

1 A bill to be entitled

2 An act relating to administrative procedures; amending
3 s. 57.111, F.S.; providing conditions under which a
4 proceeding is not substantially justified for purposes
5 of an award under the Florida Equal Access to Justice
6 Act; amending s. 120.54, F.S.; providing procedures
7 for agencies to follow when initiating rulemaking
8 following public hearings; limiting reliance upon an
9 unadopted rule in certain circumstances; amending s.
10 120.55, F.S.; providing for publication of notices of
11 rule development and of rules filed for adoption;
12 providing additional notice of rule development,
13 proposals, and adoptions; amending s. 120.56, F.S.;
14 providing that a petitioner challenging a proposed
15 rule or unadopted agency statement has the burden of
16 going forward with evidence sufficient to support the
17 petition; amending s. 120.569, F.S.; granting agencies
18 additional time to render final orders in certain
19 circumstances; amending s. 120.57, F.S.; conforming
20 proceedings that oppose agency action based on an
21 invalid or unadopted rule to proceedings used for
22 challenging rules; requiring the agency to issue a
23 notice stating whether the agency will rely on the
24 challenged rule or alleged unadopted rule; authorizing
25 the administrative law judge to make certain findings
26 on the validity of certain alleged unadopted rules;

Page 1 of 37

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

hb1355-01-c1

27 | authorizing the administrative law judge to issue a
28 | separate final order on certain rules and alleged
29 | unadopted rules; prohibiting agencies from rejecting
30 | specific conclusions of law; providing for stay of
31 | proceedings not involving disputed issues of fact upon
32 | timely filing of a rule challenge; providing that the
33 | final order terminates the stay; amending s. 120.595,
34 | F.S.; requiring a final order in specified
35 | administrative proceedings to award all reasonable
36 | costs and all reasonable attorney fees to a prevailing
37 | party under certain circumstances; revising the
38 | criteria used by an administrative law judge to
39 | determine whether a party participated in a proceeding
40 | for an improper purpose; removing certain exceptions
41 | from requirements that attorney fees and costs be
42 | rendered against the agency in proceedings in which
43 | the petitioner prevails in a rule challenge; requiring
44 | service of notice of invalidity to an agency before
45 | bringing a rule challenge as a condition precedent to
46 | the award of attorney fees and costs; authorizing the
47 | recovery of reasonable attorney fees and costs
48 | incurred by a prevailing party in litigating
49 | entitlement to or quantification of underlying
50 | attorney fees and costs; removing certain limitations
51 | on such attorney fees and costs; correcting a cross-
52 | reference; amending s. 120.68, F.S.; providing for

53 appellate review of orders rendered in challenges to
 54 specified rules or unadopted rules; authorizing
 55 extensions for filing certain appeals or petitions for
 56 review under certain circumstances; amending s.
 57 120.695, F.S.; removing obsolete provisions with
 58 respect to required agency review and designation of
 59 minor violations; requiring agency review and
 60 certification of minor violation rules by a specified
 61 date; requiring the reporting of agency failure to
 62 complete the review and file certification of such
 63 rules; requiring minor violation certification for all
 64 rules adopted after a specified date; requiring public
 65 notice; providing nonapplicability; conforming
 66 provisions; providing an effective date.

67
 68 Be It Enacted by the Legislature of the State of Florida:

69
 70 Section 1. Paragraph (e) of subsection (3) of section
 71 57.111, Florida Statutes, is amended to read:

72 57.111 Civil actions and administrative proceedings
 73 initiated by state agencies; attorney ~~attorneys'~~ fees and
 74 costs.—

75 (3) As used in this section:

76 (e) A proceeding is "substantially justified" if it had a
 77 reasonable basis in law and fact at the time it was initiated by
 78 a state agency. A proceeding is not substantially justified if

79 the specified law, rule, or order at issue in the current agency
 80 action is the subject upon which the substantially affected
 81 party previously petitioned the agency for a declaratory
 82 statement under s. 120.565; the current agency action involves
 83 identical or substantially similar facts and circumstances as
 84 those raised in the previous petition; and:

85 1. The agency action contradicts the declaratory statement
 86 issued by the agency upon the previous petition; or

87 2. The agency denied the previous petition under s.
 88 120.565 before initiating the current agency action against the
 89 substantially affected party.

90 Section 2. Paragraph (c) of subsection (7) of section
 91 120.54, Florida Statutes, is amended, and paragraph (d) is added
 92 to that subsection, to read:

93 120.54 Rulemaking.—

94 (7) PETITION TO INITIATE RULEMAKING.—

95 (c) If the agency does not initiate rulemaking or
 96 otherwise comply with the requested action within 30 days after
 97 ~~following~~ the public hearing provided for in by paragraph (b),
 98 ~~if the agency does not initiate rulemaking or otherwise comply~~
 99 ~~with the requested action,~~ the agency shall publish in the
 100 Florida Administrative Register a statement of its reasons for
 101 not initiating rulemaking or otherwise complying with the
 102 requested action, and of any changes it will make in the scope
 103 or application of the unadopted rule. The agency shall file the
 104 statement with the committee. The committee shall forward a copy

105 of the statement to the substantive committee with primary
106 oversight jurisdiction of the agency in each house of the
107 Legislature. The committee or the committee with primary
108 oversight jurisdiction may hold a hearing directed to the
109 statement of the agency. The committee holding the hearing may
110 recommend to the Legislature the introduction of legislation
111 making the rule a statutory standard or limiting or otherwise
112 modifying the authority of the agency.

113 (d) If the agency initiates rulemaking following a public
114 hearing under paragraph (b), the agency shall publish its notice
115 of rule development within 30 days after the hearing and file
116 its notice of proposed rule within 180 days after the notice of
117 rule development unless, before the 180th day, the agency
118 publishes in the Florida Administrative Register a statement
119 explaining its reasons why a proposed rule has not been filed.
120 If rulemaking is initiated under this paragraph, the agency may
121 not rely on the unadopted rule unless the agency publishes in
122 the Florida Administrative Register a statement explaining why
123 rulemaking under paragraph (1) (a) is not feasible or practicable
124 until conclusion of the rulemaking proceeding.

125 Section 3. Section 120.55, Florida Statutes, is amended to
126 read:

127 120.55 Publication.—

128 (1) The Department of State shall:

129 (a)1. Through a continuous revision and publication
130 system, compile and publish electronically, on an Internet

131 website managed by the department, the "Florida Administrative
132 Code." The Florida Administrative Code shall contain all rules
133 adopted by each agency, citing the grant of rulemaking authority
134 and the specific law implemented pursuant to which each rule was
135 adopted, all history notes as authorized in s. 120.545(7),
136 complete indexes to all rules contained in the code, and any
137 other material required or authorized by law or deemed useful by
138 the department. The electronic code shall display each rule
139 chapter currently in effect in browse mode and allow full text
140 search of the code and each rule chapter. The department may
141 contract with a publishing firm for a printed publication;
142 however, the department shall retain responsibility for the code
143 as provided in this section. The electronic publication shall be
144 the official compilation of the administrative rules of this
145 state. The Department of State shall retain the copyright over
146 the Florida Administrative Code.

147 2. Rules general in form but applicable to only one school
148 district, community college district, or county, or a part
149 thereof, or state university rules relating to internal
150 personnel or business and finance shall not be published in the
151 Florida Administrative Code. Exclusion from publication in the
152 Florida Administrative Code shall not affect the validity or
153 effectiveness of such rules.

154 3. At the beginning of the section of the code dealing
155 with an agency that files copies of its rules with the
156 department, the department shall publish the address and

157 telephone number of the executive offices of each agency, the
158 manner by which the agency indexes its rules, a listing of all
159 rules of that agency excluded from publication in the code, and
160 a statement as to where those rules may be inspected.

161 4. Forms shall not be published in the Florida
162 Administrative Code; but any form which an agency uses in its
163 dealings with the public, along with any accompanying
164 instructions, shall be filed with the committee before it is
165 used. Any form or instruction which meets the definition of
166 "rule" provided in s. 120.52 shall be incorporated by reference
167 into the appropriate rule. The reference shall specifically
168 state that the form is being incorporated by reference and shall
169 include the number, title, and effective date of the form and an
170 explanation of how the form may be obtained. Each form created
171 by an agency which is incorporated by reference in a rule notice
172 of which is given under s. 120.54(3)(a) after December 31, 2007,
173 must clearly display the number, title, and effective date of
174 the form and the number of the rule in which the form is
175 incorporated.

176 5. The department shall allow adopted rules and material
177 incorporated by reference to be filed in electronic form as
178 prescribed by department rule. When a rule is filed for adoption
179 with incorporated material in electronic form, the department's
180 publication of the Florida Administrative Code on its Internet
181 website must contain a hyperlink from the incorporating
182 reference in the rule directly to that material. The department

183 may not allow hyperlinks from rules in the Florida
184 Administrative Code to any material other than that filed with
185 and maintained by the department, but may allow hyperlinks to
186 incorporated material maintained by the department from the
187 adopting agency's website or other sites.

188 (b) Electronically publish on an Internet website managed
189 by the department a continuous revision and publication entitled
190 the "Florida Administrative Register," which shall serve as the
191 official publication and must contain:

192 1. All notices required by s. 120.54(2) and (3)(a) ~~s.~~
193 ~~120.54(3)(a)~~, showing the text of all rules proposed for
194 consideration.

195 2. All notices of public meetings, hearings, and workshops
196 conducted in accordance with s. 120.525, including a statement
197 of the manner in which a copy of the agenda may be obtained.

198 3. A notice of each request for authorization to amend or
199 repeal an existing uniform rule or for the adoption of new
200 uniform rules.

201 4. Notice of petitions for declaratory statements or
202 administrative determinations.

203 5. A summary of each objection to any rule filed by the
204 Administrative Procedures Committee.

205 6. A listing of rules filed for adoption in the previous 7
206 days.

207 7. A listing of all rules filed for adoption pending
 208 legislative ratification under s. 120.541(3) until notice of
 209 ratification or withdrawal of such rule is received.

210 ~~8.6.~~ Any other material required or authorized by law or
 211 deemed useful by the department.

212
 213 The department may contract with a publishing firm for a printed
 214 publication of the Florida Administrative Register and make
 215 copies available on an annual subscription basis.

216 (c) Prescribe by rule the style and form required for
 217 rules, notices, and other materials submitted for filing.

218 (d) Charge each agency using the Florida Administrative
 219 Register a space rate to cover the costs related to the Florida
 220 Administrative Register and the Florida Administrative Code.

221 (e) Maintain a permanent record of all notices published
 222 in the Florida Administrative Register.

223 (2) The Florida Administrative Register Internet website
 224 must allow users to:

225 (a) Search for notices by type, publication date, rule
 226 number, word, subject, and agency.

227 (b) Search a database that makes available all notices
 228 published on the website for a period of at least 5 years.

229 (c) Subscribe to an automated e-mail notification of
 230 selected notices to be sent out before or concurrently with
 231 publication of the electronic Florida Administrative Register.

232 Such notification must include in the text of the e-mail a
 233 summary of the content of each notice.

234 (d) View agency forms and other materials submitted to the
 235 department in electronic form and incorporated by reference in
 236 proposed rules.

237 (e) Comment on proposed rules.

238 (3) Publication of material required by paragraph (1) (b)
 239 on the Florida Administrative Register Internet website does not
 240 preclude publication of such material on an agency's website or
 241 by other means.

242 (4) Each agency shall provide copies of its rules upon
 243 request, with citations to the grant of rulemaking authority and
 244 the specific law implemented for each rule.

245 (5) Each agency that provides an e-mail alert service to
 246 inform licensees or other registered recipients of important
 247 notices shall use such service to notify recipients of each
 248 notice required under s. 120.54(2) and (3) (a), including a
 249 notice of rule development, notice of proposed rules, and notice
 250 of filing rules for adoption, and provide Internet links to the
 251 appropriate rule page on the Secretary of State's website or
 252 Internet links to an agency website that contains the proposed
 253 rule or final rule.

254 (6)~~(5)~~ Any publication of a proposed rule promulgated by
 255 an agency, whether published in the Florida Administrative
 256 Register or elsewhere, shall include, along with the rule, the
 257 name of the person or persons originating such rule, the name of

258 the agency head who approved the rule, and the date upon which
 259 the rule was approved.

260 (7)~~(6)~~ Access to the Florida Administrative Register
 261 Internet website and its contents, including the e-mail
 262 notification service, shall be free for the public.

263 (8)~~(7)~~(a) All fees and moneys collected by the Department
 264 of State under this chapter shall be deposited in the Records
 265 Management Trust Fund for the purpose of paying for costs
 266 incurred by the department in carrying out this chapter.

267 (b) The unencumbered balance in the Records Management
 268 Trust Fund for fees collected pursuant to this chapter may not
 269 exceed \$300,000 at the beginning of each fiscal year, and any
 270 excess shall be transferred to the General Revenue Fund.

271 Section 4. Subsection (1), paragraph (a) of subsection
 272 (2), and subsection (4) of section 120.56, Florida Statutes, are
 273 amended to read:

274 120.56 Challenges to rules.—

275 (1) GENERAL PROCEDURES ~~FOR CHALLENGING THE VALIDITY OF A~~
 276 ~~RULE OR A PROPOSED RULE.~~—

277 (a) Any person substantially affected by a rule or a
 278 proposed rule may seek an administrative determination of the
 279 invalidity of the rule on the ground that the rule is an invalid
 280 exercise of delegated legislative authority.

281 (b) The petition challenging the validity of a proposed or
 282 adopted rule under this section ~~seeking an administrative~~
 283 ~~determination~~ must state: with particularity

284 1. The particular provisions alleged to be invalid and a
285 statement with sufficient explanation of the facts or grounds
286 for the alleged invalidity. and

287 2. Facts sufficient to show that the petitioner ~~person~~
288 ~~challenging a rule~~ is substantially affected by the challenged
289 adopted rule or it, ~~or that the person challenging a proposed~~
290 ~~rule~~ would be substantially affected by the proposed rule ~~it~~.

291 (c) The petition shall be filed by electronic means with
292 the division which shall, immediately upon filing, forward by
293 electronic means copies to the agency whose rule is challenged,
294 the Department of State, and the committee. Within 10 days after
295 receiving the petition, the division director shall, if the
296 petition complies with the requirements of paragraph (b), assign
297 an administrative law judge who shall conduct a hearing within
298 30 days thereafter, unless the petition is withdrawn or a
299 continuance is granted by agreement of the parties or for good
300 cause shown. Evidence of good cause includes, but is not limited
301 to, written notice of an agency's decision to modify or withdraw
302 the proposed rule or a written notice from the chair of the
303 committee stating that the committee will consider an objection
304 to the rule at its next scheduled meeting. The failure of an
305 agency to follow the applicable rulemaking procedures or
306 requirements set forth in this chapter shall be presumed to be
307 material; however, the agency may rebut this presumption by
308 showing that the substantial interests of the petitioner and the
309 fairness of the proceedings have not been impaired.

310 (d) Within 30 days after the hearing, the administrative
311 law judge shall render a decision and state the reasons therefor
312 in writing. The division shall forthwith transmit by electronic
313 means copies of the administrative law judge's decision to the
314 agency, the Department of State, and the committee.

315 (e) Hearings held under this section shall be de novo in
316 nature. The standard of proof shall be the preponderance of the
317 evidence. Hearings shall be conducted in the same manner as
318 provided by ss. 120.569 and 120.57, except that the
319 administrative law judge's order shall be final agency action.
320 The petitioner and the agency whose rule is challenged shall be
321 adverse parties. Other substantially affected persons may join
322 the proceedings as intervenors on appropriate terms which shall
323 not unduly delay the proceedings. Failure to proceed under this
324 section shall not constitute failure to exhaust administrative
325 remedies.

326 (2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—

327 (a) A substantially affected person may seek an
328 administrative determination of the invalidity of a proposed
329 rule by filing a petition seeking such a determination with the
330 division within 21 days after the date of publication of the
331 notice required by s. 120.54(3)(a); within 10 days after the
332 final public hearing is held on the proposed rule as provided by
333 s. 120.54(3)(e)2.; within 20 days after the statement of
334 estimated regulatory costs or revised statement of estimated
335 regulatory costs, if applicable, has been prepared and made

336 available as provided in s. 120.541(1)(d); or within 20 days
337 after the date of publication of the notice required by s.
338 120.54(3)(d). The petition must state with particularity the
339 objections to the proposed rule and the reasons that the
340 proposed rule is an invalid exercise of delegated legislative
341 authority. The petitioner has the burden of going forward with
342 evidence sufficient to support the petition. The agency then has
343 the burden to prove by a preponderance of the evidence that the
344 proposed rule is not an invalid exercise of delegated
345 legislative authority as to the objections raised. ~~A person who~~
346 ~~is substantially affected by a change in the proposed rule may~~
347 ~~seek a determination of the validity of such change.~~ A person
348 who is not substantially affected by the proposed rule as
349 initially noticed, but who is substantially affected by the rule
350 as a result of a change, may challenge any provision of the
351 resulting proposed rule and ~~is not limited to challenging the~~
352 ~~change to the proposed rule.~~

353 (4) CHALLENGING AGENCY STATEMENTS DEFINED AS UNADOPTED
354 RULES; SPECIAL PROVISIONS.—

355 (a) Any person substantially affected by an agency
356 statement that is an unadopted rule may seek an administrative
357 determination that the statement violates s. 120.54(1)(a). The
358 petition shall include the text of the statement or a
359 description of the statement and shall state ~~with particularity~~
360 facts sufficient to show that the statement constitutes an
361 unadopted a rule ~~under s. 120.52 and that the agency has not~~

362 ~~adopted the statement by the rulemaking procedure provided by s.~~
363 ~~120.54.~~

364 (b) The administrative law judge may extend the hearing
365 date beyond 30 days after assignment of the case for good cause.
366 Upon notification to the administrative law judge provided
367 before the final hearing that the agency has published a notice
368 of rulemaking under s. 120.54(3), such notice shall
369 automatically operate as a stay of proceedings pending adoption
370 of the statement as a rule. The administrative law judge may
371 vacate the stay for good cause shown. A stay of proceedings
372 pending rulemaking shall remain in effect so long as the agency
373 is proceeding expeditiously and in good faith to adopt the
374 statement as a rule. ~~If a hearing is held and the petitioner~~
375 ~~proves the allegations of the petition, the agency shall have~~
376 ~~the burden of proving~~

377 (c) The petitioner has the burden of going forward with
378 evidence sufficient to support the petition. The agency then has
379 the burden to prove by a preponderance of the evidence that the
380 statement does not meet the definition of an unadopted rule, the
381 statement was adopted as a rule in compliance with s. 120.54, or
382 that rulemaking is not feasible or not practicable under s.
383 120.54(1) (a) .

384 (d) ~~(e)~~ The administrative law judge may determine whether
385 all or part of a statement violates s. 120.54(1) (a). The
386 decision of the administrative law judge shall constitute a
387 final order. The division shall transmit a copy of the final

388 order to the Department of State and the committee. The
 389 Department of State shall publish notice of the final order in
 390 the first available issue of the Florida Administrative
 391 Register.

392 (e)~~(d)~~ If an administrative law judge enters a final order
 393 that all or part of an unadopted rule ~~agency statement~~ violates
 394 s. 120.54(1) (a), the agency must immediately discontinue all
 395 reliance upon the unadopted rule ~~statement~~ or any substantially
 396 similar statement as a basis for agency action.

397 (f)~~(e)~~ If proposed rules addressing the challenged
 398 unadopted rule ~~statement~~ are determined to be an invalid
 399 exercise of delegated legislative authority as defined in s.
 400 120.52(8) (b)-(f), the agency must immediately discontinue
 401 reliance upon ~~on~~ the unadopted rule ~~statement~~ and any
 402 substantially similar statement until rules addressing the
 403 subject are properly adopted, and the administrative law judge
 404 shall enter a final order to that effect.

405 (g)~~(f)~~ All proceedings to determine a violation of s.
 406 120.54(1) (a) shall be brought pursuant to this subsection. A
 407 proceeding pursuant to this subsection may be consolidated with
 408 a proceeding under subsection (3) or under any other section of
 409 this chapter. This paragraph does not prevent a party whose
 410 substantial interests have been determined by an agency action
 411 from bringing a proceeding pursuant to s. 120.57(1) (e).

412 Section 5. Paragraph (1) of subsection (2) of section
 413 120.569, Florida Statutes, is amended to read:

414 120.569 Decisions which affect substantial interests.—

415 (2)

416 (1) Unless the time period is waived or extended with the
 417 consent of all parties, the final order in a proceeding which
 418 affects substantial interests must be in writing and include
 419 findings of fact, if any, and conclusions of law separately
 420 stated, and it must be rendered within 90 days:

421 1. After the hearing is concluded, if conducted by the
 422 agency;

423 2. After a recommended order is submitted to the agency
 424 and mailed to all parties, if the hearing is conducted by an
 425 administrative law judge, except that, at the election of the
 426 agency, the time for rendering the final order may be extended
 427 up to 10 days after entry of a mandate on any appeal from a
 428 final order under s. 120.57(1)(e)4.; or

429 3. After the agency has received the written and oral
 430 material it has authorized to be submitted, if there has been no
 431 hearing.

432 Section 6. Paragraphs (e) and (h) of subsection (1) and
 433 subsection (2) of section 120.57, Florida Statutes, are amended
 434 to read:

435 120.57 Additional procedures for particular cases.—

436 (1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING
 437 DISPUTED ISSUES OF MATERIAL FACT.—

438 (e)1. An agency or an administrative law judge may not
 439 base agency action that determines the substantial interests of

440 a party on an unadopted rule or a rule that is an invalid
441 exercise of delegated legislative authority. ~~The administrative~~
442 ~~law judge shall determine whether an agency statement~~
443 ~~constitutes an unadopted rule.~~ This subparagraph does not
444 preclude application of valid adopted rules and applicable
445 provisions of law to the facts.

446 2. In a matter initiated as a result of agency action
447 proposing to determine the substantial interests of a party, the
448 party's timely petition for hearing may challenge the proposed
449 agency action based on a rule that is an invalid exercise of
450 delegated legislative authority or based on an alleged unadopted
451 rule. For challenges brought under this subparagraph:

452 a. The challenge shall be pled as a defense using the
453 procedures set forth in s. 120.56(1)(b).

454 b. Section 120.56(3)(a) applies to a challenge alleging
455 that a rule is an invalid exercise of delegated legislative
456 authority.

457 c. Section 120.56(4)(c) applies to a challenge alleging an
458 unadopted rule.

459 d. The agency has 15 days from the date of receipt of a
460 challenge under this subparagraph to serve the challenging party
461 with a notice whether the agency will continue to rely upon the
462 rule or the alleged unadopted rule as a basis for the action
463 determining the party's substantive interests. Failure to timely
464 serve the notice constitutes a binding stipulation that the
465 agency shall not rely upon the rule or unadopted rule further in

466 the proceeding. The agency shall include a copy of this notice
467 with the referral of the matter to the division under s.
468 120.569(2)(a).

469 e. This subparagraph does not preclude the consolidation
470 of any proceeding under s. 120.56 with any proceeding under this
471 paragraph.

472 3.2. Notwithstanding subparagraph 1., if an agency
473 demonstrates that the statute being implemented directs it to
474 adopt rules, that the agency has not had time to adopt those
475 rules because the requirement was so recently enacted, and that
476 the agency has initiated rulemaking and is proceeding
477 expeditiously and in good faith to adopt the required rules,
478 then the agency's action may be based upon those unadopted rules
479 if, subject to de novo review by the administrative law judge
480 determines that rulemaking is neither feasible nor practicable
481 and the unadopted rules would not constitute an invalid exercise
482 of delegated legislative authority if adopted as rules. An
483 unadopted rule ~~The agency action~~ shall not be presumed valid ~~or~~
484 ~~invalid~~. The agency must demonstrate that the unadopted rule:

485 a. Is within the powers, functions, and duties delegated
486 by the Legislature or, if the agency is operating pursuant to
487 authority vested in the agency by ~~derived from~~ the State
488 Constitution, is within that authority;

489 b. Does not enlarge, modify, or contravene the specific
490 provisions of law implemented;

491 c. Is not vague, establishes adequate standards for agency

492 decisions, or does not vest unbridled discretion in the agency;

493 d. Is not arbitrary or capricious. A rule is arbitrary if
 494 it is not supported by logic or the necessary facts; a rule is
 495 capricious if it is adopted without thought or reason or is
 496 irrational;

497 e. Is not being applied to the substantially affected
 498 party without due notice; and

499 f. Does not impose excessive regulatory costs on the
 500 regulated person, county, or city.

501 4. If the agency timely serves notice of continued
 502 reliance upon a challenged rule or an alleged unadopted rule
 503 under sub-subparagraph 2.d., the administrative law judge shall
 504 determine whether the challenged rule is an invalid exercise of
 505 delegated legislative authority or whether the challenged agency
 506 statement constitutes an unadopted rule and if that unadopted
 507 rule meets the requirements of subparagraph 3. The determination
 508 shall be rendered as a separate final order no earlier than the
 509 date on which the administrative law judge serves the
 510 recommended order.

511 ~~5.3.~~ The recommended and final orders in any proceeding
 512 shall be governed by the provisions of paragraphs (k) and (l),
 513 except that the administrative law judge's determination
 514 ~~regarding an unadopted rule under subparagraph 4. 1. or~~
 515 ~~subparagraph 2.~~ shall be included as a conclusion of law that
 516 the agency may not reject ~~not be rejected by the agency unless~~
 517 ~~the agency first determines from a review of the complete~~

518 ~~record, and states with particularity in the order, that such~~
519 ~~determination is clearly erroneous or does not comply with~~
520 ~~essential requirements of law. In any proceeding for review~~
521 ~~under s. 120.68, if the court finds that the agency's rejection~~
522 ~~of the determination regarding the unadopted rule does not~~
523 ~~comport with the provisions of this subparagraph, the agency~~
524 ~~action shall be set aside and the court shall award to the~~
525 ~~prevailing party the reasonable costs and a reasonable~~
526 ~~attorney's fee for the initial proceeding and the proceeding for~~
527 ~~review.~~

528 (h) Any party to a proceeding in which an administrative
529 law judge of the Division of Administrative Hearings has final
530 order authority may move for a summary final order when there is
531 no genuine issue as to any material fact. A summary final order
532 shall be rendered if the administrative law judge determines
533 from the pleadings, depositions, answers to interrogatories, and
534 admissions on file, together with affidavits, if any, that no
535 genuine issue as to any material fact exists and that the moving
536 party is entitled as a matter of law to the entry of a final
537 order. A summary final order shall consist of findings of fact,
538 if any, conclusions of law, a disposition or penalty, if
539 applicable, and any other information required by law to be
540 contained in the final order. This paragraph does not apply to
541 proceedings authorized by paragraph (e).

542 (2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT
543 INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—In any case to which

544 subsection (1) does not apply:

545 (a) The agency shall:

546 1. Give reasonable notice to affected persons of the
547 action of the agency, whether proposed or already taken, or of
548 its decision to refuse action, together with a summary of the
549 factual, legal, and policy grounds therefor.

550 2. Give parties or their counsel the option, at a
551 convenient time and place, to present to the agency or hearing
552 officer written or oral evidence in opposition to the action of
553 the agency or to its refusal to act, or a written statement
554 challenging the grounds upon which the agency has chosen to
555 justify its action or inaction.

556 3. If the objections of the parties are overruled, provide
557 a written explanation within 7 days.

558 (b) An agency may not base agency action that determines
559 the substantial interests of a party on an unadopted rule or a
560 rule that is an invalid exercise of delegated legislative
561 authority. No later than the date provided by the agency under
562 subparagraph (a)2. for presenting material in opposition to the
563 agency's proposed action or refusal to act, the party may file a
564 petition under s. 120.56 challenging the rule, portion of rule,
565 or unadopted rule upon which the agency bases its proposed
566 action or refusal to act. The filing of a challenge under s.
567 120.56 pursuant to this paragraph shall stay all proceedings on
568 the agency's proposed action or refusal to act until entry of
569 the final order by the administrative law judge, which shall

570 provide additional notice that the stay of the pending agency
 571 action is terminated and any further stay pending appeal of the
 572 final order must be sought from the appellate court.

573 (c) ~~(b)~~ The record shall only consist of:

- 574 1. The notice and summary of grounds.
- 575 2. Evidence received.
- 576 3. All written statements submitted.
- 577 4. Any decision overruling objections.
- 578 5. All matters placed on the record after an ex parte
 579 communication.
- 580 6. The official transcript.
- 581 7. Any decision, opinion, order, or report by the
 582 presiding officer.

583 Section 7. Section 120.595, Florida Statutes, is amended
 584 to read:

585 120.595 Attorney ~~Attorney's~~ fees and costs.—

586 (1) CHALLENGES PURSUANT TO SECTION 120.56 OR ~~TO AGENCY~~
 587 ~~ACTION PURSUANT TO SECTION 120.57(1).~~—

588 (a) This ~~The provisions of this~~ subsection is ~~are~~
 589 supplemental to, and does ~~do~~ not abrogate, other provisions
 590 allowing the award of fees or costs in administrative
 591 proceedings.

592 (b) The final order in a proceeding conducted pursuant to
 593 s. 120.56 or s. 120.57(1) shall award all reasonable costs and
 594 all a reasonable attorney fees ~~attorney's fee~~ to the prevailing
 595 party only if the administrative law judge determines ~~only where~~

596 ~~that the nonprevailing adverse party has been determined by the~~
597 ~~administrative law judge to have participated in the proceeding~~
598 ~~for an improper purpose.~~

599 (c) In proceedings conducted pursuant to s. 120.57(1), it
600 shall be rebuttably presumed that a nonprevailing adverse party
601 participated in the current proceeding for an improper purpose
602 if the administrative law judge determines that:

603 1. The nonprevailing adverse party participated in a
604 previous proceeding involving the same prevailing party and
605 project as an adverse party and in which the nonprevailing
606 adverse party did not establish either the factual or legal
607 merits of its position.

608 2. The factual or legal position asserted in the current
609 proceeding would have been cognizable in the previous proceeding
610 ~~and upon motion, the administrative law judge shall determine~~
611 ~~whether any party participated in the proceeding for an improper~~
612 ~~purpose as defined by this subsection. In making such~~
613 ~~determination, the administrative law judge shall consider~~
614 ~~whether the nonprevailing adverse party has participated in two~~
615 ~~or more other such proceedings involving the same prevailing~~
616 ~~party and the same project as an adverse party and in which such~~
617 ~~two or more proceedings the nonprevailing adverse party did not~~
618 ~~establish either the factual or legal merits of its position,~~
619 ~~and shall consider whether the factual or legal position~~
620 ~~asserted in the instant proceeding would have been cognizable in~~
621 ~~the previous proceedings. In such event, it shall be rebuttably~~

622 ~~presumed that the nonprevailing adverse party participated in~~
 623 ~~the pending proceeding for an improper purpose.~~

624 (d) In a ~~any~~ proceeding in which the administrative law
 625 judge determines that a party participated in the proceeding for
 626 an improper purpose, the recommended order shall ~~se~~ designate
 627 that party and shall determine the award of costs and attorney
 628 ~~attorney's~~ fees.

629 (e) For purposes ~~the purpose~~ of this subsection, the term:

630 1. "Improper purpose" means participation in a proceeding
 631 pursuant to s. 120.57(1) primarily to harass or to cause
 632 unnecessary delay or for frivolous purpose or to needlessly
 633 increase the cost of litigation, licensing, or securing the
 634 approval of an activity.

635 2. "Costs" has the same meaning as the costs allowed in
 636 civil actions in this state as provided in chapter 57.

637 3. "Nonprevailing adverse party" means a party that has
 638 failed to have substantially changed the outcome of the proposed
 639 or final agency action which is the subject of a proceeding. If
 640 ~~In the event that~~ a proceeding results in any substantial
 641 modification or condition intended to resolve the matters raised
 642 in a party's petition, it shall be determined that the party
 643 having raised the issue addressed is not a nonprevailing adverse
 644 party. The recommended order shall state whether the change is
 645 substantial for purposes of this subsection. ~~In no event shall~~
 646 The term "nonprevailing party" or "prevailing party" does not be
 647 ~~deemed to~~ include a ~~any~~ party that has intervened in a

648 previously existing proceeding to support the position of an
 649 agency.

650 (f) For challenges brought under s. 120.57(1)(e), when the
 651 agency relies on a challenged rule or an alleged unadopted rule
 652 pursuant to s. 120.57(1)(e)2.d., if the appellate court or the
 653 administrative law judge declares the rule or portion of the
 654 rule to be invalid or that the agency statement is an unadopted
 655 rule which does not meet the requirements of s. 120.57(1)(e)4.,
 656 a judgment or order shall be rendered against the agency for
 657 reasonable costs and reasonable attorney fees, unless the agency
 658 demonstrates that special circumstances exist that make the
 659 award unjust. An award of attorney fees as provided by this
 660 paragraph may not exceed \$50,000.

661 (2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO
 662 SECTION 120.56(2).-If the appellate court or administrative law
 663 judge declares a proposed rule or portion of a proposed rule
 664 invalid pursuant to s. 120.56(2), a judgment or order shall be
 665 rendered against the agency for reasonable costs and reasonable
 666 attorney ~~attorney's~~ fees, unless the agency demonstrates that
 667 ~~its actions were substantially justified or special~~
 668 circumstances exist which would make the award unjust. An
 669 ~~agency's actions are "substantially justified" if there was a~~
 670 ~~reasonable basis in law and fact at the time the actions were~~
 671 ~~taken by the agency. If the agency prevails in the proceedings,~~
 672 ~~the appellate court or administrative law judge shall award~~
 673 ~~reasonable costs and reasonable attorney's fees against a party~~

674 ~~if the appellate court or administrative law judge determines~~
 675 ~~that a party participated in the proceedings for an improper~~
 676 ~~purpose as defined by paragraph (1)(c). No award of attorney~~
 677 ~~attorney's fees as provided by this subsection may not shall~~
 678 exceed \$50,000.

679 (3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO
 680 SECTION 120.56(3) AND (5).—If the appellate court or
 681 administrative law judge declares a rule or portion of a rule
 682 invalid pursuant to s. 120.56(3) or (5), a judgment or order
 683 shall be rendered against the agency for reasonable costs and
 684 reasonable attorney attorney's fees, unless the agency
 685 demonstrates that ~~its actions were substantially justified or~~
 686 ~~special circumstances exist which would make the award unjust.~~
 687 ~~An agency's actions are "substantially justified" if there was a~~
 688 ~~reasonable basis in law and fact at the time the actions were~~
 689 ~~taken by the agency. If the agency prevails in the proceedings,~~
 690 ~~the appellate court or administrative law judge shall award~~
 691 ~~reasonable costs and reasonable attorney's fees against a party~~
 692 ~~if the appellate court or administrative law judge determines~~
 693 ~~that a party participated in the proceedings for an improper~~
 694 ~~purpose as defined by paragraph (1)(c). No award of attorney~~
 695 ~~attorney's fees as provided by this subsection may not shall~~
 696 exceed \$50,000.

697 (4) CHALLENGES TO UNADOPTED RULES ~~AGENCY ACTION~~ PURSUANT
 698 TO SECTION 120.56(4).—

699 (a) If the appellate court or administrative law judge

700 determines that all or part of an unadopted rule agency
 701 ~~statement~~ violates s. 120.54(1) (a), or that the agency must
 702 immediately discontinue reliance upon ~~on~~ the unadopted rule
 703 ~~statement~~ and any substantially similar statement pursuant to s.
 704 120.56(4) (f) ~~120.56(4) (e)~~, a judgment or order shall be entered
 705 against the agency for reasonable costs and reasonable attorney
 706 ~~attorney's~~ fees, unless the agency demonstrates that the
 707 statement is required by the Federal Government to implement or
 708 retain a delegated or approved program or to meet a condition to
 709 receipt of federal funds.

710 (b) Upon notification to the administrative law judge
 711 provided before the final hearing that the agency has published
 712 a notice of rulemaking under s. 120.54(3) (a), such notice shall
 713 automatically operate as a stay of proceedings pending
 714 rulemaking. The administrative law judge may vacate the stay for
 715 good cause shown. A stay of proceedings under this paragraph
 716 remains in effect so long as the agency is proceeding
 717 expeditiously and in good faith to adopt the statement as a
 718 rule. The administrative law judge shall award reasonable costs
 719 and reasonable attorney ~~attorney's~~ fees incurred ~~accrued~~ by the
 720 petitioner before ~~prior to~~ the date the notice was published,
 721 ~~unless the agency proves to the administrative law judge that it~~
 722 ~~did not know and should not have known that the statement was an~~
 723 ~~unadopted rule. Attorneys' fees and costs under this paragraph~~
 724 ~~and paragraph (a) shall be awarded only upon a finding that the~~
 725 ~~agency received notice that the statement may constitute an~~

726 ~~unadopted rule at least 30 days before a petition under s.~~
727 ~~120.56(4) was filed and that the agency failed to publish the~~
728 ~~required notice of rulemaking pursuant to s. 120.54(3) that~~
729 ~~addresses the statement within that 30-day period. Notice to the~~
730 ~~agency may be satisfied by its receipt of a copy of the s.~~
731 ~~120.56(4) petition, a notice or other paper containing~~
732 ~~substantially the same information, or a petition filed pursuant~~
733 ~~to s. 120.54(7). An award of attorney attorney's fees as~~
734 ~~provided by this paragraph may not exceed \$50,000.~~

735 (c) Notwithstanding the provisions of chapter 284, an
736 award shall be paid from the budget entity of the secretary,
737 executive director, or equivalent administrative officer of the
738 agency, and the agency is ~~shall~~ not be entitled to payment of an
739 award or reimbursement for payment of an award under any
740 provision of law.

741 ~~(d) If the agency prevails in the proceedings, the~~
742 ~~appellate court or administrative law judge shall award~~
743 ~~reasonable costs and attorney's fees against a party if the~~
744 ~~appellate court or administrative law judge determines that the~~
745 ~~party participated in the proceedings for an improper purpose as~~
746 ~~defined in paragraph (1)(c) or that the party or the party's~~
747 ~~attorney knew or should have known that a claim was not~~
748 ~~supported by the material facts necessary to establish the claim~~
749 ~~or would not be supported by the application of then-existing~~
750 ~~law to those material facts.~~

751 (5) APPEALS.—When there is an appeal, the court in its

752 discretion may award reasonable attorney ~~attorney's~~ fees and
753 reasonable costs to the prevailing party if the court finds that
754 the appeal was frivolous, meritless, or an abuse of the
755 appellate process, or that the agency action which precipitated
756 the appeal was a gross abuse of the agency's discretion. Upon
757 review of agency action that precipitates an appeal, if the
758 court finds that the agency improperly rejected or modified
759 findings of fact in a recommended order, the court shall award
760 reasonable attorney ~~attorney's~~ fees and reasonable costs to a
761 prevailing appellant for the administrative proceeding and the
762 appellate proceeding.

763 (6) NOTICE OF INVALIDITY.—A party failing to serve a
764 notice of proposed challenge under this subsection is not
765 entitled to an award of reasonable costs and reasonable attorney
766 fees under this section.

767 (a) Before filing a petition challenging the validity of a
768 proposed rule under s. 120.56(2), an adopted rule under s.
769 120.56(3), or an agency statement defined as an unadopted rule
770 under s. 120.56(4), a substantially affected person shall serve
771 the agency head with notice of the proposed challenge. The
772 notice shall identify the proposed or adopted rule or the
773 unadopted rule that the person proposes to challenge and a brief
774 explanation of the basis for that challenge. The notice must be
775 received by the agency head at least 5 days before the filing of
776 a petition under s. 120.56(2), and at least 30 days before the
777 filing of a petition under s. 120.56(3) or s. 120.56(4).

778 (b) This subsection does not apply to defenses raised and
779 challenges authorized by s. 120.57(1) (e) or s. 120.57(2) (b).

780 (7) DETERMINATION OF RECOVERABLE FEES AND COSTS.—For
781 purposes of this chapter, s. 57.105(5), and s. 57.111, in
782 addition to an award of reasonable attorney fees and costs, the
783 prevailing party, if the prevailing party is not a state agency,
784 shall also recover reasonable attorney fees and costs incurred
785 in litigating entitlement to, and the determination or
786 quantification of, reasonable attorney fees and costs for the
787 underlying matter. Reasonable attorney fees and costs awarded
788 for litigating entitlement to, and the determination or
789 quantification of, reasonable attorney fees and costs for the
790 underlying matter are not subject to the limitations on amounts
791 provided in this chapter or s. 57.111.

792 (8) ~~(6)~~ OTHER SECTIONS NOT AFFECTED.—Other provisions,
793 including ss. 57.105 and 57.111, authorize the award of attorney
794 ~~attorney's~~ fees and costs in administrative proceedings. Nothing
795 in this section shall affect the availability of attorney
796 ~~attorney's~~ fees and costs as provided in those sections.

797 Section 8. Subsections (1), (2), and (9) of section
798 120.68, Florida Statutes, are amended to read:

799 120.68 Judicial review.—

800 (1) (a) A party who is adversely affected by final agency
801 action is entitled to judicial review.

802 (b) A preliminary, procedural, or intermediate order of
803 the agency or of an administrative law judge of the Division of

804 Administrative Hearings, or a final order under s.
 805 120.57(1)(e)4., is immediately reviewable if review of the final
 806 agency decision would not provide an adequate remedy.

807 (2)(a) Judicial review shall be sought in the appellate
 808 district where the agency maintains its headquarters or where a
 809 party resides or as otherwise provided by law.

810 (b) All proceedings shall be instituted by filing a notice
 811 of appeal or petition for review in accordance with the Florida
 812 Rules of Appellate Procedure within 30 days after the date that
 813 ~~rendition of~~ the order being appealed was filed with the agency
 814 clerk. If a party receives notice of the filing of the order
 815 later than the 25th day after the filing of the order with the
 816 agency clerk, the time by which the party must file a notice of
 817 appeal or petition for review is extended until 10 days after
 818 the date that the party received the notice of the filing of the
 819 order. If the appeal is of an order rendered in a proceeding
 820 initiated under s. 120.56, or a final order under s.
 821 120.57(1)(e)4., the agency whose rule is being challenged shall
 822 transmit a copy of the notice of appeal to the committee.

823 (c) ~~(b)~~ When proceedings under this chapter are
 824 consolidated for final hearing and the parties to the
 825 consolidated proceeding seek review of final or interlocutory
 826 orders in more than one district court of appeal, the courts of
 827 appeal are authorized to transfer and consolidate the review
 828 proceedings. The court may transfer such appellate proceedings
 829 on its own motion, upon motion of a party to one of the

830 appellate proceedings, or by stipulation of the parties to the
 831 appellate proceedings. In determining whether to transfer a
 832 proceeding, the court may consider such factors as the
 833 interrelationship of the parties and the proceedings, the
 834 desirability of avoiding inconsistent results in related
 835 matters, judicial economy, and the burden on the parties of
 836 reproducing the record for use in multiple appellate courts.

837 (9) No petition challenging an agency rule as an invalid
 838 exercise of delegated legislative authority shall be instituted
 839 pursuant to this section, except to review an order entered
 840 pursuant to a proceeding under s. 120.56, under s.
 841 120.57(1)(e)5., or under s. 120.57(2)(b), or an agency's
 842 findings of immediate danger, necessity, and procedural fairness
 843 prerequisite to the adoption of an emergency rule pursuant to s.
 844 120.54(4), unless the sole issue presented by the petition is
 845 the constitutionality of a rule and there are no disputed issues
 846 of fact.

847 Section 9. Section 120.695, Florida Statutes, is amended
 848 to read:

849 120.695 Notice of noncompliance; designation of minor
 850 violation rules.—

851 (1) It is the policy of the state that the purpose of
 852 regulation is to protect the public by attaining compliance with
 853 the policies established by the Legislature. Fines and other
 854 penalties may be provided in order to assure compliance;
 855 however, the collection of fines and the imposition of penalties

856 are intended to be secondary to the primary goal of attaining
857 compliance with an agency's rules. It is the intent of the
858 Legislature that an agency charged with enforcing rules shall
859 issue a notice of noncompliance as its first response to a minor
860 violation of a rule in any instance in which it is reasonable to
861 assume that the violator was unaware of the rule or unclear as
862 to how to comply with it.

863 (2) (a) Each agency shall issue a notice of noncompliance
864 as a first response to a minor violation of a rule. A "notice of
865 noncompliance" is a notification by the agency charged with
866 enforcing the rule issued to the person or business subject to
867 the rule. A notice of noncompliance may not be accompanied with
868 a fine or other disciplinary penalty. It must identify the
869 specific rule that is being violated, provide information on how
870 to comply with the rule, and specify a reasonable time for the
871 violator to comply with the rule. A rule is agency action that
872 regulates a business, occupation, or profession, or regulates a
873 person operating a business, occupation, or profession, and
874 that, if not complied with, may result in a disciplinary
875 penalty.

876 (b) Each agency shall review all of its rules and
877 designate those for which a violation would be a minor violation
878 and for which a notice of noncompliance must be the first
879 enforcement action taken against a person or business subject to
880 regulation. A violation of a rule is a minor violation if it
881 does not result in economic or physical harm to a person or

882 adversely affect the public health, safety, or welfare or create
883 a significant threat of such harm. ~~If an agency under the~~
884 ~~direction of a cabinet officer mails to each licensee a notice~~
885 ~~of the designated rules at the time of licensure and at least~~
886 ~~annually thereafter, the provisions of paragraph (a) may be~~
887 ~~exercised at the discretion of the agency. Such notice shall~~
888 ~~include a subject-matter index of the rules and information on~~
889 ~~how the rules may be obtained.~~

890 (c)1. No later than June 30, 2015, and after such date
891 within 3 months after any request of the rules ombudsman in the
892 Executive Office of the Governor, The agency's review and
893 designation must be completed by December 1, 1995; each agency
894 shall review under the direction of the Governor shall make a
895 report to the Governor, and each agency under the joint
896 direction of the Governor and Cabinet shall report to the
897 Governor and Cabinet by January 1, 1996, on which of its rules
898 and certify to the President of the Senate, the Speaker of the
899 House of Representatives, the Administrative Procedures
900 Committee, and the rules ombudsman those rules that have been
901 designated as rules the violation of which would be a minor
902 violation under paragraph (b), consistent with the legislative
903 intent stated in subsection (1). For each agency failing to
904 timely complete the review and file the certification as
905 required by this section, the rules ombudsman shall promptly
906 report such failure to the Governor, the President of the

907 Senate, the Speaker of the House of Representatives, and the
908 Administrative Procedures Committee.

909 2. Beginning on July 1, 2015, each agency shall:

910 a. Publish all rules that the agency has designated as
911 rules the violation of which would be a minor violation, either
912 as a complete list on the agency's Internet website or by
913 incorporation of the designations in the agency's disciplinary
914 guidelines adopted as a rule.

915 b. Ensure that all investigative and enforcement personnel
916 are knowledgeable of the agency's designations under this
917 section.

918 3. For each rule filed for adoption, the agency head shall
919 certify whether any part of the rule is designated as a rule the
920 violation of which would be a minor violation and shall update
921 the listing required by sub-subparagraph 2.a.

922 (d) The Governor or the Governor and Cabinet, as
923 appropriate ~~pursuant to paragraph (c)~~, may evaluate the review
924 and designation effects of each agency subject to the direction
925 and supervision of such authority and may direct ~~apply~~ a
926 different designation than that applied by such ~~the~~ agency.

927 (e) Notwithstanding s. 120.52(1)(a), this section does not
928 apply to:

929 1. The Department of Corrections;

930 2. Educational units;

931 3. The regulation of law enforcement personnel; or

932 4. The regulation of teachers.

CS/HB 1355

2014

933 (f) Designation pursuant to this section is not subject to
934 challenge under this chapter.

935 Section 10. This act shall take effect July 1, 2014.