



ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XXXII, No. 3

Amy W. Schrader, Editor

March 2011

Now What Do We Do? An Agency Perspective on Rulemaking After HB 1565 (and Executive Order 11-01)

by Patricia Nelson

Any attorney practicing Florida administrative law for two or more years knows that it is commonplace for the Florida Legislature to tinker with Chapter 120, Florida Statutes, the Administrative Procedure Act (“APA”), in each legislative session.¹ The articles analyzing these changes rightly acknowledge that the modifications are usually the legislature’s attempts to control the way executive agencies exercise their delegations of legislative authority so that agencies

do not begin to establish basic public policy through rulemaking.² Most recently, the legislature implemented, over the veto of then-Governor Charlie Crist, CS/CS/HB 1565, now Chapter 2010-279, Laws of Florida (“HB 1565”). This bill, entitled, “An act related to rulemaking,” made significant changes to the rulemaking procedures of the APA.³ Without any analysis or critique of the new law, this article will address how one agency settled on implementing the

law.⁴ This article will address the four major changes affecting everyday rulemaking activities of an agency: the new threshold for preparing a Statement of Estimated Regulatory Costs (“SERC”); the new content of a SERC; legislative ratification of certain rules; and compliance with Executive Order 11-01.

Threshold for Preparing SERCs

The APA has changed numerous times with regard to the requirement

See “What Do We Do?” page 10

Chair’s Column

by Cathy M. Sellers

These certainly are interesting times to practice administrative law in Florida! “They” keep moving our Chapter 120 cheese! If you read the lead article in our December 2010 Newsletter, you know that in November 2010, the Legislature overrode Governor Crist’s veto of House Bill 1565, which passed during the 2010 Regular Session. House Bill 1565 (now incarnated Chapter 2010-279, Laws of Florida) significantly changed the rulemaking landscape by requiring legislative ratification of “million dollar” rules before they can

take effect. And, on January 4, 2011, less than 12 hours after he was inaugurated, Governor Scott signed Executive Order 11-01, requiring agencies under the Governor’s direction to immediately suspend rulemaking, subject to rule review and consent to rulemake by the newly-created Office of Fiscal Accountability and Regulatory Reform.

Meanwhile, several bills have been filed for the 2011 Legislative Session that would, among other things, substantially change access rights to, and shift the burden of proof in, certain

administrative proceedings. Right or wrong, our administrative agencies currently are the focus of numerous

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CHAIR'S COLUMN

from page 1

and significant proposals espoused as “regulatory reform.” The point is, this year we may see some of the most sweeping changes to the Florida Administrative Procedure Act since 1996. Your Administrative Law Section is staying abreast of these proposals and will be weighing in, as appropriate, based on our Section’s adopted and Florida Bar-approved legislative positions, which are published on the Section website. And of course, we will be bringing you our usual post-Session analysis of any APA legislation that may pass this Session.

As the winds of change swirl around us, your Section’s Executive Council and Committees have been diligently advancing our Section’s mission. Last October, we hosted the Pat Dore Administrative Law Conference, which was a great success. The conference’s theme was “In Search of Camelot” and our keynote speaker was former Florida Supreme Court Justice Arthur England, who provided an eloquent and inspirational retrospective on our APA that helped remind us all why we love this area of the law and why we practice in it. To a speaker, our

topical sessions were excellent and the reviews very positive. We were also pleased to have our best attendance at the conference in four years. Only a few weeks before the Pat Dore Conference, our Public Utilities Law Committee hosted the “Practice Before The PSC” continuing legal education seminar, which featured an all-star cast of speakers that included First District Court of Appeal Judge William Van Nortwick and former Public Counsel Jack Shreve, and focused on electric utilities and telecommunications. On April 8, 2011, the Section will host the State and Federal Government and Administrative Practice (“SFGAP”) certification exam review course. This year’s course will feature a one-day seminar on Florida administrative and governmental law. In addition to providing certification exam instruction, this course provides an excellent and informative way to make a dent in that 90-hour CLE recertification requirement for SFGAP certified lawyers.

In addition to our CLE programs, the Section is spearheading the update of the Florida Bar’s Administrative Practice Manual. The Section also plans to publish two articles in the Florida Bar Journal covering different aspects of House Bill 1565 in the coming months, and we are always seeking articles on ad-

ministrative law for publication in the Journal, so we encourage you to consider contributing. We also continue to produce this Newsletter, which features informative articles on the most timely administrative law topics, and again, we welcome your contributions.

Finally, but certainly not of least importance, the Section is taking the lead in drafting amendments to the Uniform Rules of Procedure. The rules were last amended in 2007, and since then legislation has passed requiring certain amendments to the rules. In addition, inconsistencies in the rules need to be addressed and outdated rule provisions updated. The Section’s Uniform Rules Committee, chaired by Judge Linda Rigot, has diligently worked to produce a thorough, thoughtful package of rules amendments that will be provided to the Governor’s Office and offices of the other Administration Commission members for consideration and work through the rule amendment process. The Section is proud to take the lead in this effort.

In closing, the Executive Council deserves thanks for all it does to serve our Section. And as always, the Section encourages your involvement. Our Section will be the better for your fresh ideas, new energy, and different perspectives.

This newsletter is prepared and published by the Administrative Law Section of The Florida Bar.

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Williams v. Department of Transportation, 36 Fla. L. Weekly 195 (Fla. 5th DCA 2011) (Opinion filed January 28, 2011)

Williams, an employee of the Department of Transportation, became involved in a dispute with another employee over Williams' "private" use of an office printer. The second employee purportedly reported the private use of the printer to a higher officer of the Department and told Williams he would be hearing from them. Williams, in the hearing of other employees then stated that if he were fired as a result, he would "get his gun and blow [the employee's] guts out." The second employee complained to the office supervisor, and Williams' employment was terminated.

The hearing officer found that none of the employees who heard the statement by Williams believed that Williams was threatening anyone and that none of them were afraid of him. The hearing officer recommended that Williams be reinstated. The Department filed exceptions to the recommended order asserting that the witnesses testified only that they were not personally afraid of Williams because he had not threatened them. The Public Employees Relations Commission entered a final order accepting the Department's exceptions and terminating Williams' employment.

On appeal, the court affirmed. It held that there was evidentiary support for the Department's decision to discharge Williams.

Licensing

Resnick v. Flagler County School Board, 46 So. 3d 1110 (Fla. 5th DCA 2010) (Opinion filed October 29, 2010)

Resnick was a licensed practical nurse working in the Flagler County school system with physi-

cally impaired children. He returned to work after a leave of absence to treat a disorder similar to narcolepsy. Following his return to work, Resnick was involved in an incident where he was tube feeding a seizure prone quadriplegic student. He was then called to another classroom to assess a student suspected of having a seizure. After quickly ascertaining that the second child was not having a seizure, he returned to the first classroom. Subsequently, he was notified by the school board that he was being terminated for failure to assess and provide first aid to students and follow safe procedures.

Resnick sought an administrative hearing. The administrative law judge issued a recommended order finding only two minor instances of misconduct involving failure to record a seizure on the proper document and failing to check the residuals in a child's stomach before tube feeding. He did not find sufficient evidence of failure to provide adequate nursing care or falling asleep at school. The administrative law judge recommended a written reprimand and a medical evaluation to assess the status of Resnick's sleep disorder.

The school board rejected numerous findings of fact and conclusions of law in the recommended order and issued a final order terminating Resnick's employment.

On appeal, the court reversed. It found competent substantial evidence in the record to support the findings in the recommended order. Noting the fact-driven nature of the proceeding, the court held that the administrative law judge's weighing of the testimony must be given great weight. The case was remanded to the school board for entry of an order consistent with the recommended order.

Green v. Department of Business & Professional Regulation, 49 So. 3d 315 (Fla. 1st DCA 2010) (Opinion filed November 17, 2010)

The Florida Board of Real Estate Appraisers filed administrative complaints against two appraisers alleging eight separate counts. Following a hearing, the administrative law judge issued a recommended order recommending dismissal of all but one of the counts. The Board entered a final order, however, reinstating three additional counts, including failure to retain appraisal reports for five years; failure to include sufficient information in the report; and failure to document in the summary report information, techniques, methods and supporting analysis. The Board increased the recommended penalty from reprimand to one year probation plus administrative fines.

On appeal, the court reversed and remanded. With respect to the failure to retain records for five years, the court held that the Board's interpretation of section 475.629, Fla. Stat., was not more reasonable than that of the administrative law judge. The Board had construed the statute to require that the records retained be of adequate quality. The court held that the clear language of the statute merely required that the report and underlying documents on which it was based be retained.

The court also held that the Board had erred in rejecting the administrative law judge's determination that the report contained sufficient information for the intended user to understand it. While the Board had adopted the findings of fact in this regard, it rejected the conclusion of law that the report was not misleading or insufficient. The court held that this determination, while characterized as a conclusion of law, was actually a factual finding.

Finally, the court held that the Board improperly reweighed evidence in rejecting the administrative law judge's findings regarding the adequacy of the report with respect to the methods, techniques and analysis utilized by the appraisers.

continued, next page

CASE NOTES*from page 3***Rulemaking**

State Board of Administration v. Huberty, 46 So. 3d 1144 (Fla. 1st DCA 2010) (Opinion filed November 2, 2010)

In 2000, the Legislature adopted section 121.4501, Fla. Stat., creating the Public Employee Optional Retirement Program which allowed state employees to choose a defined investment plan as opposed to the defined pension plan that had previously been the only option. The statute provided that an employee electing to participate in the investment plan could do so “in writing or by electronic means.” §121.4501(4)(a)1.a., Fla. Stat. The state interpreted that language to allow an employee to make the election telephonically with the conversation being recorded and saved. Employees were given the option to switch back to the pension plan one time, provided that it was the employee’s responsibility to make up any shortfall if the proceeds of the investment plan did not equal what the pension plan would have yielded.

Ms. Huberty phoned the state and elected to participate in the investment plan. After six years, the amount in her investment plan was approximately \$80,000 less than what would be required to buy back into the pension plan. Ms. Huberty filed two petitions for hearing under Chapter 120 that were consolidated for hear-

ing. The first challenged the state’s interpretation of the statute allowing telephonic election as an unadopted rule, and the second sought a determination that she could return to the pension plan without buying back in. The administrative law judge concluded that the state’s construction of the statute allowing telephonic election was an unadopted rule.

On appeal, the court reversed. It held that the State Board of Administration’s interpretation of the statute was consistent with the plain meaning of the statute. It further held that the Board’s interpretation did not have the direct and consistent effect of law and was, therefore, not a rule under the definition in section 120.52(16), Fla. Stat.

Office of Insurance Regulation v. Service Insurance Co., 35 Fla. L. Weekly 2474 (Fla. 1st DCA 2010) (Opinion filed November 10, 2010)

In 1996, the Legislature amended section 627.062, Fla. Stat., to create an option for insurers to choose arbitration in lieu of a section 120.57 hearing challenging agency action relative to a rate filing. The Department of Insurance (now the Office of Insurance Regulation or OIR) adopted rules implementing that provision, including establishing the process for payment of various costs of arbitration. In 2008, the statute was again amended removing the arbitration option.

Service Insurance Company filed a rule challenge in 2009 challenging the allocation of arbitration costs after an arbitration that commenced after the

repeal of the statute but was based on a rate filing that occurred before repeal. The administrative law judge entered a final order concluding that the rule expanded on the statutory provision and was an invalid exercise of delegated legislative authority. The administrative law judge’s order rejected OIR’s argument that an expired rule could not be challenged, holding that the effect of the rule must be considered. In this situation, she found that the rule was still affecting Service Insurance because the arbitration occurred after the effective repeal of the rule and because OIR had sought, after expiration of the rule, to suspend Service Insurance’s license based on non-compliance with the rule.

On appeal, the court reversed. It held that the rule in question expired when the underlying statute was repealed. As section 120.56(3)(a), Fla. Stat., provides that a rule may be challenged “at any time during the existence of the rule,” the court concluded that under the plain language of the statute, a rule can only be challenged while it is in effect. In reaching that conclusion, the court specifically rejected the contrary holding of the Fourth District Court of Appeal in *Witmer v. Department of Business and Professional Regulation*, 662 So. 2d 269 (Fla. 4th DCA 1995), in which the court had held that a rule could be challenged so long as it was being applied to the petitioner.

Florida Elections Commission v. Blair, 35 Fla. L. Weekly 2702 (Fla. 1st DCA 2010) (Opinion filed December 8, 2010)

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Blair challenged a rule of the Florida Elections Commission defining the terms “willful,” “willfully,” “knew” and “reckless disregard.” The Commission had sought to fine Blair for knowingly and willfully accepting campaign contributions in excess of the statutory limit.

The administrative law judge determined that the rule was an invalid exercise of delegated legislative authority on the grounds that there was insufficient statutory authority for the rule and that the legislature had previously repealed a statutory definition of willfulness. In reaching this conclusion, the administrative law judge relied in part on section 120.52(17), Fla. Stat., which added a definition of “rulemaking authority.”

On appeal, the court reversed. The court recognized that the definition of “rulemaking authority,” which was added to the Administrative Procedure Act in 2008, provides that there must be statutory language “that explicitly authorizes or requires” adoption of a rule; however, it construed that language to be simply a codification of previously existing restrictions on agency rulemaking authority, not a further restriction. The court held that the terms “specific” and “explicit” were synonymous with respect to the analysis of whether sufficient statutory authority exists. Therefore, it relied on prior cases, including *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000), in concluding that the question is whether a statute contains a specific grant of rulemaking authority, not whether the grant is specific enough. The court held that section 106.26(1), Fla. Stat., which gives the Commission authority to “consider all sworn complaints,” was sufficient to allow the Commission to define the terms in the rule. The court noted that section 106.25(3) makes the “willful performance of an act prohibited by” Chapter 106 a violation, thus requiring the Commission to interpret the term.

The court further rejected the conclusions of the administrative law judge that the rule contravened the statute because the statute provides

that willfulness is a determination of fact and the legislature had repealed its statutory definition of the term. Again, the court held that the rule was simply codifying existing law.

Declaratory Statements

ExxonMobil Corporation v. Department of Agriculture & Consumer Services, 50 So. 3d 755 (Fla. 1st DCA 2010) (Opinion filed December 28, 2010)

On motion for clarification, the court substituted this opinion for the one at 35 Fla. L. Weekly 2433. The substituted opinion reiterated the original opinion, holding that a declaratory statement is appropriate even where it applies to a group of entities. It further held that the issuance of investigative subpoenas by the Department, prior to initiation of an actual lawsuit, did not justify denying a request for a declaratory statement.

Authority of Division of Administrative Hearings

Department of Revenue v. Selles, 47 So. 3d 916 (Fla. 1st DCA 2010) (Opinion filed November 10, 2010)

The Department of Revenue (DOR), pursuant to section 409.2557, Fla. Stat., and the mother’s request, sought child support payments from Selles on behalf of the child’s mother. That statute establishes an administrative mechanism for DOR to establish support payments absent a preexisting or superceding judicial determination. Selles’ request for a hearing challenging DOR’s proposed order setting an amount of support was forwarded to the Division of Administrative Hearings.

At the hearing, the administrative law judge heard testimony from the child’s grandmother that the child had been living with her for the past two years. The administrative law judge entered a final order requiring that both the mother and the father pay child support to the grandmother.

DOR appealed. It argued that DOAH had no authority to either require support payments from the mother or to order that any payments be made to the grandmother.

The court reversed in part and affirmed in part. It held that the statutory language only contemplated one parent, “the parent from whom support is being sought,” being obligated for support payments. Therefore, it held that neither DOR nor DOAH had authority to require support payments from the mother as she was “the parent from whom support is not being sought.” However, the court did conclude that the statute authorized DOR, and thus DOAH, to redirect payments from a parent to another person with whom the child resides.

Due Process

Department of Highway Safety & Motor Vehicles v. Auster, 36 Fla. L. Weekly 64 (Fla. 5th DCA 2010) (Opinion filed December 30, 2010)

The Department of Highway Safety & Motor Vehicles appealed an order of the circuit court overturning the hearing officer’s decision suspending Auster’s driver’s license for refusal to submit to a breath-alcohol test. Auster had requested a subpoena be issued for the breath technician, asserting that he could provide evidence related to the issue of whether she had recanted her refusal. However, the hearing officer refused to issue the requested subpoena.

On appeal, the court denied the Department’s request for a writ of certiorari. It held that the hearing officer erred in refusing to issue a subpoena on an issue that was relevant to the case. While recognizing that hearing officers generally have discretion in this regard, the court held that in this circumstance the refusal violated Auster’s right to due process of law.

Mary F. Smallwood is a partner with the firm of GrayRobinson, P.A. in its Tallahassee office. She is Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to mary.smallwood@gray-robinson.com.

Agency Snapshot

The Division of Administrative Hearings

by Seann M. Frazier

An Independent Judiciary

The citizens of this great state enjoy a privilege that they may not recognize. When state agency actions affect the interests of Floridians, they have a place where their grievances may be heard -- independently. Unlike complaints against federal agencies and agencies in many other states, grievances against Florida agency actions most often appear before a central panel for administrative adjudication. In Florida, citizens have the right to be heard before an independent judiciary at the Division of Administrative Hearings (DOAH).

Though housed within the Department of Management Services, DOAH effectively operates as an independent, central panel that serves all state agencies, and the public, by acting as an impartial trier of fact to resolve disputes with agency actions. DOAH's judges are not subject to the control, direction or supervision of any particular state agency. DOAH's mission is to provide a uniform and impartial forum for the resolution of disputes between private citizens and state agencies in an efficient and timely manner, as well as mediating and adjudicating workers' compensation claims.

Organizational Structure

DOAH is directed by a division

director, its Chief Administrative Law Judge, Robert Cohen. Judge Cohen was appointed by the Governor and Cabinet and confirmed by the Florida Senate. Second in command is Judge Charles Stampelos. These judges oversee two units, the Adjudication of Disputes Program and the Workers' Compensation Appeals Program.

The Adjudication of Disputes Program oversees most types of Chapter 120 proceedings including formal administrative proceedings, rule challenges and the like. DOAH's Adjudication Program includes approximately 35 administrative law judges organized into three geographic regions and with one special district.

The Northern Region is led by Judge Li Nelson, with the Middle Region led by Judge Susan Harrell and the Southern Region helmed by Judge John Van Laningham. Separately, DOAH employs the use of a statewide Environmental and Health District to adjudicate complex cases in those two fields. This section includes a panel of 5 - 6 judges that oversee cases ranging from complex environmental permits to health facility certificate of need litigation.

Several years ago, DOAH was expanded to include a Workers' Compensation Appeals Program. This Program includes an additional 32

judges specializing in the adjudication of compensation claims working in 17 district offices.

Electronic Filing

DOAH is a leader in electronic filing. In 2009, DOAH accepted more than 18,000 electronic filings in its Administrative Adjudication cases and, incredibly, more than 430,000 electronic filings in its Workers' Compensation section. Most dockets are available online, and the Division boasts a searchable website for current and past cases at www.doah.state.fl.us.

Timely Administrative Adjudication

Sometimes, justice delayed is justice denied. Unlike cases that might linger in circuit or federal court for years, cases before DOAH are intended to be resolved within 120 days. In fact, DOAH has established a goal of resolving more than 70% of its cases within 120 days. In 2009, 87% of the cases referred to DOAH were scheduled for hearing within 90 days and 80% of cases were closed within 120 days.

Agency Contacts

Most Chapter 120 cases begin at individual state agencies and are then referred to DOAH. However, DOAH retains original jurisdiction and final order authority in several types of cases, including rule challenges. Filings may be made by contacting the Agency Clerk:

Claudia Llado
 Claudia_Llado@doah.state.fl.us
 Division of Administrative Hearings
 1230 Apalachee Parkway
 Tallahassee, Florida 32399-3060
 (850) 488-9675

Fax Filing:
 (850) 921-6847



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The Florida Bar Foundation: A Cause We Can Share

By John A. Noland, President, The Florida Bar Foundation



I hope lawyers in Florida will join me in supporting a common cause: The Florida Bar Foundation.

The Foundation, a 501(c)(3) public charity, is a means through which lawyers can support a commonly held belief that everyone should have access to legal representation – regardless of his or her ability to pay.

The Florida Bar Foundation's mission to provide greater access to justice is accomplished through funding of programs that expand and improve representation and advocacy for the poor in civil legal matters; improve the fair and effective administration of justice; and make public service an integral component of the law school experience.

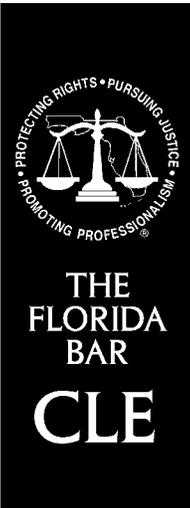
In 1981, financial support for the Foundation increased significantly when the Florida Supreme Court adopted the nation's first Interest on Trust Accounts (IOTA) program. Over the past 29 years, the Florida IOTA program has distributed more than \$350 million to help hundreds of thousands of Florida's poor receive critically needed free civil legal assistance and to improve Florida's justice system. More than 30 percent of the total funding for legal aid organizations in Florida comes from The Florida Bar Foundation.

Domestic violence, predatory lending and foreclosure, and access to public benefits are among the types of cases flooding legal aid offices throughout the state. For the sake of those throughout Florida with nowhere else to turn for legal help but to Legal Aid, your support of The Florida Bar Foundation is vital.

Gifts to the Foundation provide added value to your local legal aid organization because of Foundation initiatives such as salary supplementation and loan repayment programs to help retain legal aid attorneys, a Summer Fellows program that places law students at legal aid organizations for 11 weeks each summer, new technological efficiencies such as a statewide case management system, and training opportunities for legal aid staff attorneys.

The Foundation is unique as a funder in providing leadership, along with its financial support, by working with its grantees to improve Florida's legal services delivery system and identifying and addressing the legal needs of particularly vulnerable client groups. You can learn more about the Foundation at www.floridabarfoundation.org.

I hope you will come to consider The Florida Bar Foundation one of your charities. It's truly an organization in which all of us, as Florida attorneys, can take tremendous pride.



The Florida Bar Continuing Legal Education Committee, the Administrative Law Section, the Environmental & Land Use Law Section and the Government Lawyer Section present

State & Federal Government & Administrative Practice (SFGAP) Certification Review Course I: The Sunshine State

COURSE CLASSIFICATION: ADVANCED LEVEL

Live and Webcast Presentation: Friday, April 8, 2011

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Course No. 1184R

Those who have applied to take the certification exam may find this course a useful tool in preparing for the exam. It is developed and conducted without any involvement or endorsement by the BLSE and/or Certification committees. Those who have developed the program have significant experience in their field and have tried to include topics the exam may cover. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination.

7:30 a.m. – 8:00 a.m. **Late Registration**

8:00 a.m. – 8:10 a.m.

Welcome and Introductions

Francine M. Ffolkes, Florida Dept. of Environmental Protection
Kelly A. Martinson, Hankin, Persson, Davis, McClenathen & Darnell

8:10 a.m. – 9:00 a.m.

Administrative Hearings: From Selecting Your Forum to Winning Your Case

David L. Jordan, Department of Community Affairs

9:00 a.m. – 9:50 a.m.

Rulemaking Update: How to Keep Your SERC from Getting SBRAced and More!

Reginald L. Bouthillier, Jr., Greenberg Traurig, P.A.

9:50 a.m. – 10:00 a.m. **Break**

10:00 a.m. – 10:50 a.m.

How to Break the Rules Legally: Challenges to Proposed, Existing, and Unadopted Rules

Hon. John G. Van Laningham, Division of Administrative Hearings

10:50 a.m. – 11:40 a.m.

Professional Licensing & Discipline – It's More Than Just a Hand Slap

William M. Furlow III, Grossman, Furlow & Bayo, LLC

11:40 a.m. – 12:30 p.m.

Navigating the Taj Mahal: Administrative Appeals

Francine M. Ffolkes, Florida Dept. of Environmental Protection

12:30 p.m. – 1:30 p.m. **Lunch (on your own)**

1:30 p.m. – 2:20 p.m.

I've Fallen and I Can't Get Up: State Tort Litigation

Stephen M. Fernandez, Shapiro, Goldman, Babboni & Walsh

2:20 p.m. – 3:10 p.m.

Crying Foul: Bid Protests Under the Florida APA

Michael P. Donaldson, Carlton Fields, P.A.

3:10 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 4:10 p.m.

The Doors are Open, Come on In: Public Records and Sunshine Law Update

Seann M. Frazier, Greenberg Traurig, P.A.

4:10 p.m. – 5:00 p.m.

Florida Ethics Overview: The Top 10 Dos and Don'ts for Public Officers and Employees

Virindia A. Doss, Florida Commission on Ethics

WEBCAST CONNECTION:

Registrants will receive webcast connection instructions two days prior to the scheduled course date via e-mail. If The Florida Bar does not have your e-mail address, contact the Order Entry Department at 850-561-5831, two days prior to the event for the instructions.

CLE COMMITTEE

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Terry L. Hill, Director, Programs Division

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Francine M. Ffolkes, Tallahassee — Program Co-Chair
Kelly A. Martinson, Sarasota — Program Co-Chair
Bruce Lamb, Tampa — Program Co-Chair

CLE CREDITS

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City, County & Local Government: 9.0 hours

Civil Trial: 1.0 hour

State & Federal Gov't & Administrative Practice: 9.0 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

TO REGISTER	 ON-LINE: www.floridabar.org/CLE	 MAIL: Completed form with check	 FAX: Completed form to 850/561-5816
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REFUND POLICY: A \$25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

Register me for the “State & Federal Government & Administrative Practice (SFGAP) Certification Review Course I: The Sunshine State Seminar

ONE LOCATION: (288) LEON COUNTY CIVIC CENTER, TALLAHASSEE (APRIL 8, 2011)

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ELECTRONIC MATERIALS: Effective July 1, 2010, every CLE course will feature an electronic course book in lieu of a printed book for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable, downloadable, printable material will be available via e-mail several days in advance of the live course presentation or thereafter for purchased products. We strongly encourage you to purchase the book separately if you prefer your material printed but do not want to print it yourself.

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- Tallahassee, April 8, 2011
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WHAT DO WE DO?*from page 1*

that agencies analyze the economic impact of rules. The following is a summary of the requirement through the years:

1974: "New" APA is enacted, Ch. 74-310, Laws of Florida. No provisions requiring either economic or small business analysis

1975: Content of the Florida Administrative Weekly (FAW) rulemaking notice is amended by Ch. 75-191, Laws of Florida, to require a summary of the estimated economic impact of the proposed rule on affected persons. Also, the "Florida Economic Impact Disclosure Act" (FEIDA) passes the legislature. FEIDA requires the preparation of an economic analysis for any agency action, not just rulemaking, but only upon the request of a legislator, the cabinet, or the Governor. Governor Askew vetoes FEIDA on June 27, 1975, stating that it would put "substantial economic and manpower drains" upon state agencies.

1976: The legislature overrides the veto of FEIDA in Ch. 76-1 Laws of Florida. After extensive discussions between the legislature and the Governor, FEIDA is repealed and replaced with amendments to the APA in Ch. 76-276. An Economic Impact Statement (EIS) must now be prepared for all rules, but not other agency action. "Professionally accepted methodology" and "quantified data" must be used. Extensive analysis of policy options requires both cost-benefit and cost-effectiveness analyses. No provision linking preparation of EIS to a distinct ground of invalidity.

1978: Ch. 78-425, Laws of Florida, is enacted. Requirements substantially reworded and softened. "Professionally accepted methodology" is removed and "determinations" and "conclusions" become "estimates." No formal cost-benefit or cost-effectiveness analysis now required. Failure to provide an adequate EIS is a specified ground of invalidity, but a 1 year time limit from

effective date is imposed on such challenges.

1985: Florida Small and Minority Business Assistance Act ("SMBAA") is enacted in Ch. 85-104, Laws of Florida. "Small Business" references the SMBAA's definition of 25 or fewer employees and a net worth not more than \$1 million, but agency may define as a higher number of employees. A "minority business enterprise" is one at least 51% owned by minority persons. A Small and Minority Business Council is created in the Department of Commerce. A Small and Minority Business Advocate provides staffing for the Council. The requirement that an agency "tier" its rules or otherwise structure them so as to reduce disproportionate impact is added. Analysis of impact on small business is added as an element of the EIS.

1992: Ch. 92-166, Laws of Florida, deletes the requirement that the rulemaking notice contain a summary of the estimated economic impact of the rule. An EIS must be prepared when requested by the Governor, a body corporate and politic, at least 100 people, an organization representing 100 persons, or a domestic nonprofit corporation. Agency must also prepare an EIS if it determines the rule would result in significant adverse effects on competition, employment, investment, productivity, or innovation. Informal assessment of cost-benefit is required. Agencies directed to implement the lowest cost alternative. Standing for EIS challenge is limited to the persons that requested it and ground for challenge is limited to procedural failure to prepare or failure to consider information submitted. No challenge to a rule for failure to adopt the lowest cost alternative. Reference to maximum number of employees of a small business increased to 50, conforming to 288.703, Fla. Stat.

1996: Agencies are "encouraged" to prepare the new statement of estimated regulatory cost (SERC) for all rules by Ch. 96-159, Laws of Florida. Agency must adopt regulatory alternatives offered by the small business ombudsman that

are feasible, consistent with rule objectives, and reduce impact on small business. Definition of "invalid exercise of delegated authority" is expanded to include a rule that imposes regulatory costs that could be reduced by adoption of less costly alternatives that substantially accomplish the statutory objectives, but such a challenge must be brought within 1 year and involves special standing requirements. Ch. 96-320, Laws of Florida, changes reference from 50 to 100 employees and changes references to the Small and Minority Business Advocate in the Department of Commerce to the Office of Tourism, Trade and Economic Development.

1997: Ch. 97-176, Laws of Florida, extends the deadline for filing a noticed rule by 21 days when the small business ombudsman offers regulatory alternatives.

2008: The Small Business Regulatory Relief Act is enacted as part of Ch. 2008-149, Laws of Florida. It creates the Small Business Regulatory Advisory Council ("Council") and directs it to conduct a periodic review of agency rules in conjunction with agency sunset review. An agency is required to prepare a SERC if a proposed rule has an impact on small business. The Council, replacing the small business ombudsman, is authorized to offer regulatory alternatives to proposed rules. If an agency does not adopt alternatives, the Council may request the President and Speaker to direct OPPAGA to consider whether the alternative reduces the impact on small business while meeting the stated objectives of the proposed rule.⁵

The most recent change to the economic analysis requirement feels a little like we have come full circle. Prior to HB 1565, the APA stated:

Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541. However, an agency shall prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541, if the

proposed rule will have an impact on small business.⁶

The requirement now reads:

Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541. However, an agency must prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541, if:

- a. The proposed rule will have an adverse impact on small business; or
- b. The proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in this state within 1 year of implementation of the rule.⁷

On November 16, 2010, the Department of Business and Professional Regulation (“DBPR”) set about implementing this new requirement. Pursuant to changes made to the APA in 2008, which added the mandatory SERC requirement for any rule having an impact on small business, DBPR developed a checklist to help agency staff determine if a SERC was required. To implement the new law, DBPR added the following calculation to that checklist:

Regulatory Cost Increase Determination

Direct:

- a. Increased Regulatory Cost: _____
- b. Number of Entities Impacted: _____
- c. Multiply a. times b.: _____
- d. Is c. greater than \$200,000?
 Yes No

Indirect:

- e. Any ascertainable indirect costs?
 Yes No
- f. Amount of Indirect Cost: _____
- g. Number of Entities Impacted: _____
- h. Multiply g. times f.: _____
- i. Is h. greater than \$200,000?
 Yes No
- j. Is h. plus c. greater than \$200,000?
 Yes No

If the answer to d., i., or j. is “Yes,” the agency must prepare a SERC.

The checklist now reflects the current two-pronged analysis for whether a SERC is required, when there is:

- 1) an *adverse*⁸ impact on small business; or
- 2) an increase in regulatory costs in excess of \$200,000 in one year.

Regulatory costs are not always easy to ascertain with existing agency resources,⁹ especially indirect costs,¹⁰ but it is the responsibility of the agency to predict them to the best of its ability. The numerous attempts to insert an economic analysis into rule-making make it obvious that there is great concern about the cost¹¹ of regulation, and an agency that does not know the cost of its rules cannot possibly contemplate reducing those costs as required by the APA.¹² At DBPR, employees preparing the checklist are encouraged to research costs to the best of their ability using every resource available, including the rule development process. It is important to note that DBPR has chosen not to include the cost to the agency in its calculation of “regulatory” costs. The agency arrived at this interpretation of HB 1565 based in part on the statements of the sponsor of the legislation during his presentation to the House Governmental Affairs Policy Committee on March 24, 2010. When asked by a subcommittee member what impact the economic analysis would have on agencies, the sponsor of the bill dismissed the concern indicating that he was more concerned with the red tape affecting business, not the red tape affecting government.¹³ Furthering DBPR’s interpretation is the reality that including costs to the agency in the definition of regulatory costs would require the preparation of a SERC for nearly every agency rule, which is inconsistent with HB 1565’s suggestion that there could be rules which do not require a SERC.

Content of SERCs

The statutory content of a SERC changed significantly with HB 1565:

- (2) A statement of estimated regulatory costs shall include:
 - (a) An economic analysis showing whether the rule directly or indirectly:
 - 1. Is likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of \$1million in the aggregate

within 5 years after the implementation of the rule;

2. Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate within 5 years after the implementation of the rule; or

3. Is likely to increase regulatory costs, including any transactional costs, in excess of \$1 million in the aggregate within 5 years after the implementation of the rule.

(b) 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.

(c)(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.

(d)(e) A good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule. As used in this section paragraph, “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, and any other costs necessary to comply with the rule.

(e)(d) An analysis of the impact on small businesses as defined by s. 288.703, and an analysis of the impact on small counties and small cities as defined in by s. 120.52. The impact analysis for small businesses must include the basis for the agency’s decision not to implement alternatives that would reduce adverse impacts on small businesses.

(f)(e) Any additional information that the agency determines may be useful.

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(g)(f) In the statement or revised statement, whichever applies, a description of any regulatory alternatives good faith written proposal submitted under paragraph (1)(a) and either a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule.¹⁴

Among the many changes, new subsections (2)(a) 1.-3. stand out as significant. In most agencies, including DBPR, the concepts addressed in the new SERC requirements are foreign concepts. The concepts are expressed in terms familiar in the vernacular of the economist, not the regulator. Nevertheless, given the history of the economic impact inquiries of the APA and the overwhelming override of the Governor's veto of HB 1565, agencies will be held responsible for implementing these concepts.

To learn how to interpret the vernacular of an economist, talk to an economist. That is how DBPR set about implementing HB 1565. After consulting with five economists, both in the private and public sectors, and two companies that produce economic modeling and forecasting software (REMI and IMPLAN), three implementation options clearly emerged. First, the agency could internalize the analysis. This option would require economic forecasting software and the computer equipment on which to run it, office space in which to house it, and personnel to effectively use it. The total cost for personnel (including at least five economists based on the number of rules DBPR promulgates each year), software, computer equipment, office overhead, and training would approach \$500,000 per year. The number was lower than expected, but still more money than DBPR had available in its budget.

Second, the agency could outsource the analyses. In 2009, DBPR proposed 275 rules.¹⁵ One economist estimated the cost of the HB 1565 analysis for low complexity rules at \$7,500 per rule.¹⁶ The economist went on to explain that "For complicated or far reaching rules, the costs will esca-

late quickly to \$50,000 to \$100,000."¹⁷ Assuming DBPR promulgated 220 low complexity, limited impact rules costing an average of \$7,500 each (220 X \$7,500 = \$1,650,000) and 35 high complexity, large impact rules averaging \$50,000 each (35 X \$50,000 = \$1,750,000) and 20 high complexity, large impact rules averaging \$100,000 each (20 X \$100,000 = \$2,000,000), the total cost would be \$5,400,000 per year. DBPR certainly did not have that money in its budget to devote exclusively to analyzing the economic impact of its proposed rulemaking.

The final option was different. The first two options assumed that HB 1565 required an economic analysis with pinpoint figures as to the impacts of rules. A closer analysis of the language, however, does not really support that assumption. First, the law uses the word "likely," which implies that there will be some uncertainty in the analysis. Second, the law does not give any direction as to quantification of the impacts other than the \$1 million threshold. This is in striking contrast with the 1976 amendments that required "professionally accepted methodology" and "quantification of data."¹⁸ One economist, who wishes to remain nameless, commented on the way the statute was written and suggested a more general approach to the analysis. As a source for how to approach the economic analysis of section 120.541(2) (a)1., Florida Statutes ("Is likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of \$1 million in the aggregate within 5 years after the implementation of the rule"), from a layman's perspective, the economist suggested using the *Florida Economic Estimating Conference Long-Run Tables*.¹⁹ Using the factors relied upon by the Economic Estimating Conference for forecasting Florida's long-run economic outlook, DBPR used the following questions for this analysis:

1. Is the rule likely to reduce personal income?
2. Is the rule likely to reduce total non-farm employment?
3. Is the rule likely to reduce private housing starts?

4. Is the rule likely to reduce visitors to Florida?

5. Is the rule likely to reduce wages or salaries?

6. Is the rule likely to reduce property income?

Explanation: _____

If three or more questions are answered "Yes," there is a likely and adverse impact in excess of \$1 million, and the rule must be submitted to the legislature for ratification.

As a source for how to approach the economic analysis of section 120.541(2)(a)2., Florida Statutes ("Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate within 5 years after the implementation of the rule"), from a layman's perspective, the economist was baffled. Apparently, even in the vernacular of an economist, the requirements of this analysis are highly theoretical and non-quantifiable. Given the language of the statute and legislature's obvious intent to make compliance easier for businesses and keep businesses competitive in the current economy, DBPR used the following questions for this analysis:

1. Is the rule likely to raise the price of goods or services provided by Florida businesses?

2. Is the rule likely to add regulation that is not present in other states or markets?

3. Is the rule likely to reduce the quantity of goods or services Florida businesses are able to produce, i.e. will goods or services become too expensive to produce?

4. Is the rule likely to cause Florida businesses to reduce workforces?

5. Is the rule likely to increase regulatory costs to the extent that Florida businesses will be unable to invest in product development or other innovation?

6. Is the rule likely to make illegal any product or service that is currently legal?

Explanation: _____

If three or more questions are answered “Yes,” there is a likely and adverse impact in excess of \$1 million, and the rule must be submitted to the legislature for ratification.

The approach to the section 120.541(2)(a)3., Florida Statutes’, analysis is within the agency’s responsibility and akin to the regulatory cost analysis done to determine whether a SERC was necessary. However, because the analysis must encompass five years, the calculation is a bit different:

1. Current one-time costs _____
2. New one-time costs _____
3. Subtract 1 from 2 _____
4. Current recurring costs _____
5. New recurring costs _____
6. Subtract 4 from 5 _____
7. Number of times costs will recur in 5 years _____
8. Multiply 6 times 7 _____
9. Add 3 to 8 _____

If 9. is greater than \$1 million, there is likely an increase of regulatory costs in excess of \$1 million, and the rule must be submitted to the legislature for ratification.

It is clear that this approach is less than scientific, but DBPR believes that it will accomplish the legislature’s purpose – to make agencies take a step back from the role of regulator, focused on implementing a law in the most effective manner, to be able to predict the difficulties entities may have complying with the regulation. The law requires agencies to balance efficacy and impact.²⁰ Requiring regulators to research the answers to the questions posed in the SERC, and explain the source of those answers, will be a step toward achieving that balance.

Legislative Ratification

Legislative ratification is required if a rule meets any of the \$1 million thresholds in section 120.541(2)(a), Florida Statutes.²¹ For our purposes, this article focuses on how to implement this law, not the merit or wisdom of the law.²² Other than setting out the requirement of ratification, the law gives no indication of the criteria the legislature will use to evaluate a rule, the process by which the legislature will evaluate the rule,

or the steps an agency will have to take once the legislature takes action on the rule. This absence of direction has bred confusion and anxiety, and agencies are waiting on pins and needles for the 2011 legislative session to begin.

The only effort to implement the ratification requirement is a Notice of Development of Rulemaking filed for Rule 1B-30.002, Fla. Admin. Code.²³ Rule 1B-30.002, entitled, “Style and Form for Filing Rules; Certification of Accompanying Materials,” specifies the physical form a rule must be in for it to be filed for adoption with the Department of State, which publishes the Florida Administrative Weekly and the Florida Administrative Code.²⁴ The default effective date for a rule is 20 days after it was filed for adoption.²⁵ The only other statutory options for effective date are on a date specified in the Notice of Proposed Rule or on a date required by statute.²⁶ The current template used to certify rules for adoption indicates that the rule will be effective 20 days from filing unless an alternate date is entered in the appropriate place on the template (this date must match the alternative date in the Notice of Proposed Rule).²⁷

The Notice of Development of Rulemaking did not contain text, but text was available and discussed at the workshop held on December 13, 2010.²⁸ The major amendment designed to address HB 1565 was the addition of a check box to indicate “Effective date is contingent upon legislative ratification based on (insert citation)(e.g. section 120.541(3), Florida Statutes, etc.) and is still pending.”²⁹ There was a good deal of discussion at the workshop about how rule adoption would play out. Concerns were expressed over what an agency would do if a rule was filed for adoption and subsequently amended by the legislature during the ratification process. Concerns were also expressed regarding what would happen to a rule that had been filed for adoption and subsequently rejected by the legislature. Would an agency be forced to repeal the rule? Although no notices had been filed, the Department of State indicated an intention to address this problem by amending Rule 1B-30.0015, entitled,

“Definitions,” to change the definition of “repealed rule” to include any rule the legislature decided not to ratify.³⁰ For now, these concerns are moot because it appears the Department of State has suspended the rulemaking process for Rule 1B-30.002, Florida Administrative Code, in response to Governor Rick Scott’s Executive Order 11-01.³¹

On Friday, February 18, 2011, the House Rulemaking and Regulation Subcommittee of the Rules and Calendar Committee invited agencies to a “Discussion of Ratification and Implementation Process.” The committee staff director, Don Rubottom, and attorney, Eric Miller, discussed the committee’s proposed ratification process. The discussion was summarized in a memorandum by the subcommittee:

Preliminary questions:

-determination of impact

Clearly, if the agency determines the impact likely exists, we are assuming that the rule is presumed to be ineffective until ratified. Moreover, even if the agency does not believe the impact exists, it appears that the relevant impact might be demonstrated in a proceeding challenging the effect of adoption. Thus, we presume that the Legislature will be informed that a rule requires ratification as a matter of law either by a determination of the agency made during the rulemaking process or by an administrative law judge after the rule is adopted.

-relevance of submission deadline

The requirement of submission to the President and Speaker appears intended to facilitate communication between the rulemaking authority and the legislative leadership. It does not, however, appear to limit the Legislature in any way. Thus, when asked, House staff has been advising agency personnel that the Legislature retains full authority to ratify a rule, even if notice is not received until after the submission deadline provided in s. 120.541(3).

-timing of ratification

The bill seems to clearly imply that a rule must be adopted (or more accurately, filed for adoption) be-

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fore the ratification requirement. This implication arises from two aspects: First, the statute says the rule “may not take effect UNTIL it is ratified.” Thus, it would take effect when ratified, implying that it must have been adopted prior to ratification. The second reason for this conclusion is that one may not “ratify” something that is not in final form. Because a proposed rule is subject to change, it cannot be in final form until the amendatory process preceding adoption has ended. Finally, even if this implication were not necessary, House staff would advise against legislative approval of agency action that could change after that approval is given. Thus, for all these reasons, a rule must have completed the administrative process of adoption prior to ratification.

Form of Ratification:

The most significant legal question raised by the new law is the form and consequence of ratification. Some have proposed that this will have the effect of requiring the Legislature, either directly or indirectly by reference, to ENACT the rule making its substance a general law. This view recognizes one important constitutional factor: the Legislature must enact bills and present them to the Governor for approval or veto in order to establish public policy. A legislative action to make a rule effective, therefore, should require the enactment of a law. No other suggested mode of ratification – written approval by the legislative leadership, or a resolution by both houses or by some joint committee – would have the force of law.

However, it is not so clear that the rule itself must be enacted into law. House staff is of the opinion that a general bill can be enacted having the sole effect of:

a) ratifying the rule for the purpose of satisfying the condition of ratification, making the rule effective only as a rule, or

b) exempting the rule from the requirements of s. 120.541(3).

Attached to this memorandum is a copy of draft language that House staff has suggested for discussion purposes. Final language, of course, would be worked out between House and Senate members as bills work through the process. But the essential elements of the draft language are:

- Citing satisfaction of s. 120.541(3), as the sole purpose of the bill;
- Citing the subject rule by Florida Administrative Code rule number (without incorporating the language of the rule);
- Clarifying that the rule is intended to retain the status as a rule under ch. 120;
- Clarifying that no alteration in rulemaking authority is intended;
- Clarifying that no exception to prior law is intended;
- Clarifying that no rulemaking deficiency is cured;
- Providing for non-codification of the ratifying act.³²

The draft language of the potential ratification bill is:

A bill to be entitled

An act relating to ratification of rules; ratifying specified rules for the sole and exclusive purpose of satisfying any condition on effectiveness established by s. 120.541(3), F.S., which requires ratification of any rule meeting any of specified thresholds for likely adverse impact or excessive regulatory cost; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) The following rules are ratified for the sole and exclusive purpose of satisfying any condition on effectiveness imposed under s. 120.541(3), Florida Statutes:

- (a) Rule ..., Florida Administrative Code, relating to
- (b) Rule ..., Florida Administrative Code, relating to

(2) This act serves no other purpose and shall not be codified in the Florida Statutes. After this act becomes law, its enactment and effective dates shall be noted in the Florida Administrative Code or the Florida Administrative Weekly or both, as appropriate. This act does not alter rulemaking authority delegated by prior law, does not constitute legislative preemption of or exception to any provision of law governing adoption or enforcement of the rule cited, and is intended to preserve the status of any cited rule as a rule under chapter 120. This act does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited.

Section 2. This act shall take effect upon becoming a law.³³

The subcommittee staff solicited input from agencies and were very interested to hear ideas for facilitating the process. It is likely that the ratification process will closely resemble the approach that was presented by the subcommittee, with the caveat that the committee has no control over individual members of the House of Representatives. The subcommittee can request that members do not offer a bill that amends the language of a rule, but it could still happen. Further, there is not yet any indication whether the Senate will adopt a similar process. Until the full legislature adopts a ratification process, a complete analysis of ratification cannot be performed and no standard procedure can be implemented by agencies.

Executive Order 11-01

One of the first things Governor Scott did upon being inaugurated was to sign Executive Order 11-01.³⁴ Among other things, the Order suspended all rulemaking activities, required a review of all existing agency rules within 90 days, established the Office of Fiscal Accountability and Regulatory Reform (“OFARR”), and required agencies to have all rulemaking activity approved by OFARR.³⁵ Immediately following issuance of the Order, the vast majority of agency

rulemaking efforts did stop.³⁶

On January 20, 2011, OFARR, under Director Jerry McDaniel, former budget chief to former Governor Charlie Crist, and Deputy Director Ned Luczynski, former general counsel and inspector general for DBPR, issued guidance documents for implementation of Executive Order 11-01. The documents included a form for requesting approval of all rulemaking activity, with an explanation of whether the rulemaking is beneficial to business, required by statute, or necessary to protect the public.

Approval by OFARR is required for a Notice of Development of Rulemaking, Notice of Proposed Rule, Notice of Change, Notice of Proposed Rule, and Continuation of Rulemaking after Rejecting a Lower Cost Regulatory Alternative. OFARR approval of a Notice of Workshop or Notice of Hearing is necessary now because OFARR has not seen the Notice of Development of Rulemaking or the Notice of Proposed Rule. Once OFARR catches up with current rulemaking, approval for workshops and hearings will not be necessary. The OFARR documents also include an explanation of how to fill out the approval request form, a checklist for determining the necessity for a SERC, and a SERC template. The checklist and the SERC template are nearly identical to the DBPR templates formulated to implement HB 1565. The only change relates to the evaluation of the \$1 million threshold. The DBPR SERC required legislative ratification if the answer to three out of six questions in part I or II was "yes." The OFARR SERC template requires legislative ratification if only one question is answered in the affirmative.

Conclusion

Without question, the APA is constantly in flux. That fact is not likely to change in the immediate, near, or even distant future. Until we reach administrative law Utopia, legislators, scholars, and regulators will continue to discuss ways of improving our APA. All participants in the discussion need to focus on the realities, not perceptions, of our administrative processes. In the interim, agencies need to be prepared to implement every change that is made to the

APA, no matter what challenges the change presents. If not, then regulators risk being viewed as the "non-elected pointy-headed bureaucrat from Tallahassee" that some already think they are.³⁷

Endnotes:

¹ There are many good analyses of the morphology (and metamorphosis) of the APA, especially with regard to rulemaking. See e.g., F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida's New APA*, 24 Fla. St. U. L. Rev. 309 (1997) (discussing the 1996 amendments to the APA); Dan R. Stengle & James Parker Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 Fla. St. U. L. Rev. 415 (1993) (discussing the many efforts and methods of legislative oversight of agency rulemaking).

² See Boyd, 24 Fla. St. U. L. Rev. at 314-19.

³ For a good summary of the changes made by HB 1565, see Lawrence E. Sellers, Jr., *The 2010 Amendments to the APA: Governor Vetoes Bill that Would Require "Million Dollar Rules" to be Ratified by the Legislature*, Fla. Bar Admin. Law Section Newsletter, Vol. XXXI, No. 4, pp. 2-4 (June 2010).

⁴ In many ways, the critique and analysis has already been done. "A number of hearings were held where 'horror' stories concerning agency actions were related to the members and agencies were 'requested' to defend themselves. The complaints usually centered on the fact that 'agencies were clearly exceeding their legislative authority' in passing certain rules, denying certain permits, or requiring local governments to otherwise restrict land use decisions (particularly comprehensive plan density decisions). Occasionally, committee members were reminded by certain rogue lobbyists (including the author and a few brave or stupid agency attorneys) that the agencies were being required to implement very non-specific laws and many of the problems could be corrected if the Legislature would write laws more clearly and specifically." David Gluckman, *1994 APA Legislation: The History, the Reasons, the Results*, 22 Fla. St. U. L. Rev. 345, 346 (1994); see also *Getting Into the Act*, 22 Fla. St. U. L. Rev. 277, 279 (1994) ("This has redirected some of the anger over growth management from the Legislature, which established the present growth management regime by statute, to the state bureaucracy that enforces growth management law.") (citation omitted); Stengle & Rhea, *supra*, note 1 at 443-45:

[T]he proposed constitutional amendment [would] seriously erode our traditional system of checks and balances which results from the separation of the branches of government....

It would jeopardize the rights of the individual citizen through an unwarranted intrusion into the province of the executive and judicial branches. To a great extent, it would place those rights in the hands of a growing legislative bureaucracy....

Our system already provides a remedy against overreaching by executive rulemaking. Under the Administrative

Procedures [sic] Act, any affected person may seek an administrative determination of the validity of an executive rule on the ground that the rule is an invalid exercise of delegated legislative authority. A decision must be rendered upon such a question by an administrative hearing officer within thirty days. The decision of the hearing officer is immediately reviewable by the judicial system. The individual citizen enjoys the procedural protections of notice, a public hearing, and a written record.

...

If the constitution, as a result of the proposed amendment, states that the Legislature may nullify a rule on the specific ground that the rule is without authority, the judiciary may not be in a posture to review that decision. There would be nothing to insure that the rule was nullified because of lack of authority rather than a policy disagreement with the rule.

(quoting Veto Message of Governor Reubin Askew, Fla. CS for SB 1384 (1976) (available at Fla. Dep't of State, Div. of Archives, ser. 866, carton 13, Tallahassee, Fla.)); David B. Frohnmayer, *Regulatory Reform: A Slogan in Search of Substance*, 66 A.B.A. Journal 871, 875 (1981) ("[I]mportant research evidenc[e]s a perverse symbiotic relationship between legislators and bureaucrats. This relationship not only tolerates, but, ironically, may even require legislators to create those very bureaucracies against whose foreseeable excesses they can protest to their political gain.") (Citation omitted).

⁵ Many, many thanks to F. Scott Boyd for allowing me to reproduce this summary from his materials for the 2010 Pat Dore Administrative Law Conference at 5.35-5.37 (listing the changes).

⁶ § 120.54(3)(b)1., Fla. Stat. (2009).

⁷ § 1, Ch. 2010-279, Laws of Fla., codified as § 120.54(3)(b)1., Fla. Stat. (2010).

⁸ HB 1565 added the word "adverse" to modify "impact." Many agencies already interpreted the statute to only apply to adverse impacts due to the provision in section 288.7001(3)(c), Florida Statutes, which states, "The Council may: 1. Provide agencies with recommendations regarding proposed rules or programs that may adversely affect small business." (Emphasis supplied).

⁹ See Sally Bond Mann, *Reforming the APA: Legislative Adventures in the Labyrinth*, 22 Fla. St. U. L. Rev. 307, 321 (1994) ("Another area ripe for reform centered on the requirement that agencies prepare an economic impact statement as part of the rulemaking process. The public complains that agencies disregard a proposed rule's economic impact on business interests, and agencies protest that they lack the resources (*i.e.*, economists) to provide detailed cost analyses.") (Citation omitted).

¹⁰ HB 1565 included no definition of indirect costs, nor any guidance regarding how to estimate them.

¹¹ Many of the statutory provisions refer to "impacts," not "costs," but cost is usually the largest impact on an entity.

¹² See § 120.54(3)(b)2.a., Fla. Stat. (2010) ("Each

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WHAT DO WE DO?

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agency, before the adoption, amendment, or repeal of a rule, shall consider the impact of the rule on small businesses as defined by s. 288.703 and the impact of the rule on small counties or small cities as defined by s. 120.52. Whenever practicable, an agency shall tier its rules to reduce disproportionate impacts on small businesses, small counties, or small cities to avoid regulating small businesses, small counties, or small cities that do not contribute significantly to the problem the rule is designed to address.”); see also § 120.54(3)(b)2.b., Fla. Stat. (2010) (requiring an agency to adopt lower impact alternatives offered by the Small Business Regulatory Advisory Council if the alternative is feasible and consistent with the stated objectives of the rule); § 120.541(1), Fla. Stat. (2010) (requiring an agency to carefully evaluate and potentially adopt a lower cost regulatory alternative offered by a substantially affected person).

¹³ See Fla. H.R. Governmental Affs. Pol. Comm., video of proceedings (March 24, 2010) (on file with the committee and available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.).

¹⁴ § 2, Ch. 2010-279, Laws of Fla., codified as § 120.541(2), Fla. Stat. (2010).

¹⁵ See Joint Administrative Procedures Committee 2009 Annual Report at 12, available at <http://www.japc.state.fl.us/publications/2009AnnualReport.pdf> (last viewed January 31, 2011).

¹⁶ Email from Hank Fishkind, April 25, 2010 (on file with the author).

¹⁷ *Id.* These numbers seem high, but given the bids recently received by the Board of Medicine for economic analyses of its pain clinic rules (four rules), Dr. Fishkind’s numbers were in the ballpark. “The \$27,000 contract for the economic analysis on the pain-clinic rules went to Jerry Parrish, associate director of the Center for Economic Forecasting and Analysis

at Florida State University. The only other bid, from Orlando economist Hank Fishkind, was \$100,000. Neither Parrish nor Fishkind would comment on the way they arrived at their estimates. But University of Florida economist, James F. Dewey, told *Health News Florida* that he turned down an invitation to bid on the project because there simply isn’t time to do a decent job in just a month.” Carol Gentry, *Pill-mill Delay Also Costly*, *Health-News Florida*, December 14, 2010, available at <http://www.healthnewsflorida.org/index.cfm/go/public.articleView/article/20986> (last viewed January 31, 2011).

¹⁸ Ch. 76-276, Laws of Fla.

¹⁹ Available at <http://edr.state.fl.us/Content/conferences/fleconomic/floridaeconomicresult-slongrun.pdf> (last visited January 31, 2011).

²⁰ This interpretation is supported by the statements of the bill’s sponsor in the House of Representatives as discussed *supra*, note 13 and accompanying text. See also Gentry, *supra*, note 17 (“Sen. Mike Bennett, R- Bradenton, said the Legislature never intended for state agencies to go out and hire economists to conduct the analysis, called a ‘Statement of Estimated Regulatory Costs.’ ‘You’d think they’d have economists on staff who could take care of it,’ Bennett said, since agencies are already required to estimate the cost of new rules. He suggested the alarm being raised is just ‘more bureaucratic stuff.’”).

²¹ See § 120.541(3), Fla. Stat. (2010).

²² There has been much academic discussion of the legislative veto and legislative ratification of agency rules. For a comprehensive discussion, see Stengle & Rhea, *supra*, note 1.

²³ Chapter 1B-30, F.A.C., are the rules governing rulemaking promulgated by the Department of State pursuant to section 120.55(1)(d), Florida Statutes.

²⁴ See §§ 120.55(1)(a) & (b), Fla. Stat. (2010).

²⁵ See § 120.54(3)(e)6., Fla. Stat. (2010).

²⁶ See *id.*

²⁷ See Rule 1B-30.002(3)(a), F.A.C.

²⁸ The Notice of Development of Rulemaking can be found here: <https://www.flrules.org/gateway/readFile.asp?sid=1&tid=9414837&type=1&File=1B-30.002.htm> (last visited Janu-

ary 31, 2011). The draft text can be obtained from the Department of State and is on file with the author.

²⁹ Draft text of Rule 1B-30.002(3)(a), F.A.C., *id.*

³⁰ Draft text of Rule 1B-30.0015(8), F.A.C. The draft text can be obtained from the Department of State and is on file with the author.

³¹ See discussion *infra*.

³² Don Rubottom, Staff Director, *Memorandum Re: Legislative Ratification of Rules under s. 120.541(3)*, February 11, 2011 (available from the Florida House of Representatives, Rules & Calendar Committee, Rulemaking & Regulation Subcommittee and on file with the author).

³³ Don Rubottom, Staff Director, Draft Generic Ratification Language (available from the Florida House of Representatives, Rules & Calendar Committee, Rulemaking & Regulation Subcommittee and on file with the author).

³⁴ Available at <http://edocs.dlis.state.fl.us/fl-focs/governor/orders/2011/11-01-rulemaking.pdf> (last visited January 31, 2011).

³⁵ See *id.*

³⁶ Examples included the Department of State not proceeding with changes to the rulemaking rules in Chapter 1B-30, Florida Administrative Code, and the Department of Community Affairs withdrawing its controversial changes to Chapter 9J-5, Florida Administrative Code, that it had proposed to implement Chapter 2008-191, Laws of Florida. See Notice of Withdrawal of Rules 9J-5.003, 9J-5.006, 9J-5.013, and 9J-5.019, F.A.C. available at <https://www.flrules.org/gateway/readFile.asp?sid=3&tid=9392236&type=1&file=9J-5.003.htm> (last visited January 31, 2011).

³⁷ Gluckman, *supra*, note 4 at 347.

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