HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7127 PCB GEAC 08-13 Administrative Procedures

SPONSOR(S): Government Efficiency & Accountability Council and Homan

TIED BILLS: **IDEN./SIM. BILLS:** SB 704

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Government Efficiency & Accountability Council	14 Y, 0 N	De La Paz/Dykes	Cooper
1) Policy & Budget Council		Leznoff	Hansen
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

HB 7127 implements goals of recommendations of the Joint Administrative and Procedures Committee (JAPC) addressing issues uncovered in their review of state agency utilization of "unadopted" rules in carrying out agency responsibilities. An "unadopted rule" is an agency statement that meets the definition of "rule" but has not been adopted through the rulemaking process.

HB 7127:

- Amends the Administrative Procedures Act (APA) so that upon notification to the administrative law judge in a rule challenge proceeding that an agency, prior to the final hearing, has published a notice of rulemaking, the notice will operate as an automatic stay of the proceedings pending adoption of the statement as a rule.
- Narrows the circumstances in which an agency may continue to base its action against an individual on unadopted rules.
- Requires a petitioner seeking to challenge an unadopted rule to give the agency notice that the agency statement at issue may constitute an unadopted rule at least 30 days before the petition is filed.
- Provides that if the agency within the 30 day time period publishes notice of rulemaking to address the statement, no attorneys fees will be assessed against the agency.
- Provides that in circumstances where the rule challenge is proceeding but before the final hearing the administrative law judge is notified that the agency has published notice of rulemaking, the notice shall operate as a stay of the proceedings pending rulemaking. In such instances, the administrative law judge shall award attorney's fees accrued by the petitioner prior to the date the notice was published, unless the agency proves that it did not know and should not have known that the statement was an unadopted rule.
- Increases the existing attorney fee cap from $15,000 to $50,000.
- Requires that effective July 1, 2010, the Department of State (DOS) will be required to electronically publish the Florida Administrative Code (FAC) on its website to allow for a full text search of the code.

The bill appropriates $50,000 in lump sum, 1 full- time equivalent position, salary rate of 16,969 and $22,399 in salaries and benefits for fiscal year 2008-09 and $401,000 in lump sum for fiscal year 2009-10 from the Records Management Trust Fund. The bill authorizes the Department of State to temporarily increase its space rate for publication in the FAC in order to implement the requirements of the bill.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty - This bill creates incentives for agencies to rely on rules which have been promulgated through the procedures established in the APA. Under the bill agencies would be less likely to continue to rely on unadopted rules which can have the same force of law as rules which have been formally adopted through the APA.

B. EFFECT OF PROPOSED CHANGES:

Agency Administrative Rules and the Joint Administrative Procedures Committee Report on Unadopted Rules

Chapter 120 is the Administrative Procedure Act (APA) which sets forth the procedures by which executive branch agencies must adopt their respective agency administrative rules that are used to implement and carry out their statutory duties and responsibilities. The Joint Administrative Procedures Committee (JAPC) is created in s. 11.60, F.S., as a legislative check on statutorily created authority of agencies to adopt administrative rules. JAPC is a joint standing legislative committee composed of six members, with three members from each house. The committee is assigned the duty of maintaining a continuous review of administrative rules and the statutory authority on which they are based.

HB 7127implements some of the goals of the recommendations of JAPC addressing issues uncovered in their review of state agency utilization of what has been termed “unadopted” rules in carrying out agency function and responsibilities. For several months prior to the 2006 regular session, and on a continuing basis thereafter, JAPC has been tracking and evaluating the scope of state agency utilization of agency policy statements that meet the definition of and administrative *rule* given in s. 120.52 (15) F. S., but which have not been adopted through the rulemaking process required under the APA.

JAPC issued two reports on the subject of unadopted rules which led to the recommendations that served as goals for the statutory revisions in this PCB.[1] The first report (Initial JAPC Report) was issued in February 2006 and recommended no amendments for the 2006 session until further analysis was completed to ascertain the reasons behind agency action regarding unadopted rules. The second report, containing recommendations, was issued in February 2007 as a supplement to the initial report (Supplemental JAPC Report).

The Initial JAPC Report describes the purpose and objective of the APA as follows:

> Florida’s 1974 Administrative Procedure Act (APA) was intended to combat the perception of “phantom government,” the idea that agency policies were neither widely known nor consistently applied. Important goals of the new Act were to provide public notice of agency policy, encourage public participation in the formulation of that policy, and ensure legislative oversight of delegated authority. Agency policy was to be expressed through rules adopted pursuant to the rulemaking requirements of the Act.

[1] *Report of Unadopted Rules*, JAPC, February 2006; *Supplement to Report of Unadopted Rules*, JAPC, February 2007.

Florida Statute s. 120.52(15) of the APA defines a state agency rule as follows:

> (15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or 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. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
>
> (b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

Section 120.536(1) F.S., expresses the standard for exercising agency rulemaking authority.

> (1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

There have been some court decisions that have expanded the discretion of agencies to determine whether their own policy statements are in fact "rules" requiring adoption under the APA. [2] In contrast, s. 120.54 (1)(a), F.S., provides a clear indication of the Legislature's directive that agencies must utilize the APA's rulemaking process stating that "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule . . . shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." The statute also creates a presumption that rulemaking is feasible and practicable and sets forth express criteria for determining when it is neither. The burden to prove that rulemaking is not feasible or practicable rests with the agency, however, an agency can effectively negate the feasibility presumption by simply initiating rulemaking. [3] Section 120.54(1)(a)1 provides: Rulemaking shall be presumed feasible unless the agency proves that:

> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;

---

[2] *Department of Revenue v. Novoa*, 745 So.2d 378 (Fla. 1st DCA 1999); *Department of Highway Safety and Motor Vehicles v. Schluter*, 705 So.2d 81 (Fla. 1st DCA 1998); *McDonald v. Department of Banking and Finance*, 346 So.2d 569 (1st DCA 1977).

[3] S. 120.54(1)(a)2. provides: Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that: a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of party based on individual circumstances.

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or

c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

HB 7127removes the logically inconsistent provision found in sub-subparagraph "c" above which would require a conclusion that rulemaking shall be presumed feasible *unless* the agency is currently using the rulemaking procedure expeditiously.

An "unadopted rule" is an agency statement that meets the definition of "rule" but has not been adopted through the rulemaking process. In determining whether an agency policy statement is actually a rule courts will evaluate the effect of the statement rather than the agency's own characterization of the statement.[4] In the period between the Initial JAPC Report and the Supplemental JAPC, joint committee staff surveyed the web sites of approximately 28 agencies and documented over 130 instances of agency policy statements that appeared to meet the definition of rule that were not adopted pursuant to the APA's rulemaking requirements.[5] HB 7127codifies a definition of the term "unadopted rule."

Rule Challenges

Section 120.56(4), F.S., allows any person substantially affected by an agency statement to challenge the statement and seek an administrative determination of whether the statement violates the rulemaking requirements of s. 120.54(1)(a), F.S.

Current law provides a means for agencies to continue their reliance on a challenged unadopted rule until the administrative law judge enters a final order that the statement violates section 120.54(1),F.S.[6] Under s. 120.56(4)(e)1 & 3, F.S., if, either prior to a final hearing or following commencement of a final hearing but before entry of a final order, an agency publishes proposed rules that address the challenged agency statement and proceeds to adopt rules, the agency is allowed to continue to rely on the statement as long as it complies with the requirements of s. 120.57(1)(e), F.S. Essentially, once the agency initiates rulemaking in response to an unadopted rule challenge, it acts as a defense and the agency may avoid an adverse ruling and responsibility for a petitioner's attorney's fees simply by commencing belated rulemaking procedures. In short, even if the agency is enforcing an unadopted rule that clearly violates the rulemaking requirements of s.120.54, F.S., the agency is not penalized for its failure to initiate rulemaking prior to the statement's application to substantially affected persons.

HB 7127 amends the APA so that upon notification to the administrative law judge in a rule challenge proceeding that an agency, prior to the final hearing, has published a notice of rulemaking, the notice will operate as an automatic stay of the proceedings pending adoption of the statement as a rule. The PCB provides that the stay may be vacated on a showing of good cause, but otherwise will remain in effect as long as the agency is proceeding expeditiously and good faith to adopt the statement as a rule. The intended effect of this provision, along with revisions made regarding the award of attorney's fees in such circumstances, is to hold the agency liable for attorney's fees accrued up to the point the agency published notice of rulemaking and obtained the stay provided in this section. (See discussion of Attorney's Fees)

Agency Action Determining Substantial Interests of a Party

[4] *Department of Administration, Division of Personnel, v. Harvey*, 356 So.2d 323 (Fla. 1st DCA 1977).

[5] *Supplement to Report of Unadopted Rules*, JAPC, February 2007, at 3.

[6] Section 120.56(4)(e)1-3, F.S.

Section 120.57(1)(e), F.S., is the provision of law which provides for persons who have individually had their substantial interests determined by agency action to challenge such action. The agency action being challenged is subject to de novo review by an administrative law judge, and no presumption is made prior to the hearing as to whether the action is valid or invalid. Subparagraph (1)(e)(2) of this section contains what is known as the "prove up" provision which requires that in order to prevail in hearings for such challenges the agency must demonstrate that the unadopted rule:

1. Is within its statutory or constitutional authority and responsibilities;
2. Does not enlarge, modify, or contravene the law implemented;
3. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
4. Is not arbitrary or capricious.
5. Is not being applied without due notice; and
6. Does not impose excessive regulatory costs.[7]

The Supplemental JAPC Report explains the historical purpose of the "prove up" provision as follows:

> Early case law granted agencies the option of engaging in "policy by adjudication" but described such a "prove up" option as an incentive to rulemaking, as it was thought that development of policy through the adjudicatory process would be burdensome to agencies. However, when the precursor to section 120.57(1)(e) was enacted in 1991, instead of requiring an agency to prove up the facts at issue in the course of adjudication as an alternative to adopting policy statements by rule, the statute permitted an agency to prove up the agency policy contained in an unadopted statement.

PCB 08-13 amends s. 120.57(1)(e), F.S., to narrow the circumstances in which an agency may continue to base its action on unadopted rules against an individual. Under the PCB, an agency may continue its reliance on unadopted rules against an individual when the agency demonstrates: 1) that the statute being implemented directs it to adopt rules; 2) that the agency has not had time to adopt the statements as rules because they were recently enacted; and 3) that the agency has initiated rulemaking and is proceeding expeditiously and in good faith. In these narrow circumstances an agency would then be required to satisfy the "prove up" provision before being authorized to continue its reliance on an unadopted rule.

In all other circumstances not outlined above, the PCB provides that an agency or administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule. An agency would still, however, have the ability to apply adopted rules and provisions of law to the facts in individual cases.

Attorneys Fees

In proceedings challenging existing rules and proposed rules attorney's fees are limited to $15,000. Under the PCB the cap is raised to $50,000.

Under current law, an agency may avoid the award of attorney's fees in the context of a challenge to an unadopted rule by simply initiating the rulemaking process when the challenge is filed or anytime thereafter prior to the final order of the administrative law judge. The approach taken in the bill is to create an incentive for agencies to commence rulemaking early in the process. Under the bill, a petitioner seeking to challenge to an unadopted rule must give the agency notice that the agency statement at issue may constitute an unadopted rule at least 30 days before the petition is filed. The 30 day notice requirement must be satisfied in order for a successful petitioner to recover attorney's fees and costs. If the agency within the 30 day time period publishes notice of rulemaking to address

[7] See s. 120.57,(1)(e), F.S., for further detail with respect to each element listed.

the statement, no attorneys fees will be assessed against the agency. In circumstances where the rule challenge is proceeding but before the final hearing the administrative law judge is notified that the agency has published notice of rulemaking, the notice shall operate as a stay of the proceedings pending rulemaking. In such instances, the administrative law judge shall award attorney's fees accrued by the petitioner prior to the date the notice was published, unless the agency proves that it did not know and should not have known that the statement was an unadopted rule. Under this provision, attorney's fees are capped at $50,000. The cap, however, does not apply when the agency does not initiate rulemaking in response to a rule challenge.

With respect to attorney fee recovery by the state, current law provides for attorney's fees to be awarded to the state in proceedings challenging agency action if the administrative law judge determines that the party participating in the action was proceeding for an improper purpose. The PCB provides an additional basis to grant attorney's fees to the state when the party or the party's attorney knew or should have known that the claim was not supported by the facts or the existing law.

Legislative Oversight of Agency Rulemaking

In keeping with the role JAPC serves as a check on agency rulemaking, s. 120.54(3)(a)4., F.S., requires an agency to furnish the following documents to JAPC at least 21 days prior to rule adoption: a copy of the proposed rule; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of the economic impact statement, if required; a statement of the extent to which the proposed rule establishes standards more restrictive than federal rules, or that a federal rule on the same subject does not exist; and a copy of the notice of intent to adopt, amend, or repeal a rule. Section. 120.545, F.S., sets forth specific guidelines for the committee's review of agencies adopted rules to ensure they are in compliance with the requirements of the APA and that their implementation will not require an additional appropriation. If JAPC objects to a rule, it must certify its objection to the agency within five days. The committee also must notify the President of the Senate and the Speaker of the House of Representatives of any objection concurrent with certification to the agency.

When an agency receives an objection from JAPC about a rule it must notify the committee that it will (a) amend the rule, (b) repeal the rule or (c) refuse to amend or repeal the rule. Essentially the same options apply to proposed rules. The agency must provide notification in the Florida Administrative Weekly (Weekly) if an agency seeks to pursue either of the first two options. If the agency notifies JAPC that it refuses to amend or repeal the rule or a proposed rule, JAPC must file a detailed notice of its objection with the Department of State (DOS) and the DOS must publish the notice in the Weekly and in the Florida Administrative Code (FAC). JAPC may not require the agency to meet its objection. JAPC, however, may seek an administrative or judicial determination that a rule to which it has filed an objection is an invalid exercise of delegated legislative authority. Current provisions of s. 120.545, F.S., however, do not specify procedures to be used when JAPC objects to statements of estimated regulatory costs.

PCB 08-13 amends s. 120.545, F.S., to clarify the existing procedures to be used when addressing rules that are currently in effect and rules that are not yet in effect. In addition, the bill amends the statutory guidelines for JAPC's review of rules to include a determination of whether the rule's statement of estimated regulatory cost complies with current statutory requirements under s. 120.541, F.S.

Florida Administrative Code and Florida Administrative Weekly

Pursuant to s. 120.55(1), F.S., DOS is required to compile and publish the FAC, which contains all rules adopted by each agency, citing specific rulemaking authority, all history notes, and complete

indexes. Pursuant to s. 120.55(1)(b), F.S., DOS is required to publish notices and various other materials filed by the state's administrative agencies in the Weekly which must contain:

- Notice of adoption of, and an index to, all rules filed during the preceding week;
- All notices required by s. 120.54(3)(a), F.S., concerning agency rulemaking, showing the text of all rules proposed for consideration or a reference to the location in the Weekly where the text of the proposed rules is published;
- All notices of public meetings, hearings, and workshops, including a statement of the manner in which a copy of the agenda may be obtained;
- A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules;
- Notice of petitions for declaratory statements or administrative determinations;
- A summary of each objection to any rule filed by JAPC during the preceding week; and
- Any other material required or authorized by law or deemed useful by DOS.

Publication

During the 2006 Regular Session, the Legislature passed CS/SB 262, enacted as Ch. 226-82, Laws of Florida, which requires DOS to start publishing the Weekly on its Internet website with certain search capabilities, effective December 31, 2007.3 The law requires DOS to continue to publish a printed version of the Weekly.

Currently, DOS is authorized to prescribe by rule the style and form for rules submitted for filing. The bill expands DOS authority to include content requirements for rules, notices, and other materials. Currently, users of the Florida Administrative Weekly Internet Website subscription service are able to receive an automated email notification. The bill requires those email notifications to be sent prior to or at the same time as the printed Weekly, and the email notification must include a summary of the content of the notice.

Currently, DOS is required to publish a printed version of the FAC. Effective July 1, 2010, the bill requires DOS to electronically publish the FAC on its website to allow for a full text search and any material incorporated by reference must have a hyperlink to the material incorporated by reference.

Material Incorporated by Reference

Currently, a rule may incorporate material by reference but only as the material exists on the date the rule is adopted. The PCB provides that an agency rule that incorporates by specific reference another rule of the same agency automatically incorporates subsequent amendments to the referenced rule, unless a contrary intent is clearly indicated in the referencing rule. Also, any notice of amendments must explain the amendment's effect.

Currently an adopting agency is required to file with JAPC a copy of each rule it proposes to adopt, a detailed written statement of the facts and circumstances justifying the proposed rule, a copy of any statement of estimated regulatory costs that has been prepared, a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject, and notice of its intent. The bill requires a copy of any material incorporated by reference also be filed and if the agency filing is

required to publish its rules in the FAC, it is required to file a copy of any material incorporated by reference to the DOS upon approval of the agency head. Also, a copy of any material incorporated by reference is to be provided to JAPC when an agency adopts emergency rules. For rules adopted after December 31, 2010, material incorporated by reference must be submitted in electronic format to DOS in such a way as to make it available for free public access through an electronic hyperlink unless the agency promulgating the rule determines that the posting of the material online would violate federal copyright law. If the agency determines that the posting of the material would constitute a violation of federal copyright law, a statement to that effect, along with the address of locations at DOS and the agency at which the material is available for public inspection and examination.

Maintenance of Orders

Current law requires agencies to maintain all final agency orders along with a subject-matter index of such orders for public inspection. In lieu of this requirement, agencies may maintain and make available to the public a searchable electronic database of its orders. The PCB provides an additional way for agencies to comply with this requirement by allowing the agencies to electronically transmit to the Division of Administrative Hearings (DOAH) a copy of their respective orders for positing on DOAH's website.

Hearings Before Regulatory Boards

PCB 08-113 amends s. 120.54, F.S., relating to rulemaking hearings to expressly provide that when the proceeding is one which is to come before a regulatory board, other than a board comprised of the Governor and Cabinet, the board itself must conduct the public hearing and may not delegate that responsibility to staff unless those who requested the public hearing give their consent.

Definitions

The PCB also provides a definition of "rulemaking authority" to restrict agency rulemaking authority by providing that an agency only has rulemaking authority whenever the Legislature has explicitly authorized an agency to make rules. The bill provides that rulemaking responsibilities of an agency head to give notice prior to adopting, amending, or repealing a rule other than emergency rule; or filing requirements for final adoption, may not be delegated or transferred. The bill also provides a definition of "law implemented" to expressly provide that the term refers to statutory language being carried out or interpreted by an agency through rulemaking.

Disputed Issues of Material Fact

The bill provides that if a disputed issue of material fact arises during a hearing not involving disputed issues of material fact that hearing must be terminated and a hearing involving disputed issues of material fact must be conducted unless waived by all parties. Currently, when a disputed issue of material fact arises in such hearings it is unclear whether or not the proceeding should continue.

C. SECTION DIRECTORY:

Section 1. Names the bill the "Open Government Act."

Section 2. Amending s. 120.52, F.S., to provide definitions.

Section 3. Amending s. 120.53, F.S., to provide for electronic submission of agency orders to the Division of Administrative Hearings.

Section 4. Amending s. 120.536,F.S., to clarify a reference to the “enabling statute.”

Section 5. Amending s. 120. 54, F.S., relating to incorporating material by reference and publication thereof.

Section 6. Amending s. 120.54, F.S., effective January 1, 2009, relating to when agency rulemaking is presumed feasible.

Section 7. Amending s. 120.545, F.S., relating to committee review of agency rules and statements of regulatory costs.

Section 8. Amending s. 120.55, F.S., relating to requirements for publication.

Section 9. Amending s. 120.55, F.S., effective July 1, 2010, relating to requirements for publication.

Section 10. Amending s. 120.56, F.S., relating to notice requirements for rules challenge proceedings.

Section 11. Amending s. 120.56, F.S., effective January 1, 2009, making revisions to rule challenge proceedings and providing for the issuance of an automatic stay pending notice of rulemaking.

Section 12. Amending s. 120.57, F.S., effective January 1, 2009, relating to challenges to agency action based on unadopted rules and review thereof.

Section 13. Amending s. 120.595, F.S., effective January 1, 2009, relating to attorneys fees for chapter 120 proceedings.

Section 14. Amending s. 120.569, F.S., clarifying procedures for hearings concerning disputed issues of material fact.

Section 15 - 20. Amending ss. 120.74, F.S., 120.80, F.S., 120.81, F.S., 409.175, F.S., 420.9072,F.S., and 420.9075, F.S. making technical corrections and correcting cross-references.

Sections 21 - 23. Providing an appropriation from the Records Management Trust Fund.

Section 24. Providing an effective date except as otherwise provided.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill appears to provide incentives for people to challenge unadopted rules by eliminating those provisions that currently allow an agency to initiate the rulemaking process and avoid any sanctions. Additionally, the bill provides for the award of costs and attorney's fees against the agency in circumstances not provided for under the current law.

D. FISCAL COMMENTS:

Agencies that have not adopted as rules those agency statements that should be adopted pursuant to ch. 120, F.S., may incur administrative costs associated with the rulemaking process. Those costs are indeterminate but may be minimized by agency decisions concerning continued reliance on unadopted rules once notified of a pending rule challenge. Agencies that lose in a proceeding challenging an agency statement not adopted as a rule may be liable for costs and attorney's fees. Some costs can be avoided by complying with the new provisions concerning unadopted rules, and may be partially offset among various agencies by the effect of the provision providing an additional basis for the award of attorney's fees for the state.

At least one agency has claimed that it will incur costs associated with the requirements to: 1) electronically supply materials referenced in rules, and 2) terminate a s. 120.57(2), F.S., proceeding and initiate a s. 120.57(1), F.S., proceeding if a disputed issue of material fact arises in the former. First, though there may be costs associated with scanning documents to be submitted electronically, those costs may be less than the costs associated with providing hard copies of incorporated materials, as is currently required. The second concern appears misplaced, since the Uniform Rules of Procedure, for 10 years and until recently, required exactly what the bill would require.

The bill provides that for the 2008-2009 fiscal year, the nonrecurring sum of $50,000 is appropriated from the Records Management Trust Fund to the Department of State for the purpose of carrying out its duties. The bill also appropriates $401,000 in the 2009-2010 fiscal year to complete the implementation of the bill's requirements over a two year period. In order to generate the necessary revenue in the trust fund to implement the act, the bill authorizes a temporary increase in the line fee charged by the Department of State for publication in the Florida Administrative Weekly. After the implementation period expires, the bill directs the line fee to be reduced to its 2007-2008 fiscal year level. The bill also authorizes a recurring sum of $22,399 for an FTE to be appropriated from the Records Management Trust Fund to handle the administrative and system requirements associated with their new responsibilities under the bill.

Further the bill provides that on July 1, 2009 the unencumbered balance in the records Management Trust Fund may not exceed $300,000 plus any fund collected but unexpended from the fee increase and requires any such excess to be transferred to the General Revenue Fund on June 30, 2009.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The DOS is given rule making authority for the requirements of the bill with respect to incorporating material by reference.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

At the meeting of the Government Efficiency and Accountability Council, held April 9, 2008, the council adopted three amendments to the bill. The first amendment revises the attorney's fees provision of the bill to require that a petitioner must provide at least 30 days notice to an agency before filing a petition to challenge an agency statement as a rule in order to recover attorney's fees. The amendment also provides that a successful petitioner shall be awarded attorney's fees against the state, unless the agency proves that it did not know and should not have known that the agency statement was an unadopted rule. The second amendment adopted provides for the appropriation of funds from the Records Management Trust Fund to implement the portions of the bill regarding electronic publication of material incorporated by reference in the Florida Administrative Code and creating a search feature to the existing responsibility of the Department of State to electronically publish the Florida Administrative Code. The third amendment was a technical amendment to conform the changes made to the bill by the second amendment.