

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 483 Electronic Legal Documents

**SPONSOR(S):** Altman

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 848

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	16 Y, 0 N	Brascomb	Jones
2) Commerce Committee	22 Y, 0 N	Wright	Hamon
3) Judiciary Committee			

### SUMMARY ANALYSIS

Florida law considers many documents to be of such importance that they must be signed before a notary public. A notary public's function is to authenticate signatures and administer oaths on these documents, thereby preventing fraud. A notary public is responsible for determining that the person signing is who he or she claims to be. A notary public is authorized to perform the following six duties:

- Administer oaths and affirmations;
- Take acknowledgments;
- Attest to photocopies of certain documents;
- Solemnize marriage;
- Verify vehicle identification numbers; and
- Certify the contents of a safe-deposit box.

Current law allows a notary public to perform notarial acts using electronic means in which the principal appears using audio-video communication technology as long as certain procedures, standards, and minimum technology requirements are met.

A will is a legal document used to designate the distribution of a person's assets upon death. To be valid, a will must follow certain formalities with respect to its creation, execution, preservation, revocation, and filing. An electronic will is executed, modified, and revoked in a similar manner as a paper will.

HB 483 makes several changes relating to online notarization and electronic wills to clarify that:

- Online notarization procedures still apply in circumstances where an electronic document requires witnesses but not notarization.
- An online notary public's supervision of an electronic record's witnessing is a notarial act.
- The requirements for supervising of witnessing of electronic records in s. 117.285(5), F.S., are:
  - Applicable only when fewer than two witnesses are in the physical presence of the principal who is executing one of the enumerated electronic estate planning documents;
  - Not limited to "a waiver of spousal rights;"
  - Applicable to agreements or waivers of rights under s. 732.701, F.S.; and
  - Applicable only to the testamentary aspects of a revocable trust.

The bill also amends the definition of "online notarization" to include the appearance of witnesses by audio-video communication technology. The bill requires an online notary public to verify the principal's identity when an online notary public is supervising the execution and witnessing of an electronic record.

The bill does not appear to have a fiscal impact on state or local governments.

The bill is effective upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Notary Public

The law considers many documents to be of such importance that they must be signed in the presence of a notary public. The notary's function is to authenticate signatures and administer oaths on these documents, thereby preventing fraud. A notary public is responsible for determining that the person signing is who he or she claims to be.<sup>1</sup> A notary is authorized to perform the following six duties:

- Administer oaths and affirmations;
- Take acknowledgments;
- Attest to photocopies of certain documents;
- Solemnize marriage;
- Verify vehicle identification numbers; and
- Certify the contents of a safe-deposit box.<sup>2</sup>

A notary must be at least 18 years old, maintain legal residence in Florida, and possess the ability to read, write, and understand English. The notary public application must be signed and sworn by the applicant and accompanied by the fee and proof of a bond<sup>3</sup> required by law. The application for appointment must include a \$25 fee, a \$10 commission fee,<sup>4</sup> and a \$4 surcharge which is used for notary education and assistance.<sup>5</sup> The bond must be for at least \$7,500, payable to any individual harmed as a result of a breach of duty by the notary.<sup>6</sup>

A notary applicant must also take an oath following the application process. As part of the oath, the applicant must swear that he or she has read the statutes relating to notaries public and knows a notary public's responsibilities, limitations, and powers.<sup>7</sup> Once appointed, a notary may serve for four years. No person may be automatically reappointed as a notary; the application process must be completed regardless of whether an applicant has previously served as a notary.<sup>8</sup>

When notarizing a signature, a notary public must complete a notarial certificate for an oath, affirmation, or an acknowledgment.<sup>9</sup> Current law provides notaries with a form certificate to use in substantially the same form.<sup>10</sup> The certificate of acknowledgment must contain the following items:

- The venue stating the location of the notarization;
- The type of notarial act performed;
- A statement that the signer personally appeared physically before the notary public or by online notarization at the time of the notarization;
- The exact date of the notarial act;
- The name of the person whose signature is being notarized;

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<sup>1</sup> National Notary Association, Inc., *What is a Notary Public?* <https://www.nationalnotary.org/knowledge-center/about-notaries/what-is-a-notary-public> (last visited Mar. 30, 2021).

<sup>2</sup> Florida Governor's Office, *Duties of a Notary Public* (Dec. 13, 2016), [https://www.flgov.com/wp-content/uploads/Notary\\_Reference\\_Manual\\_12.13.16.pdf](https://www.flgov.com/wp-content/uploads/Notary_Reference_Manual_12.13.16.pdf) (last visited Mar. 30, 2021).

<sup>3</sup> A notary bond is a three-party obligation. A bonding company guarantees to the Florida Department State that it will pay, on behalf of a commissioned Florida notary, any losses incurred by the public up to \$7,500 during the notary's commission term. The bonding company will then demand reimbursement from the notary in the event of such paid losses. American Association of Notaries, *Florida Notary Bond*, <https://www.floridanotaries.com/florida-notary-bond#:~:text=A%20notary%20bond%20is%20a,during%20the%20notary's%20commission%20term> (last visited Mar. 30, 2021).

<sup>4</sup> A \$10 fee is prescribed for each Governor issued commission of an elected officer or a notary public. S. 113.01, F.S.

<sup>5</sup> S. 117.01, F.S.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> S. 117.05(4), F.S.

<sup>10</sup> S. 117.05(12), F.S.

- The type of identification the notary public is relying upon;
- The notary's official signature;
- The notary's name, typed, printed, or stamped below the signature; and
- The notary's official seal<sup>11</sup> affixed below or to either side of the notary's signature.<sup>12</sup>

### *Electronic Notarization and Electronic Records*

Any document requiring notarization may be notarized electronically. When notarizing a document electronically, a notary public must use an electronic signature that is:

- Unique to the notary public;
- Capable of independent verification;
- Retained under the notary public's sole control; and
- Attached to or logically associated with the electronic document so that any subsequent alteration to the electronic document displays alteration evidence.<sup>13</sup>

When a signature is required to be accompanied by a notary public seal, the requirement is satisfied when the electronic signature of the notary public contains the minimum information specified.<sup>14</sup> An electronic signature is any letters, characters, or symbols, manifested by electronic means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included, is attached to or logically associated with the signature or record.<sup>15</sup> In performing an electronic notarial act, a notary must reasonably ensure the security, reliability, and uniformity of electronic notarizations. To this end, the notary may use an authentication procedure such as a password, token, card, or biometric to protect access to the notary's electronic signature or the means for affixing the signature.<sup>16</sup>

### Remote Notarization

A notary public may complete a registration as an online notary public with the Florida Department of State (DOS) if he or she:

- Holds a current:
  - Commission as a notary public;
  - Appointment as a civil-law notary;<sup>17</sup> or
  - Appointment as a commissioner of deeds;<sup>18</sup>
- Submits a copy of such commission or proof of such appointment with the registration;
- Certifies that the notary public, civil-law notary, or commissioner of deeds registering as an online notary public has completed a course covering the online notary public duties, obligations, and technology requirements;
- Pays a notary public registration fee;<sup>19</sup>

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<sup>11</sup> The notary seal must be a rubber stamp and include the words "Notary Public—State of Florida"; it must also include the name of the notary public, the date of expiration of the notary's commission, and the commission number.

<sup>12</sup> S. 117.05(12), F.S.

<sup>13</sup> S. 117.021, F.S.

<sup>14</sup> *Id.*

<sup>15</sup> S. 668.50(11)(a), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> A civil-law notary is a person who is a member in good standing of The Florida Bar, who has practiced law for at least 5 years, and who is appointed by the Secretary of State as a civil-law notary. S. 118.10, F.S.

<sup>18</sup> A commissioner of deeds is a person appointed by the Governor to take acknowledgments, proofs of execution, or oaths in any foreign country, in international waters, or in any territory of the United States outside the 50 states. S. 721.97, F.S.

<sup>19</sup> S. 113.01, F.S.

- Identifies the Remote Online Notary (RON) service provider<sup>20</sup> whose audio-video communication and identity proofing technologies the registrant intends to use for online notarizations, and confirms that such technology and processes satisfy statutory requirements;
- Provides evidence that the registrant has obtained a \$25,000 bond, payable to any individual harmed as a result of the registrant's breach of duty as an online notary public; and
- Provides evidence that the registrant acting in his or her capacity as an online notary public is covered by a minimum \$25,000 errors and omissions insurance policy.<sup>21</sup>

An online notary public may perform any function as an online notarization authorized under ch. 117, F.S., excluding solemnizing matrimony rites.<sup>22</sup> If a notarization requires a principal<sup>23</sup> to appear before the online notary public, the principal may appear by audio-video communication technology.

An online notary public can perform an online notarization, regardless of the physical location of the principal at the time of the notarial act, as long as the notary public is physically located in Florida while performing the online notarization.<sup>24</sup>

An online notary public is subject to both the general notary and electronic notary provisions of law.<sup>25</sup> An online notary may charge up to \$25 for notarizing a document online, in addition to fees allowable for in-person notarial acts.<sup>26</sup>

### *Technology Standards for Online Notarization*

Florida law establishes minimum requirements for online notarization technology standards:

- *Identity proofing:*<sup>27</sup> The security characteristics, at a minimum, must present the principal with five or more questions with a minimum of five possible answer choices per question. Each question must be:
  - Drawn from a third-party provider of public and proprietary data sources;
  - Identifiable to the principal; and
  - Subjected to a two-minute time constraint, with the principal answering at least 80 percent correct.<sup>28</sup>
- *Credential analysis:*<sup>29</sup> An online notary must use commercially available credential analysis automated software or a hardware process that:
  - Is consistent with sound commercial practices;
  - Aids the notary public in verifying the authenticity of the credential to ensure it is not fraudulent or inappropriately modified; and
  - Uses information held by the issuing or authoritative agency to confirm the validity of credential details.<sup>30</sup>
- *Audio-video communication technology:*<sup>31</sup> The technology must:
  - Be secure from interception or access by anyone other than the participants communicating; and

<sup>20</sup> A RON service provider is a person that provides audio-video communication technology and related processes, services, software, data storage, or other services to online notaries public for the purpose of directly facilitating their performance of online notarizations.

<sup>21</sup> S. 117.225, F.S.

<sup>22</sup> S. 117.209, F.S.

<sup>23</sup> A principal is an individual whose electronic signature is acknowledged, witnessed, or attested to in an online notarization or who takes an oath or affirmation from the online notary public.

<sup>24</sup> S. 117.209, F.S.

<sup>25</sup> S. 117.235, F.S.

<sup>26</sup> S. 117.275, F.S.

<sup>27</sup> Identity proofing is a process by which a third party confirms the identity of an individual through use of public or proprietary data sources, which may include knowledge-based authentication or biometric verification. S. 117.201, F.S.

<sup>28</sup> S. 117.295, F.S.

<sup>29</sup> Credential analysis is a process by which a third party aids a public notary in affirming the validity of a government-issued identification credential and data thereon through review of public or proprietary data sources. S. 117.201, F.S.

<sup>30</sup> S. 117.295, F.S.

<sup>31</sup> Audio-video communication technology is technology in compliance with applicable law which enables real-time, two-way communication using electronic means in which participants are able to see, hear, and communicate with one another. S. 117.201, F.S.

- Provide sufficient audio clarity and video resolution to enable the notary to communicate with the principal and to confirm the identity of the principal.<sup>32</sup>

With respect to electronic notarization, a notary is required to include access protection to a signature through use of passwords or codes under the notary's control. The notary may not allow another person to use the notary's electronic journal, seal, or signature. Notaries must also reasonably ensure that any device used to create their electronic signature is current and secure.<sup>33</sup>

#### *Online Notarization Procedures*

In performing an online notarization, an online notary public must verify the identity of a principal at the time the signature is taken by using audio-video communication technology. The notary must record the entire audio-video conference session between the notary public and the principal and any subscribing witnesses. A principal may not serve as a witness for an online notarization.<sup>34</sup>

In performing an online notarization for a principal not located in the state, an online notary must confirm that the principal desires for the notarial act to be performed by a Florida notary public and under Florida law. An online notary public must confirm the identity of the principal and any witness by personal knowledge, or by:

- Remote presentation of a government-issued identification credential by each individual;
- Credential analysis of each government-issued identification credential; and
- The identity proofing of each individual, in the form of knowledge-based authentication or another legal method of identity proofing.<sup>35</sup>

If an online notary fails to comply with the online notarization procedures, such failure does not automatically impair the validity of the notarial act or the electronic record. However, such failure may be introduced as evidence to establish violations of ch. 117, F.S., or as an indication of possible fraud, forgery, or impersonation or for other evidentiary purposes.<sup>36</sup>

#### *Electronic Journal and Electronic Records*

An online notary must keep a secure electronic journal of electronic records he or she has notarized.<sup>37</sup> For each online notarization, the electronic journal entry must contain the:

- Date and time of the notarization;
- Type of notarial act;
- Type, title, or description of the electronic record or proceeding;
- Identity evidence for each principal involved in the transaction or proceeding;
- Indication that the principal passed the identity proofing;
- Indication that the government-issued identity credential satisfied the credential analysis; and
- Fee charged for the online notarization.<sup>38</sup>

Identity evidence for each principal may be a:

- Statement that the person is personally known to the online notary public; or
- Notation of the type of identification document provided to the online notary public.<sup>39</sup>

An online notary public must retain an unedited and uninterrupted recording of a remote notarization audio-video communication, which must include:

- Appearance by the principal and each witness before the online notary public;
- Identity confirmation of the principal and each witness;

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<sup>32</sup> S. 117.295, F.S.

<sup>33</sup> Ss. 117.021 and 117.225, F.S.

<sup>34</sup> S. 117.265, F.S.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> S. 117.245, F.S.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

- A general description of the records to be signed;
- A principal's declaration that his or her signature is knowingly and voluntarily made; and
- All of the actions and spoken words of the principal, notary public, and each required witness during the entire online notarization.<sup>40</sup>

The notary must attach or logically associate the electronic signature and seal to the electronic notarial certificate of an electronic record in a manner capable of independent verification using tamper-evident technology.<sup>41</sup> The electronic journal and backup record of such must be maintained for at least 10 years after the date of the notarial act. A notary must immediately notify an appropriate law enforcement agency and DOS of the electronic journal, electronic signature, or electronic seal's unauthorized use.<sup>42</sup>

### Electronic Wills

A will, very generally, is a legal document that a person (a testator) may use to determine who gets his or her property upon death. Wills do not dispose of all of a testator's property, but only the "estate," or those assets that are subject to probate administration.<sup>43</sup> Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. Other assets are disposed of outside of probate.

Without a will, a decedent's estate is distributed pursuant to intestacy statutes, which devise a decedent's estate according to default rules. With a will, however, a testator may devise the estate to a person of his or her choosing. Also, with a will, a testator may designate a person known as a personal representative to carry out the terms of the will. Otherwise, a court will choose the personal representative.

#### *Executing a Will*

A will must be in writing and signed by either the testator or by someone else on behalf of the testator. If someone else signs on behalf of the testator, the person must do so in the testator's presence and at the testator's direction.<sup>44</sup> At least two persons must witness the testator sign the will or must witness the testator's acknowledgement that he or she previously signed the will or that another person subscribed the testator's name to the will.<sup>45</sup> If the testator fails to comply with these requirements, the will is not valid.<sup>46</sup>

The requirement that a document be signed may be satisfied by an electronic signature.<sup>47</sup> Unless the testator is a vulnerable adult,<sup>48</sup> the witnessing of a will execution can be done remotely if:

- The individuals are supervised by a notary public;
- The individuals are authenticated and signing as part of an online notarization session in accordance with s. 117.265, F.S.;
- The witness hears the signer make a statement acknowledging that the signer has signed the electronic record; and
- In the case of an electronic will, the testator provides, to the satisfaction of the online notary public, verbal answers to the following questions:

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<sup>40</sup> *Id.*

<sup>41</sup> S. 117.255, F.S.

<sup>42</sup> *Id.*

<sup>43</sup> s. 731.201(14), F.S.

<sup>44</sup> S. 732.502(1)(a), F.S.

<sup>45</sup> S. 732.502(1)(b), F.S.

<sup>46</sup> A will executed in another state is valid in Florida if the will is executed in accordance with the laws of this state, the laws of the state in which it was executed, or both. This does not apply to nuncupative wills (oral wills) or holographic wills (wills written in the hand of the testator, but not properly executed as set forth in section 732.502(1), F.S.), which are not valid in Florida regardless of whether they were executed according to the laws of the state in which they were executed. S. 732.502(2), F.S.

<sup>47</sup> S. 732.522, F.S.

<sup>48</sup> A vulnerable adult is a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging. S. 415.102, F.S.

- Are you 18 years of age or older?
- Are you of sound mind?
- Are you signing this will voluntarily?
- Are you under the influence of any drugs or alcohol that impairs your ability to make decisions?
- Has anyone forced or influenced you to include anything in this will which you do not wish to include?
- Did anyone assist you in accessing this video conference? If so, who?
- Where are you? Name everyone you know in the room with you.<sup>49</sup>

### *Self-Proved Wills*

The estate is not required to procure an attesting witness as part of the estate administration process, before a will can be admitted to probate, when the will is “self-proved”. A will which is self-proved in accordance with the Code may be admitted to probate without further proof.<sup>50</sup> In a will contest, when the proponent initially has the burden of proving that the will was validly executed, a self-proving affidavit is admissible to meet and satisfy this burden. The affidavit must be evidenced by a certificate attached to or following the will.<sup>51</sup>

The will may be self-proved either at the time of its execution or at a subsequent date. When the will or codicil is self-proved at a subsequent date, the testator is required to acknowledge it.<sup>52</sup>

An attested electronic will is self-proved if all of the following requirements are met:

- The will is executed in conformity with Florida law;
- The acknowledgement of the electronic will by the testator and the affidavits of the witnesses are made in accordance with s. 732.503, F.S.;
- The acknowledgement and affidavits are made a part of, or are attached to or logically associated with, the electronic record; and
- The electronic will designates a qualified custodian, who at all times is in control of the electronic will and executes a certification that meets the requirements set forth in statute.<sup>53</sup>

A qualified custodian of an electronic will is a person who:

- Is domiciled in and a resident of Florida or is incorporated or organized in Florida;
- Consistently employs a system for maintaining custody of electronic records and stores electronic records containing electronic wills under the system; and
- Furnishes for a court hearing involving an electronic will that is currently or was previously stored by the qualified custodian any information requested by the court pertaining to the qualified custodian’s policies and procedures.<sup>54</sup>

A qualified custodian must maintain an audio-video recording of an electronic will online notarization.<sup>55</sup> A qualified custodian is liable for the negligent loss or destruction of an electronic record and may not limit his or her liability for doing so. A qualified custodian may not suspend or terminate a testator’s access to electronic records and must keep a testator’s information confidential.<sup>56</sup>

### **Effect of Proposed Changes**

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<sup>49</sup> *Id.*  
<sup>50</sup> S. 733.201(1), F.S.  
<sup>51</sup> The officer’s certificate must be substantially in the form set forth at s. 732.503, F.S. The form requires that the witnesses state that they witnessed the testator *sign* the will. However, the statutory requirements for executing a will do not require witnesses to witness the testator sign the will. Section 732.502, F.S., provides that the witnesses may either witness the testator sign, or witness the testator acknowledge his or her prior signature.  
<sup>52</sup> S. 732.503(1), F.S.,  
<sup>53</sup> S. 732.523, F.S.  
<sup>54</sup> S.732.524, F.S.  
<sup>55</sup> *Id.*  
<sup>56</sup> *Id.*

HB 483 makes several changes relating to online notarization and electronic wills. Specifically, the bill clarifies that:

- Online notarization procedures<sup>57</sup> still apply in circumstances where an electronic document requires witnesses but not notarization.
- An online notary public's supervision of an electronic record's witnessing is a notarial act.
- The requirements for supervision of witnessing of electronic records in s. 117.285(5), F.S., are:
  - Applicable only when fewer than two witnesses are in the physical presence of the principal who is executing one of the enumerated electronic estate planning documents;
  - Not limited to "a waiver of spousal rights;" and
  - Applicable to agreements or waivers of rights under s. 732.701, F.S.<sup>58</sup>

The bill provides that the requirements related to supervising the witnessing of electronic records for an online notary public in s. 117.285(5), F.S., are applicable only to the testamentary aspects of revocable trusts.<sup>59</sup> In other words, failure to comply with the applicable requirements may invalidate the testamentary aspects of a Florida resident's revocable trust, but will not invalidate the non-testamentary aspects of that revocable trust.

The bill also amends the definition of "online notarization" to add the appearance of witnesses by audio-video communication technology. The bill requires an online notary public to verify the principal's identity when an online notary public is supervising the execution and witnessing of an electronic record.

The bill corrects erroneous cross-references contained in statute.

Lastly, the bill revises statutory forms so that the jurats or notarial certificates in those forms comply with the requirements of s. 117.05(4)(c), F.S., which became effective January 1, 2020.

The bill is effective upon becoming law.

## B. SECTION DIRECTORY:

**Section 1:** Amends s. 117.201, F.S., relating to definitions.

**Section 2:** Amends s. 117.285, F.S., relating to supervising the witnessing of electronic records.

**Section 3:** Amends s. 709.2119, F.S., relating to acceptance of and reliance upon power of attorney.

**Section 4:** Amends s. 732.401, F.S., relating to descent of homestead.

**Section 5:** Amends s. 732.503, F.S., relating to self-proof of will.

**Section 6:** Amends s. 732.521, F.S., relating to definitions.

**Section 7:** Amends s. 732.703, F.S., relating to effect of divorce, dissolution, or invalidity of marriage on disposition of certain assets at death.

**Section 8:** Amends s. 747.051, F.S., relating to summary procedure.

**Section 9:** Creates an unnumbered section providing for retroactive application.

**Section 10:** Provides an effective date of upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

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<sup>57</sup> Online notarization procedures include verifying the identity of the principal, requiring the notary to maintain a record of the witnessing in the notary's electronic journal, and requiring the notary to maintain the audio-video recording of the execution and witnessing.

<sup>58</sup> Agreements or waivers under s. 732701, F.S., include agreements to make a will, to give a devise, not to revoke a will, not to revoke a devise, not to make a will, or not to make a devise.

<sup>59</sup> "Testamentary aspects" are those provisions of a trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor's estate.

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**