

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 24, 1998 Revised: _____

Subject: Rulemaking Authority for the Department of Citrus

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Luken</u>	<u>Poole</u>	<u>AG</u>	<u>Favorable/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
3.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
4.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
5.	<u> </u>	<u> </u>	<u> </u>	<u> </u>

I. Summary:

The committee substitute for committee substitute authorizes the Department of Citrus, in rules relating to the issuance and voluntary use of symbols, to refer generally to national or state requirements that a license applicant must meet. Further, the committee substitute for committee substitute permits the Department of Citrus to adopt a rule that lists the forms it uses, and provides that this list is sufficient notice to the public of the existence of the forms used by the department.

This bill amends section 601.10, Florida Statutes, and creates section 601.9918, Florida Statutes.

II. Present Situation:

The Florida Citrus Code of 1949¹ provides for the regulation of the citrus industry in Florida. Section 601.10, F.S., enumerates powers of the Department of Citrus. Subsection (1) of the section delegates rulemaking authority to the department, noting that the department may:

. . . adopt and, from time to time, alter, rescind, modify, or amend all proper and necessary rules, regulations, and orders for the exercise of its powers and other statutes of the state, which rules and regulations shall have the force and effect of law when not inconsistent therewith.

Further, under subsection (7) of the section, the department is authorized to:

¹Ch. 601, F.S.

. . . adopt, promulgate, alter, rescind, modify, amend, and enforce rules and regulations and establish minimum maturity and quality standards for citrus fruits not inconsistent with existing laws, to regulate and control methods and practices followed or used in harvesting, grading, packing, extracting, canning, concentrating, sectionizing, or otherwise processing citrus fruits or citrus juices or the products thereof for human consumption, including the addition or prohibition of any and all additives, and including application to or use of coloring matter thereon and coloring of fruit by placing in coloring room with or without use of heat or any form of gas in such process, to the end that such methods and practices as affect the eating and keeping qualities and depreciate the value of citrus fruits or the juices or other food products thereof in any form may be minimized to the greatest extent possible, if not altogether eliminated.

Additionally, subsection (12) of the section, provides that the department is authorized to:

. . . promulgate rules for the purpose of entering into contracts which are primarily for promotional and advertising services and promotional events which may include commodities involving a service. Such rules shall include the authority to negotiate costs with the offerors of such services and commodities who have been determined to be qualified on the basis of technical merit, creative ability, and professional competency. Contracts pursuant to this subsection may provide for advance payments when the department determines that such provision is essential to acquiring the service.

Additionally, s. 601.11, F.S., grants the department “full and plenary power” to establish fruit maturity and quality standards not inconsistent with existing laws for citrus fruits and food products.

In addition to these and other rules, the department maintains a list of forms used in conducting its business. This form was adopted as a rule by the department even though this practice is not specifically authorized in ch. 601, F.S., or in ch. 120, F.S., the Administrative Procedure Act (APA). Section 120.52(15), F.S., defines the term “rule” to mean:

each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure of practice requirements of an agency and *includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule*. The term also includes the amendment or repeal of a rule. . . .
(*emphasis added*).

The APA contains specific requirements that an agency must follow to ensure that the public is given adequate notice of the forms that are used by the agency in particular circumstances. Section 120.55(1)(a)4., F.S., states:

Forms shall not be published in the Florida Administrative Code; but any form which an agency uses in its dealings with the public, along with any accompanying instructions, shall be filed with the committee (the Joint Administrative Procedures Committee) before it is used.

Any form or instruction which meets the definition of “rule” provided in s. 120.52 *shall be incorporated by reference into the appropriate rule. The reference shall specifically state that the form is being incorporated by reference and shall include the number, title, and effective date of the form and an explanation of how the form may be obtained (emphasis added).*

Thus, under current APA requirements, forms used by the department that meet the definition of a rule must be incorporated by reference into the appropriate rule that requires the use of that form, and that rule must include specific information about the form.

The APA permits agency rules to incorporate material by reference.² This standard, however, is limited. *An agency may incorporate material by reference, but only as the material exists on the date the rule is adopted.*³ Section 120.54(1)(i), F.S., states:

. . . For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes. No rule may be amended by reference only. Amendments must set out the amended rule in full in the same manner as required by the State Constitution for laws.

Thus, changes in the material incorporated by reference are not effective in the rule that incorporates them unless the rule is amended to incorporate such changes.⁴

Section 120.54(6), F.S., imposes special requirements for incorporation of federal standards in a rule. The section provides that, notwithstanding any contrary provision of this section, in the pursuance of state implementation, operation, or enforcement of federal programs, an agency is empowered to adopt rules substantively identical to regulations adopted pursuant to federal law, in accordance with specific procedures.⁵ Whenever all or part of any rule proposed for adoption

²Section 120.54(1)(I), F.S.

³Section 120.54(1)(I), F.S.

⁴In the case *Hutchins v. Mayo*, 197 So. 495 (1940), the Florida Supreme Court stated: "There should be secured to the state (citrus) commission the power to fix and enforce its own rules. If wisdom dictates the adoption from time to time of (rules) of a federal agency the practical result will be precisely the same *but we feel that at all times the power granted in the act should be exercised by the state commission. In this manner control will remain in the commission where the legislature intended it; the control calculated to maintain the standards necessary to the stabilization and protection of a great industry. If, has been said, the Florida Citrus Commission adopts current regulations of the Bureau of Agricultural Economics, which they concluded to be appropriate and sufficient, the ends of uniformity will doubtless be advanced, but theirs (the citrus commission) is the duty and responsibility of approving the rules and regulations which they must make effective. . . . [T]he citrus commission . . . attempted to merge their regulations and those of the federal bureau by the adoption of the latter. . . . There the attempt is made to put into effect also any modifications or changes made by the federal agency after the action of the state commission. . . . The latter portion of the rule. . . goes beyond the limitations of the commission's authority. . . . (emphasis added).*

⁵An agency must publish notice of intent to adopt a rule under the subsection in the Florida Administrative Weekly and provide a copy of the notice of intent to the Joint Administrative Procedures Committee. The agency is required to consider any written comments received within 14 days after the date of publication of the notice of intent is issued. The rule is adopted upon filing with the Department of State. Substantive changes from the rule as noticed require republishing of notice.

by an agency is substantively identical to a regulation adopted pursuant to federal law, *such rule must be written in a manner so that the rule specifically references the regulation whenever possible.*

A rule adopted under this subsection is effective upon the date designated in the rule by the agency. No such rule, however, can become effective earlier than the effective date of the substantively identical federal regulation. Further, whenever a federal regulation which a rule incorporates is declared invalid or is withdrawn, revoked, repealed, remanded, or suspended, the agency which adopted the rule incorporating the federal regulation must publish a notice of repeal of that rule.

The department currently requires license applicants for the use of symbols or marks that are regulated by the department to be in compliance with the requirements of jurisdictions outside of Florida, when sales are made in those jurisdictions. What those extra-jurisdictional requirements are, however, are not contained in the rules of the department. As a result, it is possible that a license applicant must meet the requirements of the federal government, of other states, and of foreign countries in order to receive or maintain a license to voluntarily use certain marks regulated by the department. If an applicant does not meet or maintain those extra-jurisdictional requirements, permission to use or to continue to use the symbols can be denied or revoked.

III. Effect of Proposed Changes:

Section 1. Creates a new section, s. 601.9918, F.S. This section permits the Department of Citrus to make general references to national or state requirements that a license applicant is compelled to meet in the department's rules related to issuance and voluntary use of symbols, certification marks, service marks, or trademarks. This provision grants the department an exception to the general requirement that incorporated material must be specifically referenced in the rule that incorporates it.

Section 2. Section 601.10, F.S., is amended to grant the Department of Citrus an exception to the requirements of the APA regarding the use of forms. First, the section permits the department to adopt as a rule a list of the forms that are used to conduct its business. Further, the bill states that this list of forms provides the regulated public with sufficient notice of the existence of the forms that are in use by the department, and that specific citation to the forms in the rules that require them is unnecessary.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill authorizes the Citrus Commission to adopt a rule that is “. . . related to issuance and voluntary use of symbols, certification marks, service marks, or trademarks . . . “ to generally refer to national or state requirements that a license applicant must comply with in order to obtain permission to use the symbol or mark. In effect, the bill permits the Citrus Commission to require a license applicant to comply with requirements of other governments *without specifying what those requirements are*. While an agency may be authorized to adopt the rules of another agency or governmental entity and enforce them as its own, those rules must be identified and incorporated into the rule of the agency. The bill authorizes the adoption of a rule that does not enunciate a standard and could be determined to be unconstitutionally vague and overbroad.⁶

Further, if the bill is intended to permit incorporated material to be updated without republication of the rule incorporating the material, the bill may run afoul of the rule that prospective changes may not be automatically incorporated. In the case *Gallagher v Motor Ins. Corp.*,⁷ the Florida Supreme Court stated:

Although the legislature has power to approve and adopt the provisions of federal statutes, and all of the administrative rules made by a federal administrative body that are in existence and in effect at the time the legislature acts, the adoption by the legislature in advance of any federal act or the ruling of any federal administrative body might see fit to adopt in the future constitutes an unconstitutional delegation of legislative power.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

⁶*Southeast Aluminum Supply Corporation v. Metropolitan Dade County*, 533 So.2d 777 (1988).

⁷ 605 So.2d 62 (Fla. 1992).

C. Government Sector Impact:

Section 2. The Department of Citrus would be permitted to provide by rule a list of forms used in conducting its business and such a rule would be considered sufficient notice to the public of the existence of the forms. This would negate the need for the department to amend every rule that requires a form each time a form is amended and is expected to save rulemaking costs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 1. Applicants for the use of voluntary symbols or marks regulated by the commission may be required to meet other federal or national requirements. Failure to meet those other federal or national requirements, however, could result in denial of application to use the symbols regulated by the department. Without specifying what those requirements are in the department's rule, regulated persons are not put on notice of all bases for which an application can be denied.

The committee substitute for committee substitute refers to "national" standards. It is not clear if this term relates only to the United States Government or if standards of foreign governments are included.

Section 2. The list of forms that is adopted as a rule by the Department of Citrus already exists. By exempting the department from the requirement that individual rules must contain references to the forms that are required by those rules, the citrus industry could have less notice about the forms required by specific rules than other regulated entities.

Prior to 1984, the APA required every agency to maintain a "forms list." After receiving citizen complaints from persons unable to determine exactly which of several forms that a given rule was requiring them to file, the Legislature determined it would be better to have each rule specify in the text exactly which form it was requiring. Chapter 84-203, L.O.F., repealed the "forms list" provision and added language requiring forms to be "incorporated by reference into the appropriate rule."

The bill permits the Department of Citrus to use a different notice standard regarding the use of forms than other agencies.

In the revised APA, exceptions to uniform requirements were placed in s. 120.80, F.S., and s. 120.81, F.S. If the department is authorized to meet different standards than other agencies, it may be appropriate to place the provisions in s. 120.80, F.S.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
