The Open Government Act: The 2007 Amendment to the APA

by Lawrence E. Sellers, Jr.

Author's note: As of this writing, HB 7183 has not yet been presented to the Governor. After the bill is presented, the Governor will have the opportunity to sign it, veto it or allow it to become law without his signature.

The Florida Legislature recently enacted HB 7183, which makes a number of changes to Florida's Administrative Procedure Act (APA).[1] Here's a brief summary of some of the key provisions in "The Open Government Act." Many are based on recommendations by the Joint Administrative Procedures Committee.[2]

Rulemaking

Defines Rulemaking Authority. Section 2 of the Act adds new definitions, including a definition of "rulemaking authority." The term is defined to mean "statutory language that *explicitly* authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of 'rule'." The purpose of defining the term reportedly is to make clear that agencies have the duty or authority to adopt rules pursuant to the APA in cases where the statutory language directs or authorizes them to "adopt policies," or "establish criteria," or the like, even though the word "rule" is not used.

Expands Statutes that may Confer Rulemaking Authority. Section 2 also revises the "flush left" language following the definition of "invalid exercise of delegated legislative authority" to eliminate the requirement that statutory language granting rulemaking authority shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred "by the same statute." The quoted language is removed.[3] Section 3 of the Act makes a similar change to s. 120.536.

Restricts Delegation of Rulemaking Responsibilities. Section 4 of the Act provides that certain rulemaking responsibilities of an agency head may not be delegated or transferred. These include approval of the notice of intended action and the filing of the approved rule with the Department of State. This appears to be consistent with the court's ruling in *Financial Services Commission v. The Florida Insurance Council, Inc.*, 938 So. 2d 545 (Fla. 1st DCA 2006), *review denied*, ____ So. 2d ____ (Fla. 2007).

Requires Certain Boards to Conduct Public Hearings. The rulemaking requirements in the APA generally provide that the agency must give affected persons the opportunity to present evidence and argument. In addition, the agency must, if requested by an affected person, schedule a public hearing on the proposed rule. Section 4 of the Act requires that if the agency head is a board created within the Department of Business and Professional Regulation or the Department of Health, Division of Medical Quality Assurance, the board shall conduct the requested public hearing itself and may not delegate this responsibility without the consent of those persons requesting the public hearing.

Requires SERCs to be Made Available. Section 4 of the Act provides that a proposed rule may not be filed with the Department of State (and therefore may *not* become effective), until the Statement of Estimated Regulatory Costs (SERC) has been provided to all persons who submitted a lower cost regulatory alternative and it has been made available to the public.

Expands JAPC Authority. Section 5 of the Act makes a number of changes to the duties and powers of the Joint Administrative Procedures Committee (JAPC). Among other things, JAPC is now authorized to review and object to unadopted agency statements. JAPC also is authorized to consider whether a SERC complies with all applicable requirements and to object to a proposed rule where the accompanying SERC does not comply.

Clarifies Cross-References to Other Rules of the Same Agency. The APA provides that a rule may incorporate material by reference but only as to material that exists on the date the rule is adopted; for purposes of the rule, changes in the material are *not* effective unless the rule is amended to incorporate the changes. As such, questions have arisen as to whether an agency rule that incorporates by specific reference another rule of that same agency automatically incorporates subsequent amendments to the referenced rule. Section 4 of the Act clarifies this by providing that an agency rule that incorporates by specific reference another rule of that agency automatically incorporates subsequent amendments to the referenced rule, unless a contrary intent is clearly indicated in the referencing rule. Any notice of amendments to a rule that has been incorporated by specific reference in other rules of that agency must explain the effect of the amendments on the referencing rules.

Limits Materials that may be Incorporated by Reference. Section 4 of the Act also provides that material incorporated by reference in a rule may not incorporate additional material by reference unless the rule specifically identifies the additional material. For rules adopted after 2008, material may not be incorporated by reference unless the full text of the material can be made available for free public access through an electronic hyperlink from the rule in the *Florida Administrative Code* making the reference, unless the agency has determined that posting of the material would constitute a violation of federal copyright law, in which case a statement to that effect, along with the address of locations at the Department of State and the agency at which the material is available for public inspection and examination, must be included in the notice.

Requires Electronic Publication of Code. Effective December 31, 2008, Section 8 of the Act requires the Department of State to publish electronically the *Florida Administrative*

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Code on an Internet website managed by the department. The electronic code is to display each rule chapter currently in effect in browse mode and must allow full text search of the code and each rule chapter.

Unadopted Rules

Defines "Unadopted Rule." Section 2 of the Act also adds a new definition for the term "unadopted rule," and defines the term to mean "an agency statement that meets the definition of the term 'rule' but has not been adopted pursuant to the [rulemaking] requirements of s. 120.54."

Effect of Filing of Challenge to Agency Statements Defined as Rules. The APA establishes a legislative preference for rulemaking, and it requires that agency statements meeting the definition of a rule must be adopted as soon as practicable and feasible. The APA also provides a procedure for challenging agency statements defined as rules. If the administrative law judge enters a final order that all or part of an agency statement violates the rulemaking requirement, then the agency is required to immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

Agencies typically have responded to such challenges by initiating rulemaking to adopt the challenged statement, because the initiation of such rulemaking generally results in a stay of the challenge to the unadopted statement (and the subsequent adoption of the rule moots the challenge). In such cases, the agency may continue to rely upon the challenged statement if the statement meets certain requirements in s. 120.57(1)(e). The referenced provision generally requires that the agency "prove up" that the unadopted rule is not an invalid exercise of delegated legislative authority (i.e., it does not enlarge, modify, or contravene the specific provisions of law implemented, etc.) and that the rule is not being applied without due notice.[4]

Sections 9 and 10 of the Act make significant changes to these provisions. The Act provides that upon the *filing* of a petition for administrative determination that an agency statement violates the rulemaking requirement, the agency shall *immediately* discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action until either of the following occurs: (1) the proceeding is dismissed, (2) the statement is adopted and becomes effective as a rule, (3) a final order is issued that contains a determination that the petitioner failed to prove the statement constitutes a rule, or (4) a final order is issued that contains a determination that rulemaking is not feasible or not practicable. However, if the administrative law judge determines that the agency's inability to rely upon the statement during the proceeding will constitute an immediate danger to the public health, safety, or welfare, then the administrative law judge shall grant an agency petition to allow application of the statement until the proceeding is concluded.

Agencies May Not Rely on Unadopted Statements. As noted, the APA currently allows an agency to rely upon a challenged unadopted statement if the agency is proceeding expeditiously and in good faith to adopt rules that address the challenged unadopted statement and the agency complies with s. 120.57(1)(e). However, effective January 1, 2008, Section 10 of the Act repeals the "prove up" provisions in s. 120.57(1)(e) and expressly provides that an agency or an administrative law judge may not enforce any agency policy that constitutes an unadopted rule when the agency fails to prove that rulemaking is not feasible or practicable. Notably, this requirement does not preclude application of properly adopted rules and applicable provisions of law to the facts.[5]

Rule Challenges

Clarifies Deadlines for Filing Rule Challenges. Section 9 of the Act clarifies deadlines for filing challenges to proposed rules when a public hearing has been held or the agency is required to prepare a statement of estimated regulatory costs (SERC). The APA provides several "windows" for filing challenges to proposed rules. One of these "windows" is within 10 days after the final public hearing is held on the proposed rule as provided by "s. 120.54(3)(c)." Section 9 of the Act revises this reference to "s. 120.54(3)(e)2," which expressly provides that the term "public hearing" includes any public hearing held by any agency in which the rule was considered. A second "window" is within 20 days after the "preparation" of a SERC. Section 9 of the Act also revises this to conform to other provisions of the APA so that the time begins to run only after the statement "has been provided to all persons who submitted a lower cost regulatory alternative and made available to the public."

Increases Limits on Attorney's Fees. Section 11 of the Act increases from $15,000 to $50,000 the limit on

attorney's fees that may be awarded to the prevailing party in challenges to proposed and existing rules.[6] The Act also makes clear that attorney's fees are available in challenges to emergency rules.

Revises Attorney's Fees in Challenges to Unadopted Rules. While the APA always has included a limit on the attorney's fees that may be awarded in cases involving challenges to *proposed* or *existing* rules, the Legislature initially did not establish any limits on attorney's fees that may be awarded in cases involving challenges to *unadopted* rules. However, agencies typically avoided the risk of paying attorney's fees in such cases by initiating rulemaking to adopt the challenged unadopted statement. Section 11 of the Act makes two changes to the provision governing attorney's fees in cases involving challenges to unadopted rules. First, Section 11 provides that, if prior to the final hearing the agency initiates rulemaking and requests a stay of the proceedings pending rulemaking, the administrative law judge shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the agency filed its request for a stay pending rulemaking, providing the agency adopts the statement as a rule. However, a request for attorney's fees and costs may be granted only upon a finding that the agency knew or should have known at the time the petition was filed that the agency statement was an unadopted rule, and no award of attorney's fees may exceed $50,000. Second, Section 11 also provides that, if the agency prevails in the proceedings, the administrative law judge shall award reasonable costs and attorney's fees against the party if the party participated in the proceedings for an improper purpose.

Effective Date. Section 20 provides that the Act takes effect July 1, 2007, except as otherwise expressly provided.[7] Several of the sections have delayed effective dates. For example, the provisions governing challenges to agency statements defined as rules, reliance on unadopted rules, and changes to attorney's fees all become effective January 1, 2008. The provision requiring the publication of an electronic version of the *Florida Administrative Code* becomes effective December 31, 2008.

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Endnotes:

[1] HB 7183 initially was filed as Proposed Committee Bill (PCB) GEAC 07-05. As enacted, it also includes the contents of HB 7179, which initially was filed as PCB GEAC 07-04. The two House bills were similar to SB 1592 and SB 1594, both by Senator Mike Bennett (R-Bradenton).

[2] See JAPC, *Report on Unadopted Rules* (Feb. 2006), and JAPC, *Supplement to Report on Unadopted Rules* (Feb. 2007).

[3] The "by the same statute" language was an issue in *JM Auto v. DHSMV*, DOAH Case No. 07-0603RX (Final Order, April 20, 2007).

[4] For a general discussion of these provisions, see Kent Wetherell, *Rulemaking Reforms and NonRule Policy: A Catch-22 for State Agencies*, 71 Fla. B.J. 20 (Mar. 1997); Cathy M. Sellers, *Nonrule Policy and the Legislative Preference for Rulemaking*, 75 Fla. B.J. 38 (Jan. 2001); Cathy M. Sellers, *OFFA v SFWMD—An Agency Need Not Successfully Adopt a Challenged Statement to Avoid a Final Order and Attorney's Fees*, XXIV Admin. L. Section Newsletter 1 (Mar. 2003).

[5] This provision appears to be consistent with the court's ruling in *The Environmental Trust v. Department of Environmental Protection*, 714 So. 2d 493 (Fla. 1st DCA 1998),that an agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. For a discussion of this decision, *see* Lawrence E. Sellers, Jr., *The Environmental Trust: Will the Exceptions Swallow the "Rule?,"* XX ELULS *Reporter*, No. 2 (March 1999).

[6] The new $50,000 limit is consistent with the limit on attorney's fees available under the Equal Access to Justice Act, s. 57.111(4)(d), which likewise was increased from $15,000 to $50,000 in 2003. *See* Lawrence E. Sellers, Jr., *The 2003 Amendments to the Florida APA*, 77 Fla. B.J. 74 (Oct. 2003).

[7] The Act 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 adjudicatory proceedings. The general rule is that a statute that relates only to a procedural remedy applies to all pending cases, but there can be no retroactive application of substantive law without a clear directive from the Legislature. For example, Florida courts previously have held that the right to collect attorney's fees may be substantive in nature and therefore may not be applied retroactively. In one of the first appellate decisions interpreting the 1996 APA legislation, the court concluded that certain provisions were "means and methods" by which the administrative determination is rendered, and therefore are procedural in nature. *Life Care Centers of America, Inc., v. Sawgrass Care Center, Inc.*, 683 So. 2d 609, 614 (Fla. 1st DCA 1996).