulemaking Requirements

The 1996 legislation establishes several new requirements that were designed to improve the rulemaking process.[216] Some resisted these

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212. FLA. STAT. § 120.595(2) (Supp. 1996). The definition of "substantially justified" is taken from the Florida Equal Access to Justice Act. FLA. STAT. § 57.111(3)(e) (Supp. 1996). For a more complete discussion of the new provisions providing for attorneys' fees and costs, see Elizabeth C. Williamson, *The 1996 Florida Administrative Procedure Act's Attorneys' Fees Reforms: Creating Innovative Solutions or New Problems?*, 24 FLA. ST. U. L. REV. 439 (1997); Edenfield, *supra* note 7, at 73.

213. FLA. STAT. § 120.595(2) (Supp. 1996).

214. *Id.* § 120.595(1)(e)1.

215. *Id.* § 120.595(2). The 1996 legislation also includes similar provisions for payment of reasonable costs and reasonable attorneys' fees in cases involving challenges to existing agency rules. *Id.* § 120.595(3).

216. *See supra* pt. III. Examples of the new requirements include: (1) agencies must publish notice of rule development; (2) agencies must conduct public workshops, if requested, unless they explain in writing why a workshop is unnecessary; (3) rules must be written in readable language; (4) the notice of proposed rule must include certain additional information; (5) agencies are required to choose a lower cost regulatory alternative that substantially accomplishes the objectives of the law being implemented; (6) agencies are required to prepare statements of estimated regulatory costs, in certain cases; (7) agencies must consider the impact of a proposed rule on small cities and small counties; (8) if a public workshop or a public hearing is held, the agency must ensure that the persons responsible for preparing the proposal are available to explain the proposal and to respond to questions or comments; and (9) agencies

new requirements because they feared that the inadvertent failure to comply with these requirements would create new grounds for administrative challenges to proposed or adopted rules based on mere "technicalities." Others who favored these new rulemaking requirements agreed that a limited harmless error rule should be applied to these requirements, but consistent with the theme of leveling the playing field, they did not believe that the person challenging the rule should have the burden of showing that the error was not harmless.[217]

The 1996 legislation specifically addresses this issue. It expressly provides that an agency's "failure to follow the applicable rulemaking procedures or requirements . . . [is] presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired."[218]

### C. *Additional Grounds for Challenging Rules*

Both proposed and adopted rules now may be determined to be invalid for two new reasons.

#### 1. Less Costly Alternatives

As previously noted, a proposed or existing rule is an invalid exercise of delegated legislative authority if "[t]he rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives."[219] In the past, courts and hearing officers have upheld agency rules that were designed to minimize the cost to the agency, rather than the cost to the regulated person.[220] This

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are required to publish notice of changes to proposed rules.

217. For an example of a judicial decision that, prior to the 1996 legislation, applied the harmless error to rulemaking requirements *and* placed the burden for showing that the error was *not* harmless on the person challenging the rule, see Cataract Surgery Ctr. v. Health Care Cost Containment Bd., 581 So. 2d 1359, 1364 (Fla. 1st DCA 1991) (holding that "[t]he harmless error doctrine will be applied unless the challenging party can show that [the] deficiencies . . . impair the fairness of the rulemaking proceedings").

218. FLA. STAT. § 120.56(1)(c) (Supp. 1996).

219. *Id.* § 120.52(8)(g); see *supra* pt. III.F., for a detailed discussion of this new requirement.

220. *See, e.g.*, Dravo Basic Materials Co. v. Department of Transp., 602 So. 2d 632, 634-39 (Fla. 2d DCA 1992) (upholding a challenged regulation that was "created primarily to control the cost of state inspection," even though the regulated party was unable to remain competitive in its market if it complied with the regulation and even though, as the court admitted, the regulated party "may well [have been able to compete] . . . under some other adequate and economical test procedures").

may no longer be the case now that the Legislature has expressly said that a proposed or existing rule is an invalid exercise of delegated legislative authority if "[t]he rule imposes regulatory costs on the regulated [party] . . . which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives."[221]

### 2. Not Based on Competent Substantial Evidence

A proposed or existing rule also is now an invalid exercise of delegated legislative authority if it is not based on "competent substantial evidence."[222] The phrase "competent substantial evidence" has long been used in the APA,[223] and it has a well-established meaning when used in the context of judicial review of agency action:

> "We have used the term 'competent substantial evidence' advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. . . . In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. . . . We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reason-

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221. FLA. STAT. § 120.52(8)(g) (Supp. 1996).

222. *Id.* § 120.52(8)(f). Some may suggest that it was unnecessary to add this new ground, since such a rule would be invalid under the existing "arbitrary or capricious" standard. FLA. STAT. § 120.52(8)(e) (1995). *Agrico*, 365 So. 2d at 763 (stating that a proposed rule is arbitrary if it is "not supported by fact or logic"). However, other courts have held that whether a rule is arbitrary or capricious is not the same as whether the rule is supported by competent substantial evidence. *E.g.*, Adam Smith Enter. v. Department of Envtl. Reg., 553 So. 2d 1260, 1274 n.23 (Fla. 1st DCA 1989) (distinguishing between the standard of review for "quasi-judicial rule challenge proceedings[s]"—"competent substantial evidence"—and that for "quasi-legislative rule enactment proceeding[s]"—"arbitrary or capricious").

223. The phrase "competent substantial evidence" is used in the APA in two places: (1) in the provision limiting the agencies' authority to reject or modify findings of fact made by an administrative law judge to those cases where "the agency . . . determines . . . that the findings of fact were not based upon competent substantial evidence. . . .," FLA. STAT. § 120.57(1)(b)10 (1995); and (2) in the provision describing the appellate court's authority to "set aside agency action or [to] remand the case to the agency if [the court] finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record." FLA. STAT. § 120.68(10) (1995).

> able mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.' . . . "[224]

Although the phrase has been defined principally in the context of judicial review of agency action, it would appear to be readily applicable to proceedings involving a determination of the validity of a proposed or existing rule. For example, consider a case involving the challenge of a proposed rule where the challenger has objected to the proposed rule on the ground that the underlying factual predicate for the rule was not based on competent substantial evidence. In such a case, the agency would be required to provide evidence that will establish a substantial basis of fact from which the facts at issue may be reasonably inferred. This "substantial" evidence also then must be "competent" or sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

The addition of this new standard could change the outcome of some cases. For example, in one earlier case, the hearing officer rejected a challenge to a proposed rule even though the agency conceded that it performed no scientific tests to support the requirements of the proposed rule.[225] Now, however, an agency may be required to conduct such tests if necessary to provide competent substantial evidence to support the challenged rule.

### D. *Challenges to Unadopted Rules*

The APA establishes procedures for challenging both proposed and adopted rules.[226] There are now two means for challenging agency statements that meet the definition of a "rule," but which have not been proposed for adoption or adopted. First, the procedure previously available is generally retained under the 1996 legislation.[227] This procedure was codified in the controversial section 120.535 and is now codified in section 120.54(1).[228] Under this procedure, the agency must

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224. Gulf Oil Co. v. Bevis, 322 So. 2d 30, 32 (Fla. 1975) (quoting De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)).

225. *Dravo*, 602 So. 2d at 635.

226. FLA. STAT. § 120.54(4) (1995) (establishing the procedure for challenging a proposed rule); *id.* § 120.56 (establishing the procedure for challenging an adopted rule).

227. Although the existing procedure is retained, the 1996 law makes a few changes to this procedure. For a discussion of these changes, see Hopping & Wetherell, *supra* note 7, at 137-42.

228. FLA. STAT. § 120.54(1) (Supp. 1996). As previously noted, the question of whether this procedure should be retained was hotly debated. For a description of this debate, see Hopping & Wetherell, *supra* note 7, at 142-46.

show that it is not feasible or practicable to adopt the agency's statement through the rulemaking process.[229]

Second, a new procedure is created.[230] An agency's unadopted statement may be challenged during the course of an administrative hearing in which the agency has sought to apply the unadopted statement to "determine[ ] the substantial interests of a party."[231] In this case, the agency's statement is not "presumed valid or invalid", and the agency must show that its statement:[232] (1) is within the agency's delegated power;[233] (2) "[d]oes not enlarge, modify, or contravene the [enabling statute]"; (3) "[i]s not vague . . . [and] does not vest unbridled discretion in the agency;" (4) "[i]s not arbitrary or capricious;" (5) "[i]s not being applied . . . without due notice;" (6) "[i]s supported by competent and substantial evidence; and" (7) "[d]oes not impose excessive regulatory costs on the [affected party]."[234] In other words, the unadopted statement must meet essentially the same substantive tests as a proposed or adopted rule.[235]

## V. CONCLUSION

After more than three years of considerable effort, the Legislature enacted, and Governor Chiles approved, comprehensive revisions to Florida's APA. The principal changes are designed to help agencies make better rules by providing early and meaningful opportunities for additional public participation and by requiring agencies to evaluate the economic impacts of the proposed rule as well as suggested alternatives. Other revisions seek to encourage agencies to prepare better rules by providing citizens with new and revised remedies for challenging objectionable rules. The existing rule challenge procedures and requirements are modified to level the playing field. In addition, new remedies are created for challenging unadopted rules, thus encouraging agencies to promulgate their policies in the legislatively-preferred fashion: through the now-improved rulemaking process.

Throughout the three-year ordeal, both the Legislature and Governor Chiles exhibited an intense interest in regulatory reform. No doubt, they

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229. FLA. STAT. §§ 120.54(1)(a)1.-2. For a detailed discussion of § 120.535, see Dore, *supra* note 36, at 444-48; Maher, *supra* note 36, at 390-408.

230. FLA. STAT. § 120.57(1)(e) (Supp. 1996). For a detailed discussion of this new procedure, see Hopping & Wetherell, *supra* note 7, at 152-58.

231. FLA. STAT. § 120.57(1)(e)1. (Supp. 1996).

232. *Id.* § 120.57(1)(e)2.

233. *Id.* § 120.57(1)(e)2.a.

234. *Id.* § 120.57(1)(e)2.b.-g.

235. *Compare* FLA. STAT. § 120.57(1)(e) *with* FLA. STAT. § 120.52(8) (defining "invalid exercise of delegated legislative authority"); *see also supra* note 195.

will watch closely to see whether the 1996 revisions prove successful, and if, in fact, the third time's the charm.[236]

236. Indeed, one commentator already has predicted that Florida may have travelled too far down the road of curtailing agency discretion, and that it will only be a short time before Florida revisits the issue of APA reform. *See* Rossi, *supra* note 7, at 307.

It is perhaps noteworthy that during the 1997 Regular Session, the Legislature considered and enacted only very minor changes to the 1996 APA legislation. *See* 1997 Fla. Laws ch. 97-176. However, it may be too early to tell whether the 1996 revisions were successful or if significant changes are indeed required.