

LEGISLATIVE REPORT
1992 SESSION

CHANGES IN
CHAPTER 120

RULEMAKING CHANGES IN CHAPTER 92-166

The following summary of changes was prepared by the Joint Administrative Procedures Committee:

Chapter Law 92-166, enacted during the 1992 legislative session, amends the Administrative Procedure Act (APA) in several ways. All agencies should be aware of some significant changes in rulemaking procedures.

Prior to publishing the notice of proposed rulemaking, an agency now may notice the development of proposed rules by publishing a notice of rule development in the FAW. The notice of rule development must include the subject area of the rule development, a short plain explanation of the purpose and effect of the rule development, the specific legal authority, and the preliminary text of the rule, if available.

If the agency publishes a notice of rule development, it must hold a rule development workshop if requested by any affected person. Notice of this workshop shall be published in the Florida Administrative Weekly (FAW) not less than 14 days prior to the date of the workshop and shall indicate the subject area, agency contact person, place, date, and time of the workshop.

If an agency publishes a notice of rule development and an economic impact statement (EIS) is prepared, prior to notice of proposed rules, the agency must make a draft of the EIS available to the public.

Agencies no longer have to publish a summary of the EIS in the notice of proposed rulemaking. The APA now provides that the preparation of an EIS is discretionary unless:

1. The agency determines that the proposed action would result in a substantial increase in costs or prices paid by consumers, individual industries or state or local government agencies, or would result in significant adverse effects on competition, employment, investment, productivity or innovation, and legal alternative approaches exist; or

2. Within 14 days after publication of the notice of rule development, or if no such notice was provided, within 21 days after the notice of proposed rulemaking, a written request for preparation of an EIS is filed with the agency by the governor, a body corporate and politic, at least 100 people signing a request, or an organization representing at least 100 people, or any domestic nonprofit corporation or association; or
3. If requested by the Joint Administrative Procedures Committee.

The agency's decision regarding preparation of an EIS pursuant to (1) is not subject to challenge. If an EIS is prepared, then a draft of the EIS must be available for public inspection at least 14 days prior to the 21 day public hearing following notice.

The requirements of the EIS itself have been amended. The new EIS must contain 8 sections of analysis:

1. An estimate of the cost to the agency, and to any other state or local government entities, of implementing and enforcing the proposed action, including the estimated amount of paperwork, and any anticipated effect on state or local revenues;
2. An estimate of the cost or the economic benefit to all persons directly affected by the rule;
3. An estimate of the impact of the proposed action on competition and the open market for employment, if applicable;
4. An analysis of the impact on small business;
5. A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of not adopting the rule;
6. A determination of whether less costly or less intrusive methods exist for achieving the purpose of the rule where reasonable legal alternatives exist;

7. A description of any reasonable alternative methods which were considered by the agency and the reasons for rejecting those alternatives in favor of the proposed rule; and
8. A detailed statement of the data and methodology used in making the foregoing estimates.

The new law mandates that, based upon these factors, all agencies must choose the regulatory alternative that imposes the lowest net cost to society or provide a statement of why the agency has rejected the lower cost alternatives in favor of the rule.

An EIS cannot be challenged unless the petitioner had previously requested preparation of the EIS and provided the agency with specific concerns regarding the economic impact of the proposed rule either by participating in a public workshop, public hearing or through written comments.

The only grounds for invalidating a rule based upon a challenge to the EIS are failure of the agency to prepare the EIS according to the statutory procedure, or failure to consider information provided to the agency regarding specific concerns about the EIS when such failure substantially impairs the fairness of the rulemaking proceeding.

The new law also affects the duties of the Joint Administrative Procedures Committee with respect to rule review. The Committee now has the responsibility to examine emergency rules and to consult with standing legislative committees on the legislative authority for rules. The law also establishes additional elements for the Committee's review of rules. These include:

1. Whether the rule is consistent with the expressed legislative intent of the law implemented;
2. Whether the rule is necessary to accomplish the apparent or expressed objectives of the law being implemented;
3. Whether the rule is a reasonable implementation of the law as it affects the convenience of the public or persons particularly affected by the rule;

4. Whether the rule could be made less complex or more easily comprehensible to the public;
5. Whether the rule involves the lower net cost to society consistent with the law implemented;
6. Whether the rule will require additional appropriations; and
7. In the case of emergency rules, whether there exists an emergency which justifies the promulgation of the rule, whether the agency exceeded its statutory authority, and whether the rule was promulgated in accordance with statutory procedure.

Section 120.543 of the APA now provides for a simplified procedure to adopt rules which are substantively identical to federal regulations when the agency is charged by the Florida Statutes with the implementation of a federal program. A notice of intent to adopt a rule under this simplified procedure must appear in the Florida Administrative Weekly and be provided to the Committee at least 21 days prior to filing the rule with the Department of State. The agency head must consider any written comments received within 14 days after this notice of intent appears. The rule is then adopted upon filing with the Department of State and becomes effective on a date designated in the rule, but not earlier than the effective date of the substantively identical federal regulation.

This simplified procedure cannot be used if a substantially affected person files an objection with the agency head within 14 days of the publication of the notice of intent, unless the agency finds the objection to be frivolous. After adoption of the rule, if the substantively identical federal regulation ceases to have effect, the agency rule must be repealed within 60 days by publication of a notice of repeal in the FAW. If the substantively identical federal regulation is substantially amended, the agency rule must be likewise amended within 180 days or the original agency rule is deemed repealed.

SUMMARY OF CHANGES IN CHAPTER 120

The following summary of changes was prepared by the House Governmental Operations Committee:

CHAPTER 92-166

Administrative Procedure Act

Committee substitute for Senate Bill 1354 provides for enhanced review of administrative agency rulemaking activity by the Joint Administrative Procedures Committee (JAPC). The act establishes additional criteria for review of rules by the JAPC through amendment to Subsection 120.545(1), F.S. The JAPC is provided authority to request information from agencies which is reasonably necessary for review of rules under the statutory criteria. The JAPC is required to consult with the standing committees of the Legislature which have jurisdiction over subject areas pertinent to rules under review regarding legislative authority for the rules. If the JAPC objects to a rule, it must report the objection to the President of the Senate and the Speaker of the House of Representatives.

The law also provides through amended Paragraph 120.54(9)(a), F.S., for JAPC review of emergency rules.

It may challenge the rule in an administrative or judicial proceeding pursuant to amended Paragraph 11.60(2)(k), F.S.

Subparagraph 120.53(2)(a)3., F.S., is revised to permit a state agency to substitute an electronic data base of its administrative orders with an ad hoc indexing system for research and retrieval by the general public instead of a hierarchical subject-matter index of such orders. A statement of legislative finding that the official reporters used by the Public Employees Relations Commission satisfy this accessibility requirement is provided. Final orders relating to rule challenge proceedings pursuant to Section 120.535, F.S., must be included in the subject-matter index making them available for public inspection and copying.

Paragraph 120.52(12)(d), F.S. is amended to bar prisoners from obtaining or participating in administrative rule challenge proceedings under subsections 120.54(4) and (9), F.S., or Section 120.56, F.S. and from

obtaining appellate review of any agency action under Section 120.68, F.S.

Paragraph 120.54(2)(a), F.S., is amended to conform the definition of "small business" to that found in the Small Business Assistance Act of 1985 [Section 288.703, F.S.]. Subsections 120.54(1), (2) and (12), F.S., are modified to provide for additional notice in the process of administrative rulemaking.

Subsection 120.535(10), F.S., is added to exempt agency statements relating to cost-recovery clauses, factors or mechanisms implemented under Chapter 366, F.S., (Public Utilities) from the requirement that agency statements be adopted as rules.

The measure creates Section 120.543, F.S., to provide procedures for the adoption of federal rules by the state. The act is effective July 1, 1992, except for those portions of the act regarding the JAPC took effect April 9, 1992.

The following summary of changes was prepared by the House Corrections Committee.

CHAPTER 92-166

Exemption from Rule Challenges

Senate Bill 1354 Amends Paragraph 120.52(12)(d), F.S., to bar inmates from obtaining or participating in administrative rule challenge proceedings under Subsections 120.54(4) and (9), F.S., or Section 120.56, F.S., and from obtaining appellate review of any agency action under Section 120.68, F.S.

[Inmates have been excluded from Section 120.57, F.S., the most substantial proceeding under the Administrative Procedure Act (APA) , since 1978. Subsequent to this date, inmates have continued to be excluded from other proceedings under the APA, including their right to appeal agency action to the District Court. The act adds rule challenges to a list of administrative remedies unavailable to inmates. These revisions take effect July 1, 1992.

[The intended goal of this change, as stated by the Department of Corrections, was to "restrict forum shopping by inmates by directing them to the proper procedures for addressing legitimate concerns, and to put an end to the unnecessary and costly abuse of the rule challenge process." The Department also stated that, "It has become common for inmates to abuse the discovery process in rule challenges by filing numerous interrogatories and requests for admissions, the content of which are irrelevant, vague, or repetitious. Substantial staff and attorney time must be spent responding to these requests."

[Inmates already have existing avenues through which individual complaints concerning rules may be addressed. They may utilize the inmate grievance procedure, file with the agency pursuant to Subsection 120.54(5), F.S., petitions to initiate rulemaking, and they are allowed input into the rule promulgation process through the submission of written comments to the agency pursuant to Subsection 120.54(3), F.S. Inmates are also able to obtain redress and to protect their constitutional rights through the circuit and federal courts.