RULEMAKING OVERSIGHT
&
REPEAL
SUBCOMMITTEE
MEETING

Wednesday, January 13, 2016
10:00 a.m. – 12:00 p.m.

306 House Office Building

MEETING PACKET

Steve Crisafulli
Speaker

Lake Ray
Chair

Notice & Agenda

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Rulemaking Oversight & Repeal Subcommittee

Start Date and Time: Wednesday, January 13, 2016 10:00 am

End Date and Time: Wednesday, January 13, 2016 12:00 pm

Location: 306 HOB

Duration: 2.00 hrs

Consideration of the following bill(s):

HB 981 Administrative Procedures by Richardson

Consideration of the following proposed committee bill(s):

PCB RORS 16-01 -- Ratification of administrative rules of the Division of Workers' Compensation
PCB RORS 16-02 -- Ratification of administrative rules of the Board of Medicine

Workshop on the following:

HB 953 Legislative Reauthorization of Agency Rulemaking Authority by Eisnaugle

NOTICE FINALIZED on 01/11/2016 3:12PM by Powell-Battles.Sonja

FLORIDA HOUSE OF REPRESENTATIVES

Rules, Calendar & Ethics Committee
Rulemaking Oversight & Repeal Subcommittee

Steve Crisafulli
Speaker

Lake Ray
Chair

AGENDA
Wednesday, January 13, 2016
10:00 p.m. – 12:00 p.m.
306 House Office Building

- **Opening Remarks by Chair Ray**
- **Roll Call by Sonja Powell-Battles, CAA**
- **Announcements**
- **Consideration of the following bill(s):**
    - HB 981 Administrative Procedures by Richardson
- **Consideration of the following proposed committee bill(s)**
    - PCB RORS 16-01—Ratification of administrative rules of the Division of Workers' Compensation

402 South Monroe Street, 400 House Office Building, Tallahassee, Florida 32399-1300
Telephone: 850–717-4881

- PCB RORS 16-02—Ratification of administrative rules of the Board of Medicine

Workshop on the following:

- HB 953 Legislative Reauthorization of Agency Rulemaking Authority by Eisnaugle

- **Closing Remarks**

- **Meeting Adjourned**

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 953 Legislative Reauthorization of Agency Rulemaking Authority
SPONSOR(S): Eisnaugle
TIED BILLS: **IDEN./SIM. BILLS:** SB 1150

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom
2) Appropriations Committee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Agency rulemaking authority must be specifically authorized by law. Under Florida's Administrative Procedures Act (ch. 120), rules must be supported by a law granting rulemaking authority to the agency and a specific law being implemented by the rule. Laws authorizing rulemaking are typically codified in the Florida Statutes as permanent laws. Any rule that has an economic or regulatory cost impact in excess of $1 Million cannot go into effect until ratified by the legislature. Such ratifications occur by enacting of a general law.

House Bill 953 proposes to suspend any rulemaking authorized by law three years after the effective date of the authority. Rulemaking authority in force upon the bill's effective date will be suspended on July 1, 2019, unless re-authorized. If rulemaking is not reauthorized by general law prior to the suspension, rulemaking authority is suspended until reauthorized. The bill makes exceptions for emergency rules and rules necessary to maintain the financial or legal integrity of any financial obligation of the state or its agencies or political subdivisions.

The bill allows the Governor to issue a declaration of necessity, delaying any suspension for 90 days to allow the Legislature to convene and reauthorize necessary rulemaking. It also allows rulemaking proceedings to be undertaken pursuant to ch. 120, but delaying the effect of any rules until a suspension ends.

The Bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Agency Rulemaking

Process and Ratification
Rulemaking is the executive application of constitutionally delegated legislative power to particularize public policy or regulate within guidelines set by the Legislature. The Florida Administrative Procedures Act (APA)[1] governs all rulemaking by state agencies except when specific legislation exempts its application.

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[2] Rulemaking authority is delegated by the Legislature[3] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[4] a rule. Agencies do not have discretion whether to engage in rulemaking.[5] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[6] The grant of rulemaking authority itself need not be detailed.[7] The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[8]

A notice of rule development initiates public input on a rule proposal.[9] The process may be facilitated by conducting public workshops or engaging in negotiated rulemaking.[10] An agency begins the formal rulemaking by filing a notice of the proposed rule.[11] The notice is published by the Department of State in the Florida Administrative Register[12] and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared,[13] and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.[14]

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth,

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[1] Chapter 120, Florida Statutes.
[2] Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region,* 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[3] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).
[4] Section 120.52(17).
[5] Section 120.54(1)(a), F.S.
[6] Section 120.52(8) & s. 120.536(1), F.S.
[7] *Save the Manatee Club, Inc.,* supra at 599.
[8] *Sloban v. Florida Board of Pharmacy,*982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.,* 794 So. 2d 696, 704 (Fla. 1st DCA 2001).
[9] Section 120.54(2)(a), F.S.
[10] Section 120.54(2)(c)-(d), F.S.
[11] Section 120.54(3)(a)1, F.S..
[12] Section 120.55(1)(b)2, F.S.
[13] Preparation of a SERC is required if the proposed rule will have an adverse impact on small business or if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 within one year of implementation of the rule. Alternatively, preparation of a SERC is triggered when a substantially affected person submits a good faith written proposal for a lower cost regulatory alternative which substantially accomplishes the objectives of the law being implemented. Section 120.541(1)(a), (b), F.S.
[14] Section 120.541(2)(a), F.S.

private-sector job creation or employment, or private-sector investment.[15] Next is the likely adverse impact on business competitiveness,[16] productivity, or innovation.[17] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[18] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[19] A rule must be filed for adoption before it may go into effect[20] and cannot be filed for adoption until completion of the rulemaking process.[21] A rule projected to have a specific economic impact exceeding $1 million in the aggregate over 5 years[22] must be ratified by the Legislature before going into effect.[23] As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Proposed rules also must be formally reviewed by the Legislature's Joint Administrative Procedures Committee (JAPC)[24] which reviews rules to determine their validity, authority, sufficiency of form, consistency with legislative intent, reasonableness of regulatory cost estimates and other matters.[25] An agency must formally respond to JAPC concerns or objections.[26]

There are presently tens of thousands of agency rules in force.[27] There are many hundreds of permanent statutes authorizing rules.[28] Once rulemaking is authorized, the authority is perpetual unless and until the Legislature enacts a change in law. Agencies and boards have been known to repeatedly reject sound advice provided by JAPC when exceeding their delegated authority.[29] Altering any such authority that may have receded in its conformity to the will of the people of Florida requires either the Governor's approval or passage notwithstanding a veto by a 2/3 vote of each legislative chamber. Thus, it is more difficult for the Legislature to withdraw delegated power from the executive than it is to give it.

Emergency Rulemaking

Florida's APA provides for emergency rulemaking by any procedure which is fair under the circumstances when an immediate danger to the public health, safety, or welfare requires emergency action. Emergency rules may not be effective for more than 90 days but may be renewed if the agency has initiated rulemaking to adopt rules addressing the subject.[30]

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[15] Section 120.541(2)(a)1., F.S.
[16] Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[17] Section 120.541(2)(a) 2., F.S.
[18] Section 120.541(2)(a) 3., F.S.
[19] Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.
[20] Section 120.54(3)(e)6., F.S.
[21] Section 120.54(3)(e), F.S.
[22] Section 120.541(2)(a), F.S.
[23] Section 120.541(3), F.S.
[24] Section 120.54(3)(a)4., F.S.
[25] Section 120.545(1), F.S.
[26] Sections 120.54(3)(e)4. and 120.545(3), F.S.
[27] Florida Administrative Code.
[28] An informal review by the House Rulemaking and Regulation Subcommittee in 2011-12 identified in excess of 2500 rule authorizing provisions in Florida Statutes that have been cited as authority by agencies. There are other redundant and unnecessary provisions that are never used. See, section 11.
[29] See, for example, "Summary Final Order", Florida Medical Association, Inc, et al. vs. Department of Health, Board of Nursing, et al., Case 12-1545RP, accessed on January 11, 2016, at: https://www.doah.state.fl.us/ROS/2012/12001545.pdf.
[30] Section 120.54(4), F.S.

Effect of proposed changes

The bill suspends all existing rulemaking authority on July 1, 2019, and all new rulemaking authority three years after its enactment unless the Legislature reauthorizes the rulemaking authority. Any reauthorization will have a three year life unless a different period is provided in the reauthorization.

The bill provides that reauthorization must be by general law. The Legislature can be expected to use general bills to reauthorize rulemaking by reference to chapter, agency or specific section of law, in a manner procedurally similar to the ratification of rules under s. 120.541(3), F.S.

By suspending the rule-authorizing laws, rather than repealing them or directing their expiration, reauthorization is not expected to require re-enactment of rulemaking authority but only a clear statement in law that a suspension is avoided or lifted. The bill allows for the Legislature to reauthorize currently existing rulemaking on its own schedule to avoid having to reauthorize all such rulemaking in the 2019 Regular Session.

The bill allows an agency to continue or initiate rulemaking proceedings during a suspension but no rule adopted during a suspension of authority may be effective unless ratified by the Legislature.

The bill makes exception for any emergency rulemaking or any rulemaking necessary to maintain the financial or legal integrity of any financial obligation of the state, its agencies or political subdivisions. This allows public health, safety and welfare to be protected and assures the reliability of state obligations such as bonds financing toll roads.

Finally, the bill allows the Governor to issue a written declaration of public necessity delaying a suspension for 90 days, allowing the Legislature to convene and address the necessity. In the event the Legislature adjourns a Regular Session without reauthorizing needed rulemaking authority, the Governor would be able to confront the Legislature's neglect by issuing the declaration and calling a Special Session.

The bill expressly provides that all rules lawfully adopted remain in effect during any suspension of rulemaking authority under the bill's provisions.

B. SECTION DIRECTORY:

SECTION 1. amends s. 120.536, creating a new subsection (2) providing for suspension and reauthorization of rulemaking authority.

SECTION 2. provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to affect revenues of the state.

2. Expenditures:

   The bill does not appear to impose any significant expenditures on the state.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to affect local government revenues.

2. Expenditures:

   The bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

They bill does not appear to impact the private sector economy.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to implicate the Mandates provision.

2. Other:

   N/A

B. RULE-MAKING AUTHORITY:

The bill regularly suspends rulemaking authority, unless reauthorized by general law, providing that no rule adopted during a suspension is effective without ratification by the Legislature.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to legislative reauthorization of agency rulemaking authority; amending s. 120.536, F.S.; providing for suspension of certain rulemaking authority after a specified period, until reauthorized by general law; providing for expiration of such reauthorization after a specified period; providing for suspension of rulemaking authority upon expiration of its reauthorization, until reauthorized by general law; requiring legislative ratification of rules adopted while rulemaking authority is suspended; authorizing the Governor to delay suspension of rulemaking authority for a specified period upon declaration of a public necessity; providing exceptions; providing applicability; providing an effective date.

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

Section 1. Subsections (2) through (4) of section 120.536, Florida Statutes, are renumbered as subsections (3) through (5), respectively, and a new subsection (2) is added to that section to read:

120.536 Rulemaking authority; reauthorization; repeal; challenge.—

(2)(a) Notwithstanding any other provision of law, and

except as provided in paragraph (d), any new rulemaking authority is suspended 3 years after the effective date of the law authorizing rulemaking until reauthorized by general law. Any rulemaking authority effective on or before July 1, 2016, is suspended July 1, 2019, until reauthorized by general law.

(b) A reauthorization of rulemaking authority remains in effect for 3 years, unless another date is specified in the law reauthorizing rulemaking, after which the reauthorization expires and the rulemaking authority is suspended until reauthorized by general law.

(c) During the suspension of any rulemaking authority under this subsection, a rule may be adopted pursuant to such rulemaking authority but does not take effect unless ratified by the Legislature. Upon written declaration by the Governor of a public necessity, suspension of any rulemaking authority may be delayed for up to 90 days, allowing the Legislature an opportunity to reauthorize the rulemaking authority. A declaration of public necessity may be issued only once with respect to any suspension of rulemaking authority.

(d) This subsection does not apply to:

1. Emergency rulemaking pursuant to s. 120.54(4).

2. Rulemaking necessary to maintain the financial or legal integrity of any financial obligation of the state or its agencies or political subdivisions.

(e) Rules lawfully adopted remain in effect during any suspension of rulemaking authority under this subsection.

Section 2. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 981 Administrative Procedures
SPONSOR(S): Richardson
TIED BILLS: **IDEN./SIM. BILLS:** SB 1226

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee		Stranburg	Rubottom
2) Appropriations Committee			
3) State Affairs Committee			

SUMMARY ANALYSIS

A Statement of Estimated Regulatory Cost (SERC) must be prepared during promulgation of agency rules that are expected to affect small business or have a significant economic impact. The bill revises the requirements for preparing a SERC to clarify for administrative agencies the time frame in which costs are to be evaluated for decision makers and affected constituencies to understand the economic and policy impacts of proposed rules. The bill creates new s. 120.541(5), F.S., clarifying the time frame of impacts and costs that agencies must evaluate when preparing a SERC to include provisions that may not be implemented until 5 years or longer after implementation of the rule.

The bill provides an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

1. Present Situation

Agency Rulemaking

One important aspect of the Administrative Procedure Act (APA)[1] is the emphasis on public notice and opportunity for participation in agency rulemaking. A rule is an agency statement of general applicability interpreting, implementing, or prescribing law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms.[2] The APA provides specific requirements agencies must follow in order to adopt rules.[3]

With some exceptions,[4] required rulemaking begins with an agency publishing a notice of rule development in the Florida Administrative Register (F.A.R.).[5] If the agency conducts public rule development workshops,[6] the persons responsible for preparing the draft rule under consideration must be available to explain the proposal and respond to public questions or comments.[7]

Once the final form of the proposed rule is developed (whether the proposal creates a new rule or amends or repeals an existing rule), the agency must publish a notice of the proposed rule before it may be adopted.[8] The publication of this notice triggers certain deadlines for the rulemaking process.[9] Each notice must include the full text of the proposed rule and other additional information, such as a summary of the agency's statement of estimated regulatory costs (SERC) and the opportunity for anyone to provide the agency with information pertaining to the SERC or to propose a lower cost regulatory alternative to the proposed rule. The notice must also state the procedure to request a hearing on the proposed rule.[10]

At a public rulemaking hearing agency staff must be available to explain the proposed rule and respond to public questions or comments. Material pertaining to the proposed rulemaking submitted to the agency between the date of publishing the notice of proposed rule and the end of the final public hearing must be considered by the agency and made a part of the rulemaking record.[11] If a person substantially affected by the proposed rule shows the proceeding does not provide adequate opportunity to protect those interests, and the agency concurs, the agency must suspend the rulemaking proceeding and convene a separate, more formal proceeding, including referring the matter

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[1] Ch. 120, F.S.
[2] Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region,* 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[3] Section 120.54, F.S.
[4] Rule repeals do not require initial rule development. Section 120.54(2)(a), F.S. Emergency rulemaking proceeds separately under s. 120.54(4), F.S.
[5] Section 120.54(2)(a), F.S. The APA is silent on the initial, internal process an agency follows prior to initiating public rule development. *Adam Smith Enterprises, Inc. v. Dept. of Environmental Regulation*, 553 So. 2d 1260, 1265, n. 4 (Fla. 1st DCA 1990).
[6] An agency must conduct public workshops if so requested in writing by any affected person unless the agency head explains in writing why a workshop is not necessary. Section 120.52(c), F.S.
[7] Section 120.52(c), F.S.
[8] Section 120.54(3)(a)1., F.S.
[9] Persons affected by the proposed rule have 21 days from the date of publication to request a hearing on the proposed rule. Section 120.54(3)(c), F.S. Those wanting to submit a lower cost regulatory alternative to the proposed rule have the same 21 day time limit. Sections 120.54(3)(a)1., 120.541(1)(a), F.S. The agency must wait at least 28 days from the date of publication before filing the proposed rule for final adoption. Section 120.54(3)(a)2., (3)(e)1., F.S.
[10] Section 120.54(3)(a)1., F.S.
[11] Section 120.54(3)(c)1., F.S.

to the Division of Administrative Hearings (DOAH). Once the separate proceeding concludes the rulemaking proceeding resumes.[12]

Subsequent to the final rulemaking hearing, if the agency makes any substantial change to the proposed rule the agency must provide additional notice and publish a notice of change in the F.A.R. at least 21 days before the rule may be filed for adoption.[13] If the change increases the regulatory costs of the rule the agency must revise its SERC.[14]

Statement of Estimated Regulatory Costs (SERC)

A SERC is an agency estimate of the potential impact of a proposed rule on the public, particularly the potential costs to the public of complying with the rule as well as to the agency and other governmental entities to implement the rule.[15] Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule,[16] but are required to prepare a SERC if:

- The proposed rule will have an adverse impact on small businesses;[17]
- The proposed rule is likely to directly or indirectly increase aggregate regulatory costs by more than $200,000 in the first year after the rule is implemented;[18] or
- If a substantially affected person submits a proposal for a lower cost regulatory alternative to the proposed rule. The proposal must substantially accomplish the same objectives in the law being implemented by the agency.[19]

Each SERC at a minimum must contain the following elements:

- An economic analysis of the proposed rule's potential direct or indirect impacts,[20] including whether any of the following exceed an aggregate of $1,000,000 in the first 5 years after implementing the rule:
  - Any adverse impact on economic growth, private sector job creation or employment, or private sector investment;[21]
  - Any adverse impact on business competitiveness (including the ability to compete with businesses in other states or markets), productivity, or innovation;[22] or
  - Any likely increase in regulatory costs (including transactional costs). [23]
- A good faith estimate of the number and a general description of the individuals and entities required to comply with the rule.[24]
- A good faith estimate of the cost of implementing the rule to the agency and any other state or local governmental entities, including any anticipated impacts on state or local revenues.[25]
- A good faith estimate of the transactional costs members of the public and local governmental entities are likely to incur to comply with the rule.[26]

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[12] Section 120.54(3)(c)2., F.S.
[13] Section 120.54(3)(d)1., F.S.
[14] Section 120.541(1)(c), F.S.
[15] Section 120.541(2), F.S. Beginning in 1975, the APA required agencies to estimate the economic impact of proposed rules or explain why such an estimate could not be prepared. Ch. 75-191, s. 3, LOF, codified at 120.54(1), Fla. Stat. (1975).
[16] Section 120.54(3)(b)1., F.S.
[17] Sections 120.54(3)(b)1.a. & 120.541(1)(b), F.S.
[18] Sections 120.54(3)(b)1.b. & 120.541(1)(b), F.S.
[19] Section 120.541(1)(a), F.S. Upon the submission of the lower cost regulatory alternative, the agency must revise its initial SERC, or prepare one if not done previously, and either adopt the proposed alternative or state its reasons for rejecting the proposal.
[20] Section 120.541(2)(a), F.S.
[21] Section 120.541(2)(a)1., F.S.
[22] Section 120.541(2)(a)2., F.S.
[23] Section 120.541(2)(a)3., F.S.
[24] Section 120.541(2)(b), F.S.
[25] Section 120.541(2)(c), F.S.
[26] Section 120.541(2)(d), F.S. The definition of "transactional costs" is discussed later in this analysis.

- An analysis of the impact of the rule on small businesses, including the agency's explanation for not implementing alternatives which could reduce adverse impacts, and of the impact on small counties and small cities.[27]
- A description of each lower cost regulatory alternative submitted to the agency with a statement adopting the alternative or explaining the reasons for rejection.[28]

Additional information may be included if the agency determines such would be useful.[29] The agency's failure to prepare a SERC when required or failure to respond to a written proposed lower cost regulatory alternative[30] is a material failure to follow the APA rulemaking requirements.[31] Consequently, if challenged the rule could be found to be an invalid exercise of delegated legislative authority.[32] Even when the agency properly prepares a SERC and responds to all proposed lower cost regulatory alternatives, the resulting rule could be challenged as an invalid exercise of delegated legislative authority if the rule imposes regulatory costs greater than a proposed alternative which substantially accomplishes the same result.[33]

The specific requirements of s. 120.541, F.S., were adopted in 1996 as part of the comprehensive revision of the APA.[34] The revisions resulted from the Final Report of the Commission appointed by the Governor to study and recommend improvements to the APA, particularly in rulemaking and making agencies more accountable to the Legislature and the public.[35] The Commission found the purpose for economic impact statements was to assist both the government and the public to understand the potential financial impacts of a rule before adoption but "(t)he quality of economic analyses ... prepared by state agencies is inadequate, and existing law requirements ... are ineffective."[36] Although the Commission recommended a number of revisions to improve the evaluation of costs, which serve as the basis for the present statute, these recommendations provided little guidance on the actual cost components relevant to evaluating the potential impact of a proposed rule.[37]

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[27] Section 120.541(2)(e), F.S. This statute incorporates the definitions of "small city" and "small county" in ss. 120.52(18) & 120.52(19), F.S., respectively. The statute also incorporates the definition of "small business" in s. 288.703, F.S. *Compare*, s. 120.54(3)(b)2., F.S., which uses similar language requiring agencies to consider the impact of every proposed rule, amendment, or repeal on small businesses, small cities, and small counties but also permits agencies to rely on expanded versions of these definitions if necessary to more adapt the rule for more specific needs or problems. Section 120.54(3)(b)2.a., F.S., specifies 5 methods agencies must consider to reduce the rule's impact on small businesses, cities, and counties. If the agency determines the rule will affect defined small businesses, notice of the rule must be sent to the rules ombudsman in the Executive Office of the Governor. Section 120.54(3)(b)2.b.(I), F.S. The agency must adopt regulatory alternatives reducing impacts on small businesses timely offered by the rules ombudsman or provide JAPC a written explanation for failing to do so. Section 120.54(3)(b)2.b.(II), (III), F.S.

[28] Section 120.541(2)(g), F.S.

[29] Section 120.541(2)(f), F.S.

[30] The party submitting a proposal to the agency must designate it as a lower cost regulatory alternative or at a minimum discuss cost issues with the proposed rule in order to inform the agency of the purpose of the submittal. A party challenging the validity of a school board rule argued the board failed to prepare a SERC after receiving a lower cost regulatory alternative. The administrative law judge (ALJ) found the proposal submitted to the board neither referenced s. 120.541, F.S., nor asserted it would result in lower costs. The ALJ ruled the failure to demonstrate the proposal presented a lower cost alternative meant the agency was not informed of the purpose of the submission and thus had a duty to prepare a SERC or respond to a lower cost regulatory alternative. *RHC and Associates, Inc. v. Hillsborough County School Board*, Final Order, DOAH Case no. 02-3138RP at http://www.doah.state.fl.us/ALJ/searchDOAH/ (accessed 1/28/2014).

[31] Section 120.541(1)(e), F.S. Unlike other failures to follow the APA rulemaking requirements, this provision prevents the challenged agency from rebutting the presumed material failure by proving the substantial interests of the petitioner and the fairness of the proceedings were not impaired. Section 120.56(1)(c), F.S. This limitation applies only if the challenge is brought by a substantially affected person within one year from the rule going into effect. Section 120.541(1)(f), F.S.

[32] Section 120.52(8)(a), F.S.

[33] Section 120.52(8)(f), F.S. This type of challenge must be to the agency's rejection of a lower cost regulatory alternative and brought by a substantially affected person within a year of the rule going into effect. Section 120.541(1)(g), F.S.

[34] Ch.96-159, s. 11, LOF.

[35] *Final Report of the Governor's Administrative Procedure Act Review Commission*, 1 (Feb. 20, 1996), at http://japc.state.fl.us/research.cfm (accessed 1/29/2014).

[36] *Final Report of the Governor's APA Review Commission*, supra at 31.

[37] *Final Report of the Governor's APA Review Commission*, supra at 32.

For example, neither a definition nor examples of "regulatory costs" are found in the APA although the concept is important to an agency's economic analysis. "Transactional costs" are defined as direct costs of compliance, readily ascertainable based on standard business practices, including:

- Filing fees;
- Costs to obtain a license;
- Costs of equipment installed or used for rule compliance;
- Costs of procedures required for compliance;
- Additional operating costs;
- Costs for monitoring and reporting; and
- Any other necessary costs of compliance.[38]

The statute does not provide guidance or reference on how agencies are to identify and apply standard business practices in the development of required SERCs. As a result, some agencies with access to, and familiarity with, cost impact data from entities affected by specific rules provide comprehensive analyses of such impacts in SERCs.[39] Other agencies, less familiar with costs to individuals and entities to conduct the regulated activities and comply with specific rules, prepare SERCs which do not reflect the full impact of particular rules, particularly when a rule contains delayed impacts.[40]

2. *Effect of Proposed Changes*

The bill clarifies the time frame in which agencies must evaluate costs and impacts when preparing SERCs. The required economic analysis must still analyze the proposed rule's impact on regulatory costs, which will include all costs and impacts estimated in the SERC. The PCB creates s. 120.541(5), requiring agencies to estimate all impacts and costs for the first 5 years after full implementation of all provisions of the rule, not simply from the effective date of the proposed rule.

B. SECTION DIRECTORY:

Section 1: Amends s. 120.541, F.S., creating new s. 120.541(5), F.S., revising the impacts and costs agencies must evaluate when preparing a SERC to include the impacts and costs of the first 5 years after full implementation of all provisions of a rule.

Section 2: Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

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[38] Section 120.541(2)(d), F.S.

[39] Presentations of Curt Kiser, General Counsel, and Bill McNulty, Economic Analyst, of the Public Service Commission, at scheduled meeting of Rulemaking Oversight & Repeal Subcommittee on November 5, 2013, at http://myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2013111059&committeeID=2727 (accessed 1/31/2014).

[40] Presentation of Dept. of Elder Affairs at scheduled meeting of RO&RS on March 27, 2013. *See*, 3-27-2013 Subcommittee Action Packet, 45-52. The agency was revising several rules in Ch. 58A-5, F.A.C., including increased training and testing requirements for administrators, managers, and staff of assisted living facilities (ALF). The SERC prepared by the agency initially concluded the proposed rules would increase regulatory costs by less than $1,000,000 over the first five years of implementation. However, as adduced by the Subcommittee during the agency's presentation, a number of cost factors were not considered in preparing the SERC, including the time and expense for testing to *all* applicants (not merely those passing the test), increased training and labor costs to ALFs, and even the costs of implementation and operation to the agency. The SERC also did not account for the delayed effective dates for some of the rules, resulting in the agency measuring cost impacts for the first 5 years from the initial effective date of some rules rather than a full 5 years for each rule. When questioned on these assumptions, the agency conceded the SERC should have indicated an overall cost impact exceeding $1,000,000 for the first 5 years of full implementation of all the subject rules. An audio recording of the meeting is at http://myfloridahouse.gov/FileStores/AdHoc/PodCasts/03_27_2013/Rulemaking_Oversight_Repeal_2013_03_27.mp3 (accessed 1/31/2014).

1. Revenues:

   None.

2. Expenditures:

   The bill may have an indeterminate fiscal impact on state government. *See* FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill is expected to provide a better estimation of economic impacts of agency rules, a better opportunity of local government and private entities to participate in rulemaking and in estimating regulatory costs. In addition, more complete estimates of regulatory costs and economic impacts may bring more agency rules under the scrutiny of legislative ratification prior to their becoming effective.

D. FISCAL COMMENTS:

State agencies currently are required to comply with notice, publication, and hearing requirements for preparing SERCs. The bill adds to these requirements. Compliance with these additional requirements may require agencies to devote more resources to rulemaking.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not create any additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to administrative procedures; amending s. 120.541, F.S.; providing additional requirements for the calculation of estimated adverse impacts and regulatory costs; providing an effective date.

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

Section 1. Subsection (5) is added to section 120.541, Florida Statutes, to read:

120.541 Statement of estimated regulatory costs.—

(5) For purposes of subsections (2) and (3), adverse impacts and regulatory costs likely to occur within 5 years after implementation of the rule include adverse impacts and regulatory costs estimated to occur within 5 years after the effective date of the rule. However, if any provision of the rule is not fully implemented upon the effective date of the rule, the adverse impacts and regulatory costs associated with such provision must be adjusted to include any additional adverse impacts and regulatory costs estimated to occur within 5 years after implementation of such provision.

Section 2. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RORS 16-01 Ratification of administrative rules of the Division of Workers' Compensation
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Stranburg	Rubottom

SUMMARY ANALYSIS

Florida's Workers' Compensation law requires that the provider reimbursement manuals setting maximum reimbursement rates for medical services must be updated every three years. Due to the Legislature's not ratifying the most recent 2011 manual, the current manual dates from 2008.

Since the 2015 Legislature adjourned, the Department of Financial Services has adopted amendments to the rule incorporating by reference the Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition (2015 Manual). The 2015 Manual sets out the policies, guidelines, codes, and maximum reimbursement allowances for services and supplies furnished by health care providers under the Workers' Compensation statutes. The Manual also states the reimbursement policies and payment methodologies for pharmacists and medical suppliers pertaining to Workers' Compensation.

The Statement of Estimated Regulatory Costs showed Rule 69L-7.020, F.A.C., *Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition*, would have a specific, adverse economic effect, or would increase regulatory costs, exceeding $1 million over the first 5 years the rule was in effect. Accordingly, the Rule must be ratified by the Legislature before it may go into effect.

The Rule was adopted on July 16, 2015, and submitted for ratification on November 3, 2015.

The proposed bill authorizes the Rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida's workers' compensation law[1] provides medically necessary treatment and care for injured employees, including medications. The Department of Financial Services, Division of Workers' Compensation, (DFS) provides regulatory oversight of Florida's workers' compensation system. The law provides for reimbursement formulas and methodologies to compensate providers of health services to compensation claimants, subject to maximum reimbursement allowances (MRAs).[2] DFS incorporates the uniform schedules MRAs by rule in reimbursement manuals.[3]

Currently, the reimbursement schedules for individual licensed providers are contained in the Florida Workers' Compensation Health Care Provider Reimbursement Manual (Manual), 2008 Edition. On January 22, 2015, the Three-Member Panel approved a revised uniform schedule of MRAs for physicians and other recognized practitioners. DFS initiated rulemaking to update the Manual and on July 16, 2015, adopted the amended version of Rule 69L-7.020, F.A.C., incorporating by reference the 2015 Edition of the Manual and updating incorporating references to other materials used for provider reimbursement together with the Manual. According to the Statement of Estimated Regulatory Costs (SERC), the revisions to MRAs in the updated Manual will result in increased costs to the overall compensation system of $61 million over the next five years.[4]

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[5] Rulemaking authority is delegated by the Legislature[6] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[7] a rule. Agencies do not have discretion whether to engage in rulemaking.[8] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[9] The grant of rulemaking authority itself need not be detailed.[10] The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[11]

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[1] Chapter 440, F.S.
[2] Section 440.13(12), F.S. The law creates the Three-Member Panel (CFO or CFO designee and 2 Governor appointees subject to Senate confirmation) that sets all MRAs.
[3] Section 440.13(12), (14)(b), F.S. Chapter 69L-7, F.A.C. Currently there are three such manuals: the Florida Workers' Compensation Health Care Provider Reimbursement Manual (Rule 69L-7.020, F.A.C.), Florida Workers' Compensation Reimbursement Manual for Ambulatory Surgical Centers (Rule 69L-7.100, F.A.C.), and Florida Workers' Compensation Reimbursement Manual for Hospitals (Rule 69L-7.501, F.A.C.). Each manual is adopted by reference in the indicated rule.
[4] DFS, "Statement of Estimated Regulatory Costs for Legislative Review and Ratification of Proposed Rule Change, Pursuant to Section 120.541, Florida Statutes" (12/9/2011).
[5] Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[6] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).
[7] Section 120.52(17).
[8] Section 120.54(1)(a), F.S.
[9] Section 120.52(8) & s. 120.536(1), F.S.
[10] *Save the Manatee Club, Inc.*, supra at 599.
[11] *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

An agency begins the formal rulemaking process by filing a notice of the proposed rule.[12] The notice is published by the Department of State in the Florida Administrative Weekly[13] and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.[14]

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.[15] Next is the likely adverse impact on business competitiveness,[16] productivity, or innovation.[17] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[18] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[19] A rule must be filed for adoption before it may go into effect[20] and cannot be filed for adoption until completion of the rulemaking process.[21] A rule projected to have a specific economic impact exceeding $1 million in the aggregate over 5 years[22] must be ratified by the Legislature before going into effect.[23] As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Impact of Rule

The Rule incorporates by reference the 2015 Edition of the Manual, providing for reimbursement of health care providers under the increased MRAs approved by the Three-Member Panel.

Effect of Proposed Change

The bill ratifies Rule 69L-7.020, F.A.C., allowing the rule to go into effect.

B. SECTION DIRECTORY:

Section 1: Ratifies Rule 69L-7.020, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

[12] Section 120.54(3)(a)1, F.S..
[13] Section 120.55(1)(b)2, F.S.
[14] Section 120.541(2)(a), F.S.
[15] Section 120.541(2)(a)1., F.S.
[16] Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[17] Section 120.541(2)(a) 2., F.S.
[18] Section 120.541(2)(a) 3., F.S.
[19] Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State .
[20] Section 120.54(3)(e)6, F.S.
[21] Section 120.54(3)(e), F.S.
[22] Section 120.541(2)(a), F.S.
[23] Section 120.541(3), F.S.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill creates no additional source of state revenues.
2. Expenditures: The bill requires no state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill itself has no impact on local government revenues.
2. Expenditures: The bill does not impose additional expenditures on local governments. To the extent local governments are responsible for paying workers' compensation claims or obtain workers' compensation insurance, they will incur increased costs due to the increase in maximum reimbursements for providers.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill itself does not directly impact the private sector. Private employers responsible for paying workers' compensation claims or obtaining workers' compensation insurance will incur increased costs due to the increase in maximum reimbursements for providers.

D. FISCAL COMMENTS:

The economic impacts projected in the statement of estimated regulatory costs would result from the operation of the new provider reimbursement provisions of the Manual incorporated in the rule.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

No other constitutional issues are presented by the bill.

B. RULE-MAKING AUTHORITY:

The bill meets the final statutory requirement for the department to exercise its rulemaking authority concerning the periodic adjustment of Workers' Compensation health care provider reimbursement policies and rates. No additional rulemaking authority is required.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to ratification of Department of Financial Services rules; ratifying specified rules relating to the Florida Workers' Compensation Health Care Provider Reimbursement Manual, for the sole and exclusive purpose of satisfying any condition on effectiveness pursuant to s. 120.541(3), F.S., which requires ratification of any rule meeting any specified thresholds for likely adverse impact or increase in regulatory costs; providing an effective date.

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

Section 1. (1) The following rule is ratified for the sole and exclusive purpose of satisfying any condition on effectiveness imposed under s. 120.541(3), Florida Statutes: Rule 69L-7.020, Florida Administrative Code, titled "Florida Workers' Compensation Health Care Provider Reimbursement Manual" as filed for adoption with the Department of State pursuant to the certification package dated July 16, 2015.

(2) This act serves no other purpose and shall not be codified in the Florida Statutes. After this act becomes law, its enactment and effective dates shall be noted in the Florida Administrative Code, the Florida Administrative Register, or both, as appropriate. This act does not alter rulemaking

authority delegated by prior law, does not constitute legislative preemption of or exception to any provision of law governing adoption or enforcement of the rule cited, and is intended to preserve the status of any cited rule as a rule under chapter 120, Florida Statutes,. This act does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited.

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

69L-7.020 Florida Workers' Compensation Health Care Provider Reimbursement Manual.

(1) The Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition http://www.flrules.org/Gateway/reference.asp?No=Ref-05618, is adopted by reference as part of this rule. The manual contains the Maximum Reimbursement Allowances determined by the Three-Member Panel, pursuant to Section 440.13(12), F.S., and establishes reimbursement policies, guidelines, codes and maximum reimbursement allowances for services and supplies provided by health care providers. Also, the manual includes reimbursement policies and payment methodologies for pharmacists and medical suppliers.

(2) The CPT® 2014 Current Procedural Terminology Professional Edition, Copyright 2013, American Medical Association; the CDT-2014, Dental Procedure Codes Copyright 2013, American Dental Association; and in part for D codes and for injectable J codes, and for other medical services and supply codes, the "2014 HCPCS Level II Professional Edition", American Medical Association, Copyright 2014, Elsevier Saunders, are adopted by reference as part of this rule. When a health care provider performs a procedure or service which is not listed in the Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition incorporated above, the provider must use a code contained in the CPT®-2014, CDT-2014 or HCPCS-2014 as specified in this section. The CPT® Assistant, Copyright American Medical Association, the 2014 ICD-9-CM Professional Edition for Physicians, Volumes 1 & 2, American Medical Association, Copyright 2013, and the 2014 ICD-10-CM: The Complete Official Draft Code Set, American Medical Association, Copyright 2013, OptumInsight, Inc., are also adopted by reference as part of this rule. A copy of these reference materials may be obtained from the American Medical Association's website at https://commerce.ama-assn.org/store/. A copy of the CDT reference material may be obtained from the American Dental Association's website at http://www.ada.org/en/publications/ada-catalog. A copy of the HCPCS Level II reference material may be obtained from the American Medical Associations' website at http://commerce.ama-assn.org/store/.

(3) The Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition and copies of other materials incorporated by reference in this rule are available for inspection during normal business hours at the Florida Department of Financial Services, Document Processing Section, 200 East Gaines Street, Tallahassee, Florida 32399-0311, or via the Department's web site at http://www.myfloridacfo.com/Division/wc.

Rulemaking Authority 440.13(13)(b), 440.591 FS. Law Implemented 440.13(7), (12), (13)(b) FS. History–New 10-1-82, Amended 3-16-83, 11-6-83, 5-21-85, Formerly 38F-7.20, Amended 4-1-88, 7-20-88, 6-1-91, 4-29-92, 2-18-96, 9-1-97, 12-15-97, 9-17-98, 9-30-01, 7-7-02, Formerly 38F-7.020, 4L-7.020, Amended 12-4-03, 1-1-04, 7-4-04, 5-9-05, 9-4-05, 11-16-06, 10-18-07, 2-4-09, 8-9-15.

CERTIFICATION OF DEPARTMENT OF FINANCIAL SERVICES

ADMINISTRATIVE RULES

FILED WITH THE DEPARTMENT OF STATE

I hereby certify:

[X] (1) That all statutory rulemaking requirements of Chapter 120, F.S., and all rulemaking requirements of the Department of State have been complied with; and

[X] (2) That there is no administrative determination under Section 120.56(2), F.S., pending on any rule covered by this certification; and

[X] (3) All rules covered by this certification are filed within the prescribed time limitations of Section 120.54(3)(e), F.S. They are filed not less than 28 days after the notice required by Section 120.54(3)(a), F.S.; and

[ ] (a) Are filed not more than 90 days after the notice; or

[ ] (b) Are filed more than 90 days after the notice, but not more than 60 days after the administrative law judge files the final order with the clerk or until 60 days after subsequent judicial review is complete; or

[ ] (c) Are filed more than 90 days after the notice, but not less than 21 days nor more than 45 days from the date of publication of the notice of change; or

[ ] (d) Are filed more than 90 days after the notice, but not less than 14 nor more than 45 days after the adjournment of the final public hearing on the rule; or

[ ] (e) Are filed more than 90 days after the notice, but within 21 days after the date of receipt of all material authorized to be submitted at the hearing; or

[ ] (f) Are filed more than 90 days after the notice, but within 21 days after the date the transcript was received by this agency; or

[X] (g) Are filed not more than 90 days after the notice, not including days the adoption of the rule was postponed following notification from the Joint Administrative Procedures Committee that an objection to the rule was being considered; or

[ ] (h) Are filed more than 90 days after the notice, but within 21 days after a good faith written proposal for a lower cost regulatory alternative to a proposed rule is submitted which substantially accomplishes the objectives of the law being implemented; or

[ ] (i) Are filed more than 90 days after the notice, but within 21 days after a regulatory alternative is offered by the ombudsman in the Executive Office of the Governor.

Attached are the original and two copies of each rule covered by this certification. The rules are hereby adopted by the undersigned agency by and upon their filing with the Department of State.

Rule No(s).

69L-7.020

Under the provision of Section 120.54(3)(e)6., F.S., the rules take effect 20 days from the date filed with the Department of State or a later date as set out below:

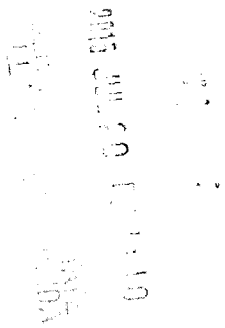
Effective: _____
(month) (day) (year)

JEFF ATWATER
Chief Financial Officer

2
Number of Pages Certified

SUMMARY OF PROPOSED RULE

Pursuant to the Rules of the Department of State, including Rule 1-1, the Department of Financial Services hereby summarizes the proposed action to Rule 69L-7.020, F.A.C.: The Florida Workers' Compensation Health Care Provider Reimbursement Manual incorporated in Rule 69L-7.020, F.A.C., is updated to conform to the mandate in paragraph 440.13(12)(b), F.S., limiting workers' compensation healthcare provider reimbursements to 110% of Medicare reimbursement allowances. Manuals containing updated billing codes are also updated.



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SUMMARY OF HEARING

Re: Adoption of Rule 69L-7.020, F.A.C.

Pursuant to the Rules of the Department of State, including Rule 1-1, the Department of Financial Services hereby submits a summary of hearing on the proposed action.

Notice of this proposed action was published in the *Florida Administrative Register*, Vol. 41, No. 21, issued on February 2, 2015, and otherwise given pursuant to §120.54(3)(a)1., Florida Statutes. The hearing was scheduled to be held on Thursday, February 26, 2015 @ 9:00 AM, in Room 102 of the Hartman Building located at 2012 Capital Circle Southeast, Tallahassee, Florida. A request for hearing was timely received; therefore, the hearing was held pursuant to notice in accordance with §120.54(3)(c)1., Florida Statutes, and the rules of the Department of Financial Services. The requesting party and other affected persons were given an opportunity to present evidence and argument on all issues under consideration appropriate to inform the Department of Financial Services of their contentions and concerns.

The hearing was attended by approximately 15 individuals. Presiding at the hearing was Tom Valentine, Assistant General Counsel with the Department. The proceedings were opened with a statement of the nature and purpose of the hearing, the statutory authority for the proceedings, and the facts of the giving of notice of the proposed action. A copy of the notice was made a part of the record as Exhibit A. The letter received requesting the hearing was made a part of the record as Exhibit B.

Some representatives made comments for the Department's consideration. The issues raised were suggestions for clarifications and technical corrections. No substantive objections to the rule were made.

The hearing was adjourned.

sumhrg

STATEMENT OF FACTS AND CIRCUMSTANCES

JUSTIFYING THE PROPOSED ACTION

Pursuant to subparagraph 120.54(3)(a)4., F.S., the Department of Financial Services hereby submits a detailed written statement of the facts and circumstances justifying the proposed amendment of Rule 69L-7.020, F.A.C., regarding the "Florida Workers' Compensation Health Care Provider Reimbursement Manual,", which will appear in Title 69 of the Florida Administrative Code.

The rulemaking authority for the action is: 440.13(13)(b), 440.591, F.S., and the laws implemented are: 440.13(7), (12), (13)(b), F.S. The reasons which necessitate the proposed action are: The Florida Workers' Compensation Health Care Provider Reimbursement Manual incorporated in Rule 69L-7.020, F.A.C., is updated to conform to the mandate in paragraph 440.13(12)(b), F.S., limiting workers' compensation healthcare provider reimbursements to 110% of Medicare reimbursement allowances. Manuals containing updated billing codes are also updated.

The Department has determined that Rule 69L-7.020, F.A.C., will have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of $200,000 in the aggregate within one year after the implementation of the rule and is subject to ratification. A SERC has been prepared by the agency for proposed Rule 69L-7.020, F.A.C. The Department has determined that proposed amendment to Rule 69L-7.020, F.A.C., is expected to generate an overall Florida workers' compensation system cost increase of 1.9%. The Agency has determined that proposed Rule 69L-7.020, F.A.C., will generate costs of $61,000,000, and therefore will require legislative ratification.

The Department believes these facts and circumstances justify the proposed action.

STATEMENT RELATING TO

FEDERAL STANDARDS OR RULES

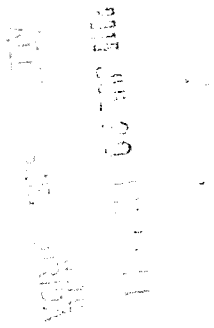
WITH REFERENCE TO

RULE CHAPTER 69L-7, F.A.C.

Pursuant to subparagraph 120.54(3)(a)4., Florida Statutes, the Department of Financial Services hereby states that Rule Chapter 69L-7, F.A.C., is a rule chapter within the Department of Financial Services.

The Department is an agency of state government, and the proposed action involving Rule Chapter 69L-7, F.A.C., is authorized by, and implements, laws of the State of Florida.

The Department does not believe that there are any federal standards, rules, or regulations on the same subject.



69L-7.020 Florida Workers' Compensation Health Care Provider Reimbursement Manual.

(1) The Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 ~~2008~~ Edition http://www.flrules.org/Gateway/reference.asp?No=Ref-05618, is adopted by reference as part of this rule. The manual contains the Maximum Reimbursement Allowances determined by the Three-Member Panel, pursuant to subsection ~~Section~~ 440.13(12), F.S., and establishes reimbursement policies, guidelines, codes and maximum reimbursement allowances for services and supplies provided by health care providers. Also, the manual includes reimbursement policies and payment methodologies for pharmacists and medical suppliers.

(2) The CPT® 2014 ~~2009~~ Current Procedural Terminology Professional Edition, Copyright 2013 ~~2008~~, American Medical Association; the ~~Current Dental Terminology,~~ CDT-2014 ~~2009/2010~~, Dental Procedure Codes, Copyright 2013 ~~2008~~, American Dental Association; and in part for D codes and for injectable J codes, and for other medical services and supply codes, the "2014 HCPCS Level II Professional Edition ~~Healthcare Common Procedure Coding System, Medicare's National Level II Codes, HCPCS 2009~~", American Medical Association, ~~Twenty-first Edition,~~ Copyright 2014 ~~2008~~, Elsevier Saunders ~~Ingenix Publishing Group~~, are adopted by reference as part of this rule. When a health care provider performs a procedure or service which is not listed in the Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 ~~2008~~ Edition incorporated above, the provider must use a code contained in the CPT®-2014 ~~2009~~, CDT-2014 ~~2009/2010~~ or HCPCS-2014 ~~2009~~ as specified in this section. The CPT® Assistant, Copyright American Medical Association, the 2014 ICD-9-CM Professional Edition for Physicians, Volumes 1 & 2, American Medical Association, Copyright 2013, and the 2014 ICD-10-CM: The Complete Official Draft Code Set, American Medical Association, Copyright 2013, OptumInsight, Inc., are also adopted by reference as part of this rule. A copy of these reference materials may be obtained from the American Medical Association's website at https://commerce.ama-assn.org/store/. A copy of the CDT reference material may be obtained from the American Dental Association's website at http://www.ada.org/en/publications/ada-catalog. A copy of the HCPCS Level II reference material may be obtained from the American Medical Associations' website at http://commerce.ama-assn.org/store/.

(3) The Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 ~~2008 Edition~~ Edition and copies of other materials incorporated by reference in this rule are ~~above, is~~ available for inspection during normal business hours at the Florida Department of Financial Services, Document Processing Section, 200 East Gaines Street, Tallahassee, Florida 32399-0311, or via the Department's web site at

http://www.myfloridacfo.com/Division/wc/ ~~http://www.fldfs.com/wc~~.

~~Rulemaking~~Specific Authority 440.13(13)~~(14)~~(b), 440.591 FS. Law Implemented 440.13(7), (12), (13)(b)~~(14)(c)~~ FS. History–New 10-1-82, Amended 3-16-83, 11-6-83, 5-21-85, Formerly 38F-7.20, Amended 4-1-88, 7-20-88, 6-1-91, 4-29-92, 2-18-96, 9-1-97, 12-15-97, 9-17-98, 9-30-01, 7-7-02, Formerly 38F-7.020, 4L-7.020, Amended 12-4-03, 1-1-04, 7-4-04, 5-9-05, 9-4-05, 11-16-06, 10-18-07, 2-4-09, Amended 8-9-15

CERTIFICATION OF MATERIALS INCORPORATED

BY REFERENCE IN RULES FILED WITH THE DEPARTMENT OF STATE

I hereby certify pursuant to Rule 1-1.013, Florida Administrative Code:

[ ] (1) That materials incorporated by reference in Rule 69L-7.020, F.A.C., have been electronically filed with the Department of State.

[X] (2) That because there would be a violation of federal copyright laws if the submitting agency filed the incorporated materials described below electronically, a true and complete paper copy of the incorporated materials are attached to this certification for filing. Paper copies of the incorporated materials below may be obtained from the American Medical Association's website at https://commerce.ama-assn.org/store/ and the American Dental Association's website at http://www.ada.org/en/publications/ada-catalog.

List form number(s) and form title(s), or title of document(s) below:

(CPT®) 2014 Current Procedural Terminology Professional Edition, Copyright 2013, American Medical Association

Current Dental Terminology (CDT-2014), Copyright 2013, American Dental Association

2014 HCPCS Level II Professional Edition, American Medical Association, Copyright 2014, Elsevier Saunders

CPT® Assistant, Copyright American Medical Association

2014 ICD-9-CM Professional Edition for Physicians, Volumes 1 & 2, American Medical Association, Copyright 2013

2014 ICD-10-CM: The Complete Official Draft Code Set, American Medical Association, Copyright 2013, OptumInsight, Inc.

Under the provisions of subparagraph 120.54(3)(e)6., F.S., the attached material(s) take effect 20 days from the date filed with the Department of State, or a later date as specified in the rule.

JEFF ATWATER
Chief Financial Officer

CERTIFICATION OF MATERIALS INCORPORATED

BY REFERENCE IN RULES FILED WITH THE DEPARTMENT OF STATE

I hereby certify pursuant to Rule 1-1.013, Florida Administrative Code:

[X] (1) That materials incorporated by reference in Rule 69L-7.020, F.A.C., have been electronically filed with the Department of State.

[ ] (2) That because there would be a violation of federal copyright laws if the submitting agency filed the incorporated materials described below electronically, a true and complete paper copy of the incorporated materials are attached to this certification for filing. Paper copies of the incorporated materials below may be obtained at the agency by [include address(es)/location(s)].

List form number(s) and form title(s), or title of document(s) below:

Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition

Under the provisions of subparagraph 120.54(3)(e)6., F.S., the attached material(s) take effect 20 days from the date filed with the Department of State, or a later date as specified in the rule.

JEFF ATWATER
Chief Financial Officer

Johnson, Serica

From: FL-Rules@dos.state.fl.us
Sent: Tuesday, July 07, 2015 12:48 PM
To: Johnson, Serica
Cc: flrules@dos.state.fl.us
Subject: 69L-7.020 Reference Material for Rule Adoption Approved

Dear johnsons:
The reference material for rule adoption you submitted has been approved by the Administrative Code and Register Staff.
The approved material is available in the Review/Modify Agency Reference Material list (Agency Main Menu page).
Rule Number: 69L-7.020
Reference Number: Ref-05618; Reference Name: 2015 HCP Manual

Click here to log in.

Administrative Code and Register Staff
Division of Library and Information Services
Florida Department of State

DEPARTMENT OF FINANCIAL SERVICES
STATEMENT OF ESTIMATED REGULATORY COSTS

Division: Workers' Compensation

Rule#: 69L-7.020, F.A.C.

Rule Title: Florida Workers' Compensation Health Care Provider Reimbursement Manual

I. Estimated Costs of the Rule:

(A) Does the rule directly or indirectly increase regulatory costs by $200,000 in one year in the aggregate after implementation? Yes or No: YES

(B) Is the rule likely to have an adverse impact on any of the following in excess of $1 million in the aggregate for 5 years after implementation of the rule?

- Economic growth — Yes X — No __
- Private-sector job creation or employment — Yes X — No __
- Private-sector investment — Yes X — No __

(C) Is the rule likely to have an adverse impact on any of the following in excess of $1 million in the aggregate for 5 years after implementation of the rule:

- Business competitiveness (including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets) — Yes _____ — No X
- Productivity — Yes _____ — No X
- Innovation — Yes _____ — No X

(D) Provide an Economic Analysis (a specific calculation) for any statement above that is checked "Yes":

Please see next page.

The National Council on Compensation Insurance (NCCI) has conducted an actuarial analysis of the impact the proposed revision to the Health Care Provider Reimbursement Manual would have on workers' compensation rates in Florida. See attachment (FL_PhysicianAndHO_2014MFS_Update Writeup.pdf). The NCCI estimates that the change in maximum reimbursement allowances would be an increase of 1.9 percent. This represents an estimated increased cost to Florida's employers of $61.0 million.

The increased costs are not collected by the state. Rather, the increased cost is due to an increase in the amount of reimbursement that would be paid to physicians and other recognized practitioners for workers' compensation medical services provided for a compensable workers' compensation injury, pursuant to Florida's Workers' Compensation Law. Therefore, the cost impacts are borne by the state's employers in the negative and benefit Florida's medical providers in the positive. To the extent that the state government and local governmental entities pay for workers' compensation coverage to governmental employees, the state and local governments will incur increased costs in the same manner as private sector employers similarly situated, regardless of whether they are insured in the private market or self-insured for purposes of workers' compensation.

Whether the proposed change is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of $1 million in the aggregate within five years after the implementation of the rule seems relatively straightforward. Per the NCCI estimate, the workers' compensation rates, e.g., the amount of undiscounted premium paid by Florida's employers, are estimated to increase by $61.0 million in the first year (premium rates changes occur upon application to and approval by the Office of Insurance Regulation). Within five years after implementation, this would represent an aggregate cost estimated increase of $272 million, absent any other changes in approved premium rates. Of course, this would reduce the amount of money Florida's employers would have available to reinvest in their business or create jobs. Conversely, this also represents $272 million that would be paid to health care providers, allowing them to increase investments and job creation. The net result between the two is uncertain. Nonetheless, it would seem reasonable to expect that there would be a net aggregate adverse impact in excess of $1 million. This is because if only 0.37 percent of estimated premium increase, which is primarily driven by prospective payment increases to health care providers, fails to translate into economic growth, job creation, or investment, then the threshold would be met.

The rule revision is likely to increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years after the implementation of the rule. The regulatory impact of the change to the Division can be accomplished within currently allocated resources. The change in the maximum reimbursement allowances will require a one-time change in claim administrator programming to implement the updated amounts. Assuming each claim administrator bears direct costs for this compliance effort, it is estimated that it will cost the workers' compensation carriers between $2,176,800 and $3,174,500 to implement the revised fee schedule. This would be a one-time, first year cost.

The above estimate assumes that each of the 907 claim administrators (there are 415 insurers, 397 self-insurers, and 95 third party administrators, as of 01/23/2015) will expend 20 hours in programming time. The Division contacted two claim administrators to identify their per hour programming cost; one quoted $120 per

hour, while the other quoted $175 per hour. Each of these claim administrators would be impacted by this rulemaking. However, many carriers and self-insurers meet their obligations by employing third party administrators to administer their claims. Since one of the services offered by third party administrators is using their business systems to administer their customer's claims, many carriers and self-insurers will comply with the rule revision via their third party administrator's compliance. So, use of third party administrators will tend to mitigate the overall cost of compliance among all affected entities. Bill review companies also provide services in this respect. The Division does not directly regulate bill review companies and does not have a count on the number of such companies.

II. Provide a good faith estimate of the number and types of affected persons/entities:

(1) The number of individuals and entities likely to be required to comply with the rule:

There are 907 workers' compensation claim administrators (415 insurers, 397 self-insurers, and 95 third party administrators) in Florida, as of 01/23/2015. Each of these claim administrators would be impacted by this rulemaking. However, many carriers and self-insurers meet their obligations by employing third party administrators to administer their claims. Since one of the services offered by third party administrators is using their business systems to administer their customer's claims, many carriers and self-insurers will comply with the rule revision via their third party administrator's compliance. So, use of third party administrators will tend to mitigate the overall cost of compliance among all affected entities. Bill review companies also provide services in this respect. The Division does not directly regulate bill review companies and does not have a count on the number of such companies.

In addition, every health care provider in Florida who renders workers' compensation health care services will be subject to at least some portion of the incorporated reimbursement manual.

(2) A general description of the types of individuals likely to be affected by the rule:

It is anticipated that this rule will impact workers' compensation carriers, self-insurers, third party administrators, bill review companies, and health care providers.

III. Provide a good faith estimate of the transactional costs likely to be incurred by individuals and entities (including local government entities) required to comply with the requirements of the rule.

"Transactional costs" include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used, procedures required to be employed in complying with the rule, additional operating costs incurred, the cost of monitoring or reporting, and any other costs necessary to comply with the rule.

_____ None. The rule will only affect the Department.

_____ Minimal. Provide a brief explanation:

__X__ Other. Provide an explanation for estimate and methodology used:

It is anticipated that claim administrators will need to load/install the proposed fee schedule amounts into their medical claims payment software. The Division estimates carriers will spend between $2,176,800 and $3,174,500 to implement the proposed fee schedule change. Please see the discussion on page 2, above.

IV. Provide information on additional regulatory costs:

(A) The cost to the Department to implement and enforce the rule:

_X_ None. To be done with the current workload and existing staff.

_____ Minimal. Provide a brief explanation:

_____ Other. Provide an explanation for estimate and methodology used:

(B) The cost to any other state and local government entity to implement and enforce the rule:

_____ None. The rule will only affect the Department.

_____ Minimal. Provide a brief explanation:

_X_ Other. Provide an explanation for estimate and methodology used:

Other state and local government entities will only bear implementation costs to the extent that they are required to secure workers' compensation coverage for their employees and that they operate as workers' compensation claims administrators. In this regard, they will bear the same burdens as other similarly situated public or private entities. See page 2, above.

(C) Any anticipated effect on state or local revenues:

_X_ None.

_____ Minimal. Provide a brief explanation:

_____ Other. Provide an explanation for estimate and methodology used:

V. Will the proposed rule have an impact on small businesses, small counties or small cities? _____

(A) "Small business" is defined by section 288.703, F.S. as an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, have a net worth of not more than $5 million or any firm based in this state that has a Small Business Administration 8(a) certification. As to sole proprietorships, the $5 million net worth requirement includes both personal and business investments.

_____ No adverse impact on small business.

_____ Minimal. Provide a brief explanation:

_X_ Other. Provide an explanation for estimate and methodology used:

"Small businesses" will bear the same impact in workers' compensation premiums as other employers in Florida. See page 2, above.

(B) A "small city" is defined by section 120.52, F.S., as any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census. A "small county" is defined by section 120.52, F.S., as any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census.

_____ No adverse impact on small cities or small counties.

_____ Minimal. Provide a brief explanation:

_X_ Other. Provide an explanation for estimate and methodology used:

"Small cities" will only bear implementation costs to the extent that they are required to secure workers' compensation coverage for their employees and/or that they operate as workers' compensation claim administrators. In this regard, they will bear the same burdens as other similarly situated public or private entities. See page 2, above.

VI. Add any additional information that may be useful:

_X_ None.

Additional Information:

Name of Person Completing this Form: Pam Macon
Telephone Number of Person Completing the Form: 850-413-1708 (1-1708)

ANALYSIS OF THE PROPOSED CHANGES TO THE FLORIDA WORKERS COMPENSATION HEALTH CARE PROVIDER REIMBURSEMENT MANUAL EFFECTIVE UPON ADOPTION

NCCI estimates that the proposal to update the Florida Workers' Compensation Health Care Provider Reimbursement Manual (FWCRM) to the 2014 Medicare level, if adopted, would result in an overall Florida workers compensation system cost impact of +1.9% (+$61.0M[1]).

Please note that the estimated cost impact is based on the provisions summarized below, which may differ from the final implemented version. If the final version is different from the provisions included here, NCCI would perform an analysis based on the adopted rule and the impacts stated in this analysis may change accordingly.

Summary of Proposed Changes

The Florida Division of Workers' Compensation (FL DWC) proposes to update Schedule B and Schedule C of the FWCRM for professional health care providers, which became effective 2/4/2009, and is based on 2008 Medicare Conversion Factor and Resource Based Relative Value Scale (RBRVS) geographic-specific reimbursement levels, to 2014 Medicare Conversion Factor and RBRVS geographic-specific reimbursement levels. There are no proposed changes to the Maximum Reimbursement Allowances (MRAs) in schedule A (anesthesia services). (Note that the MRAs in the current and proposed FWCRMs are limited to no less than the MRAs published in the 2003 FWCRM).

The proposed changes would impact reimbursements for physician services as well as Category 1 hospital outpatient services (as described below).

Below is a summary of the 3 sections of the FWCRM:

- Schedule A: Contains MRAs for all anesthesia services, dental and certain injection services, services performed outside of the state of Florida, and services performed by workers compensation certified providers not specifically addressed in the FWCRM.

- Schedule B: Contains MRAs for surgical procedures performed by physicians. In addition, maximum reimbursement levels for surgical procedures performed by physician assistants and advanced registered nurse practitioners are based on 85% of the MRAs listed in schedule B.

- Schedule C: Contains MRAs for non-surgical procedures (excluding anesthesia) performed by physicians, physical and occupational therapists, audiologists,

[1]Overall system costs are based on 2013 net written premium for insurance companies including an estimate of self-insured premium as provided by the Florida Division of Workers' Compensation. The estimated dollar impact of +$61.0M is the percent impact displayed multiplied by $3,210M. This figure does not include the policyholder retained portion of deductible policies, or adjustments for subsequent changes in premium levels. The use of premium as the basis for the dollar impact assumes that expenses and other premium adjustments will be affected proportionally to the change in benefit costs.

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psychologists, independent clinical laboratories, and freestanding imaging/x-ray centers. Maximum reimbursement levels for non-surgical procedures performed by physician assistants, advanced registered nurse practitioners, dietitians, nutritionists, and nutrition counselors are based on 85% of the MRAs listed in schedule C. Maximum reimbursement levels for non-surgical procedures performed by licensed clinical social workers are based on 75% of the MRAs listed in schedule C.

Hospital outpatient services in Florida are currently reimbursed under the 2014 Florida Workers' Compensation Hospital Reimbursement Manual. This manual contains 3 categories of reimbursement:

- Category 1: All scheduled, non-emergency clinical laboratory and radiology services shall be reimbursed by the schedule of MRAs listed in the FWCRM. In addition, any outpatient physical, occupational, and speech therapy is reimbursable based on the listed MRA in the FWCRM.

- Category 2 and Category 3: Non-scheduled surgical services will be reimbursed at the base rate from Florida Workers' Compensation Reimbursement Manual for Hospitals, Appendix B, multiplied by the geographic modifier listed for the county of the location of service from Appendix A. Similarly, scheduled surgical services will be reimbursed at the base rate from Appendix C, multiplied by the geographic modifier from Appendix A. Procedures with no specified MRA will continue to be reimbursed in accordance with the current methodology (60% of UCC for Category 2 procedures and 75% of UCC for Category 3 procedures).

- Surgical implants utilized during unscheduled surgeries shall be reimbursed at 75% of UCC. Surgical implants utilized during scheduled surgeries shall be reimbursed at 60% of UCC.

Since no effective date was explicitly provided for the proposed rule change, NCCI has assumed an effective date of July 1, 2015 for this analysis.

Actuarial Analysis

NCCI's methodology to evaluate the impact of medical fee schedule changes includes three major steps:

1. Calculate the percentage change in maximum reimbursements
   a. Compare the prior and revised maximum reimbursements by procedure code and determine the percentage change by procedure code
   b. Calculate the weighted average percentage change in maximum reimbursements for the fee schedule using observed payments by procedure code as weights

2. Estimate the price level change as a result of the revised fee schedule

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a. NCCI research by Frank Schmid and Nathan Lord (2013), "The Impact of Physician Fee Schedule Changes in Workers Compensation: Evidence From 31 States", suggests that a portion of a change in maximum reimbursements is realized on payments impacted by the change.
b. In response to a fee schedule decrease, NCCI research indicates that payments decline by approximately 50% of the fee schedule change.
    i. The assumption for the percent realized for fee schedule decreases is 50%.
c. In response to a fee schedule increase, NCCI research indicates that payments increase by approximately 80% of the fee schedule change and the magnitude of the response depends on the relative difference between actual payments and fee schedule maximums (i.e. the price departure).
    i. The formula used to determine the percent realized for fee schedule increases is 80% x (1.10 + 1.20 x (price departure)).

3. Determine the share of costs that are subject to the fee schedule
    a. The share is based on a combination of fields, such as procedure code, provider type, and place of service, as reported on the FL DWC detailed medical data, to categorize payments that are subject to the fee schedule.

In this analysis, NCCI relies primarily on two data sources:

- Based on detailed medical data provided by the FL DWC with dates of service between January 1, 2013 and December 31, 2013.

- The share of benefit costs attributed to medical benefits is based on NCCI's Financial Call data for Florida from the latest 2 policy years projected to July 1, 2015 (consistent with below)

In some components of the analysis NCCI may rely on other data sources, which are referenced where applicable.

Physicians Services

In Florida, payments for physician services represent 30.5% of total medical payments. To calculate the percent change in maximums for physician services, we calculate the percentage change in maximums for each procedure code. The overall change in maximums for physician services is a weighted average of the percentage change in MRA (proposed MRA / current MRA) by procedure code weighted by the observed payments by procedure code as reported in detailed medical data provided by FL DWC for Service Year 2013. The MRAs by medical procedure depend on the geographic locality and place of service where the procedure is performed. The place of service is split into two distinct categories:

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ANALYSIS OF THE PROPOSED CHANGES TO THE FLORIDA WORKERS COMPENSATION HEALTH CARE PROVIDER REIMBURSEMENT MANUAL EFFECTIVE UPON ADOPTION

1. Facility—Inpatient Hospital, Outpatient Hospital Department, Hospital Emergency Room, and Skilled Nursing Facility
2. Non-Facility—Home, Adult Home, Office, Partial Hospital, Intermediate Care Facility, and Outpatient Clinic Other than Outpatient Hospital

The current facility and non-facility MRAs are based on the FWCRM, which became effective 2/4/2009.

The proposed facility and non-facility MRAs were calculated using the following formulas:

MRA, Surgical Services =
[(Work RVU x Work GPCI) + (Transitioned PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Medicare Conversion Factor x 140%

MRA, Non-Surgical Services =
[(Work RVU x Work GPCI) + (Transitioned PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Medicare Conversion Factor x 110%

Where:
RVU = Medicare's Relative Value Unit for Physicians
GPCI = Medicare's Geographic Practice Cost Index
PE = Practice Expense
MP = Medical Malpractice Insurance
2014 Medicare CF = $35.8228

GPCI's measure the resource cost differences by geographic area in the three components of the fee schedule—physician work, practice expenses (PE) (such as employee wages, rents, and medical equipment and supplies) and malpractice insurance (MP). Medicare specifies three GPCI localities for Florida. Locality 03 represents the greater Ft. Lauderdale area (including West Palm Beach), locality 04 represents the greater Miami area, and locality 99 represents the rest of Florida. (Note the FWCRM uses the label "01/02" instead of "99" for the "rest of Florida" locality).

For purposes of estimating the impact, an average MRA is calculated for each medical procedure using the following geographic weights:

Locality 01/02:	60%
Locality 03:	25%
Locality 04:	15%

The facility and non-facility maximums for each procedure are the weighted average of the maximum reimbursement for each locality (after limiting the reimbursement to be no less than the 2003 MRA).

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ANALYSIS OF THE PROPOSED CHANGES TO THE FLORIDA WORKERS COMPENSATION HEALTH CARE PROVIDER REIMBURSEMENT MANUAL EFFECTIVE UPON ADOPTION

The overall weighted average percent change in MRAs is +10.6%. The estimated impact by category is shown in the table below.

Physician Service Category	Distribution of Payments	Percent Change In MRAs
Anesthesia	2.8%	0.0%*
Surgery	16.7%	+5.0%
Radiology	12.3%	-0.6%
Pathology & Laboratory	3.9%	0.0%
Medicine	24.7%	+18.9%
Evaluation & Management	28.1%	+18.3%
Other Healthcare Common Procedure Coding	0.1%	+19.2%
Payments with no Specific MRA	11.4%	0.0%
Overall Physician Payments	**100.0%**	**+10.6%**

*Assumes no change to anesthesia reimbursement

Since the overall average maximum reimbursement for physicians increased, the percent expected to be realized from the fee schedule increase is estimated according to the formula 80% x (1.10 + 1.20 x (price departure)). The observed price departure for physician payments in Florida is -9%, which implies that the ratio of actual payments to the prior fee schedule maximums is 0.91. The percent realized is estimated to be 79% (= 80% x (1.10 + 1.20 x (-0.09))). The estimated impact on physician payments due to the proposed physician fee schedule change is +8.4% (= +10.6% x 0.79).

The above impact of +8.4% is then multiplied by the Florida percentage of medical costs attributed to physician payments (30.5%) to arrive at the estimated impact on medical costs of +2.6%. The resulting impact on medical costs is then multiplied by the percentage of Florida benefit costs attributed to medical benefits (69.3%) to arrive at the estimated impact on Florida overall workers compensation costs of +1.8%.

Hospital Outpatient Services

The changes to the FWCRM also impact Category 1 hospital outpatient services. In Florida, payments for Category 1 hospital outpatient services represent 5.1% of total hospital outpatient payments. To calculate the percentage change in maximums for hospital outpatient services, we calculate the percentage change in maximums for each procedure code. The overall change in maximums for hospital outpatient services is a weighted average of the percentage change in MRA (proposed MRA / current MRA) by procedure code weighted by the observed payments by procedure code as reported in detailed medical data provided by FL DWC for

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ANALYSIS OF THE PROPOSED CHANGES TO THE FLORIDA WORKERS COMPENSATION HEALTH CARE PROVIDER REIMBURSEMENT MANUAL EFFECTIVE UPON ADOPTION

Service Year 2013. The overall weighted average percentage change in MRAs is estimated to be +12.8% on Category 1 hospital outpatient payments.

The above impact of +12.8% is then multiplied by the ratio of category 1 hospital outpatient payments to total hospital outpatient payments in Florida (5.1%) to arrive at the estimated impact on hospital outpatient costs of +0.7%. NCCI estimates the percent realized from the fee schedule increase to be 88%. The estimated impact on hospital outpatient payments due to the proposed fee schedule change is +0.6% (= +0.7% x 0.88).

The resulting impact of +0.6% is then multiplied by the Florida percentage of medical costs attributed to hospital outpatient payments (18.6%) to arrive at the estimated impact on medical costs of +0.1%. The resulting impact on medical costs is then multiplied by the percentage of Florida benefit costs attributed to medical benefits (69.3%) to arrive at the estimated impact on Florida overall workers compensation costs of +0.1%.

The estimated impacts due to the proposed changes to the FWCRM for professional health care providers are summarized in the following table:

	(A) Impact on Type of Service	(B) Medical Cost Distribution	(C) Estimated Impact On Medical Costs (A) x (B)
Physician	+8.4%	30.5%	+2.6%
Hospital Outpatient	+0.6%	18.6%	+0.1%
(1) Estimated Impact on **Florida** Medical Costs			**+2.7%**
(2) Medical Costs as a Percentage of Overall Workers Compensation Benefit Costs in **Florida**			69.3%
(3) Estimated Impact on Overall Workers Compensation System Costs in Florida = (1) x (2)			**+1.9%**

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HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RORS 16-02 Ratification of administrative rules of the Board of Medicine
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom

SUMMARY ANALYSIS

The Board of Medicine has adopted amendments to the rule regarding costs of reproducing medical records. The rule sets out the maximum reasonable cost per page reproduced that a physician may ask of the party requesting the medical records.

The Statement of Estimated Regulatory Costs showed Rule 64B8-10.003, F.A.C., *Costs of Reproducing Medical Records*, would have a specific, adverse economic effect, or would increase regulatory costs, exceeding $1 million over the first 5 years the rule was in effect. Accordingly, the Rule must be ratified by the Legislature before it may go into effect.

The Rule was adopted on December 9, 2015, and submitted for ratification on December 10, 2015.

The proposed bill authorizes the Rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Medical Records Charges

Health care practitioners must regularly provide copies of patient records for use by the patient, insurers, other medical professionals or users authorized in legal proceedings. Such records can include materials such as X-Rays and other photographic records. All such records are private and confidential information regulated by federal and state patient privacy laws. Thus, reproduction of such records involves significant administrative costs to health care practitioners. Florida law limits the amount that can be charged by a practitioner for the reproduction and provision of copies.[1] The statute authorizes the practitioner's licensing board to specify limitations by administrative rule. For Medical Doctors, the Board of Medicine in the Department of Health (DOH) is the board responsible for such rulemaking.

After nine hearings conducted between August 2, 2013, and February 6, 2015, the Board of Medicine on March 12, 2015, filed a final version of a revision to its rule limiting physician charges for such records.[2] The rule was challenged in to separate administrative proceedings and a decision the consolidated cases was entered December 8, 2015, upholding the rule as a valid exercise of the Board's authority. The Board filed the rule for adoption the following day with the Department of State.

The revised rule, if it goes into effect, would increase the cost of such copies to $1.00 per page for all records. Since 1988, the rule has limited charges for patients and governmental entities to $1.00 per page for the first 25 pages and 25 cents per page for each page in excess of 25.[3] That rate was increased only for other entities to $1.00 per page in 2009.[4]

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[5] Rulemaking authority is delegated by the Legislature[6] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[7] a rule. Agencies do not have discretion whether to engage in rulemaking.[8] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[9] The grant of rulemaking authority itself need not be detailed.[10] The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[11]

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[1] Section 456.057(17), F.S.

[2] "Additional Statement to the Secretary of State" included with "Certificate of Board of Medicine Administrative Rules" filed December 9, 2015. A copy of the Certificate and the Additional Statement are available in the offices of the Rulemaking Oversight and Repeal Subcommittee.

[3] The 1988 rule may be found at: https://www.flrules.org/gateway/notice_Files.asp?ID=2414541.

[4] 64B8-10.003, F.A.C. Accessed on January 11, 2016, at: https://www.flrules.org/gateway/notice_Files.asp?ID=6848605.

[5] Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region,* 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

[6] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).

[7] Section 120.52(17).

[8] Section 120.54(1)(a), F.S.

[9] Section 120.52(8) & s. 120.536(1), F.S.

[10] *Save the Manatee Club, Inc.,* supra at 599.

[11] *Sloban v. Florida Board of Pharmacy,*982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.,* 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

An agency begins the formal rulemaking process by filing a notice of the proposed rule.[12] The notice is published by the Department of State in the Florida Administrative Weekly[13] and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.[14]

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.[15] Next is the likely adverse impact on business competitiveness,[16] productivity, or innovation.[17] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[18] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[19] A rule must be filed for adoption before it may go into effect[20] and cannot be filed for adoption until completion of the rulemaking process.[21] A rule projected to have a specific economic impact exceeding $1 million in the aggregate over 5 years[22] must be ratified by the Legislature before going into effect.[23] As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

SERC for Rule 64B8-10.003

At its December 4, 2014, hearing, the Board determined that a SERC should be prepared for the rule. The Board approved the SERC on February 6, 2015. The SERC estimates increased annual costs to DOH for its regulatory investigations of almost $100,000 annually, increased annual costs in civil litigation of about $300,000, and increased annual costs of about $250,000 in Social Security disability cases.[24] While these costs are economically offset by equal gains to medical practices so that the impact on the Florida economy is neutral, it is appropriate to evaluate regulatory cost impacts by totaling the impacts on negatively affected parties. On March 12, 2015, the Board filed a Notice of Change indicated that the rule appeared to require legislative ratification.[25]

The bill ratifies the rule as filed, making the rule effective upon the bill's becoming law.

B. SECTION DIRECTORY:

Section 1: Ratifies Rule 64B8-10.003, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not

[12] Section 120.54(3)(a)1, F.S.
[13] Section 120.55(1)(b)2, F.S.
[14] Section 120.541(2)(a), F.S.
[15] Section 120.541(2)(a)1., F.S.
[16] This includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[17] Section 120.541(2)(a) 2., F.S.
[18] Section 120.541(2)(a) 3., F.S.
[19] Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.
[20] Section 120.54(3)(e)6, F.S.
[21] Section 120.54(3)(e), F.S.
[22] Section 120.541(2)(a), F.S.
[23] Section 120.541(3), F.S.
[24] A copy of the SERC is available in the offices of the Rulemaking Oversight and Repeal Subcommittee.
[25] Notice of Change, accessed on January 11, 2015, at https://www.flrules.org/gateway/notice_Files.asp?ID=15773963.

be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill creates no additional source of state revenues.

2. Expenditures:

   If ratified, the SERC anticipates regulatory costs to DOH investigative activities of about $100,000, less whatever might be recoverable therefor by costs assessments against licensees disciplined or entering into consent orders in such matters.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill itself has no impact on local government revenues.

2. Expenditures:

   The bill itself does not impose additional expenditures on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

If ratified, the rule appears to have a neutral economic impact on the private sector. However, this impact results from increased costs to some actors being offset by the physicians' receipt of the authorized increased charges.

D. FISCAL COMMENTS:

According to the SERC, if the rule is ratified, the regulatory costs to all parties expected to incur increased medical records charges may exceed of $650,000 annually.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

B. RULE-MAKING AUTHORITY:

This bill does not grant additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to ratification of Board of Medicine rules; ratifying specified rules relating to costs of reproducing medical records, for the sole and exclusive purpose of satisfying any condition on effectiveness pursuant to s. 120.541(3), F.S., which requires ratification of any rule meeting any specified thresholds for likely adverse impact or increase in regulatory costs; providing an effective date.

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

Section 1. (1) The following rule is ratified for the sole and exclusive purpose of satisfying any condition on effectiveness imposed under s. 120.541(3), Florida Statutes: Rule 64B8-10.003, Florida Administrative Code, titled "Costs of Reproducing Medical Records" as filed for adoption with the Department of State pursuant to the certification package dated December 9, 2015.

(2) This act serves no other purpose and shall not be codified in the Florida Statutes. After this act becomes law, its enactment and effective dates shall be noted in the Florida Administrative Code, the Florida Administrative Register, or both, as appropriate. This act does not alter rulemaking authority delegated by prior law, does not constitute

legislative preemption of or exception to any provision of law governing adoption or enforcement of the rules cited, and is intended to preserve the status of any cited rule as a rule under chapter 120, Florida Statutes. This act does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited.

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

64B8-10.003 Costs of Reproducing Medical Records.

Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records.

(1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.

(2) For patients and governmental entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than the following:

(a) For the first 25 pages, the cost shall be $1.00 per page.

(b) For each page in excess of 25 pages, the cost shall be 25 cents.

(3) For other entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page.

(4) Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs and overhead costs associated with such duplication.

Specific Authority 456.057(18), 458.309 FS. Law Implemented 456.057(18) FS. History–New 11-17-87, Amended 5-12-88, Formerly 21M-26.003, 61F6-26.003, 59R-10.003, Amended 3-9-09.

CERTIFICATE OF

BOARD OF MEDICINE ADMINISTRATIVE RULES

FILED WITH THE DEPARTMENT OF STATE

I hereby certify:

[xx] (1) That all statutory rulemaking requirements of Chapter 120, F.S., and all rulemaking requirements of the Department of State have been complied with; and

[xx] (2) That there is no administrative determination under subsection 120.56(2), F.S., pending on any rule covered by this certification; and

[xx] (3) All rules covered by this certification are filed within the prescribed time limitations of paragraph 120.54(3)(e), F.S. They are filed not less than 28 days after the notice required by paragraph 120.54(3)(a), F.S., and;

[ ] (a) Are filed not more than 90 days after the notice; or

[XX] (b) Are filed more than 90 days after the notice, but not more than 60 days after the administrative law judge files the final order with the clerk or until 60 days after subsequent judicial review is complete; or

[ ] (c) Are filed more than 90 days after the notice, but not less than 21 days nor more than 45 days from the date of publication of the notice of change; or

[ ] (d) Are filed more than 90 days after the notice, but not less than 14 nor more than 45 days after the adjournment of the final public hearing on the rule; or

[ ] (e) Are filed more than 90 days after the notice, but within 21 days after the date of receipt of all material authorized to be submitted at the hearing; or

[ ] (f) Are filed more than 90 days after the notice, but within 21 days after the date the transcript was received by this agency; or

[ ] (g) Are filed not more than 90 days after the notice, not including the days the adoption of the rule was postponed following notification from the Joint Administrative Procedures Committee that an objection to the rule was being considered; or

[ ] (h) Are filed more than 90 days after the notice, but within 21 days after a good faith written proposal for a lower cost regulatory alternative to a proposed rule is submitted which substantially accomplishes the objectives of the law being implemented; or

[ ] (i) Are filed more than 90 days after the notice, but within 21 days after a regulatory alternative is offered by the Small Business Regulatory Advisory Committee.

Attached are the original and two copies of each rule covered by this certification. The rules are hereby adopted by the undersigned agency by and upon their filing with the Department of State.

Rule No(s).

64B8-10.003

Under the provision of subparagraph 120.54(3)(e)6., F.S., the rules take effect 20 days from the date filed with the Department of State or a later date as set out below:

Effective: _____

(Month) (Day) (Year)

_____

Signature, Person Authorized
To Certify Rules

Interim Executive Director
Title

/

Number of Pages Certified

DEPARTMENT OF HEALTH

BOARD OF MEDICINE

ADDITIONAL STATEMENT TO THE SECRETARY OF STATE

RULE TITLE:	RULE NO.:
Costs of Reproducing Medical Records	64B8-10.003

SUMMARY: The proposed rule amendments streamline the medical records rule by setting forth one fee for the reproduction of medical records.

SUMMARY OF THE HEARINGS ON THE RULE: The Board held nine (9) public hearings on this rule as follows: August 2, 2013; October 3, 2013; December 6, 2013; February 6, 2014; April 3, 2013; June 5, 2014; October 9, 2014; December 4, 2014; and February 6, 2015. The rule was originally published in Volume 39, No. 95, of the May 15, 2013, issue of the Florida Administrative Register (FAR). At the nine (9) public hearings, the Rules Committee and the Board reviewed many written comments and heard oral testimony from many interested parties. Additionally, at the December 4, 2014 public hearing, the Committee determined that a Statement of Estimated Regulatory Costs (SERC) should be prepared. At the Board's meeting held on February 6, 2015, the Board voted to approve the SERC and to make additional changes the proposed rule. Prior to filing the Notice of Change, the Board received correspondence from the staff of the Joint Administrative Procedures Committee dated February 17, 2015, with regard to the SERC and inquiring as to whether the rule required legislative ratification. The Board held a telephone conference meeting on March 4, 2015, and based upon the written comments from the Joint Administrative

Procedures Committee and discussion of the Board, the Board determined that the rule would indeed, require legislative ratification and that the SERC needed to be revised to state as such. The Notice of Change was published in Volume 41, No. 49, of the March 12, 2015, issue of the FAR.

On March 31, 2015, Petitioners, Daniel Fernandez, and Dax J. Lonetto, Sr. PLLC, each filed a Petition for Administrative Hearing Determining Invalidity of Proposed Rule. On April 1, 2015, Petitioner, Florida Justice Association and Florida Consumer Action Network, Inc. filed Petitions for Administrative Hearing Determining Invalidity of Proposed Rule. The cases were consolidated and assigned DOAH Case No. 15-1774RP. The hearing in this matter was held at the Division of Administrative Hearings on September 8 and 9, 2015. On December 8, 2015, Administrative Law Judge, Lynne A. Quimby-Pennock, issued a Final Order finding that the proposed changes to the rule do not constitute an invalid exercise of delegated legislative authority, and dismissing the petitions. The rule is being adopted as changed.

STATEMENT OF FACTS AND CIRCUMSTANCES JUSTIFYING RULE PROPOSAL: Physicians receive numerous requests to reproduce patient medical records. The Board has determined that one fee for the reproduction of medical records is appropriate. The proposed rule amendments streamline the rule by setting forth one fee for the reproduction of medical records.

THE FULL TEXT OF THE PROPOSED RULE IS:

64B8-10.003 Costs of Reproducing Medical Records. Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records stored and delivered in any format or medium.

(1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.

~~(2) For patients and governmental entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than the following:~~

~~(a) For the first 25 pages, the cost shall be $1.00 per page.~~

~~(b) For each page in excess of 25 pages, the cost shall be 25 cents.~~

(2) ~~(3)~~ The ~~For other entities, the~~ reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page.

(3) ~~(4)~~ Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs ~~and overhead costs~~ associated with duplication, plus postage.

(4) Accessing medical records through patient portals does not constitute the reproduction of medical records.

Rulemaking ~~Specific~~ Authority 456.057(17) ~~(18)~~, 458.309 FS.

Law Implemented 456.057(17) ~~(18)~~ FS.

History–New 11-17-87, Amended 5-12-88, Formerly 21M-26.003, 61F6-26.003, 59R-10.003, Amended 3-9-09,_____.

STATEMENT OF ESTIMATED REGULATORY COSTS

Subject: Proposed amendments to Rule 64B8-10.003, F.A.C., Costs of Reproducing Medical Records

Summary of Proposed Changes

The proposed rule amends the rule for the costs of reproducing medical records by setting forth a single fee of $1.00 per page for reproducing medical records.

(a) An economic analysis showing whether the rule directly or indirectly:

1. Is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of $1 million in the aggregate within 5 years after the implementation of the rule;

The proposed rule is likely to have an adverse impact on economic growth, private sector job creation or employment, or investment in excess of $1 million in the aggregate within 5 years. There may be increased costs of doing business to small law firms and law practices that are defined as a small business by s. 288.703, F.S. See analysis under 3(e).

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

The proposed rule is likely to have an adverse impact on business competitiveness. However, the proposed rule would have a positive impact on Florida physicians' businesses; they would be able to charge the reasonable costs of reproducing records of up to a $1 per page and recoup more of the costs associated with reproducing medical records. As far as the impact on business competitiveness to businesses other than physician offices, the impact of the rule is the same to any party that requests medical record copies, regardless of geographic location. To obtain copies of medical records from a Florida physician, an out of state party would be charged the same amount as a party residing within the state. The proposed rule may have an impact on small plaintiffs' law firms' ability to compete with larger plaintiffs' firms because those smaller firms likely have less capital to recoup the upfront expenditures associated with reproducing large volumes of medical records. However, the loss in competitiveness to smaller plaintiffs' firms is only realized if a case is dismissed or found in favor of the defendant. The adverse impact on these smaller

firms' ability to compete with larger firms is likely *de minimis* as small plaintiffs' firms are not likely to reject a potential client's business based upon the sole fact that it will have to pay more upfront costs for reproducing medical records.

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

No. This is a regulatory rule that physicians are required to comply with. By increasing the amount a physician may charge for medical records, the physician's regulatory costs may actually be reduced over five years.

(b) A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule.

There are approximately 45,000 licensed physicians actively practicing in Florida. Any one of these physicians may be asked for copies of medical records for a patient and would have to comply with Rule 64B8-10.003, F.A.C.

The individuals that would be affected by the proposed rule amendment are patients that request medical records from a physician's office. Previously those patients would pay $1 per page for the first 25 pages and $.25 per page thereafter. When all the requested records are less than 25 pages, this rule change has no effect on the cost the patient would have to pay. The rule change would have an effect on those patients that request copies of medical records that contain greater than 25 pages. Patients requesting copies of medical records in excess of 25 pages would pay more based upon the proposed rule than the current rule. The proposed rule would have no effect on the costs to patients that received treatment at a hospital, because pursuant to s. 395.025, F.S., a hospital may charge $1 per page.

This rule change may have an effect on attorneys' offices that request records on behalf of a patient. That effect would be determinant on whether an attorney representing a patient in a civil suit and requesting that patient's records would be entitled to the patient rate under the current version of the rule.[1]

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[1] See Rule 64B8-10.003(2), F.A.C., effective 03/09/2009.

(c) A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues.

There would not be any additional costs to the agency for implementing and enforcing the proposed rule. However, there would be a cost to the agency when requesting copies of medical records for the purpose of investigating legally sufficient complaints for alleged violations of the Medical Practice Act. Under the current rule the Department would be entitled to the rate under subsection (2), $1.00 for the first $25 pages and $0.25 for each page in excess of 25 pages. Under the proposed rule the Department would have to pay $1.00 per page.

To estimate the costs to the agency there needs to be an estimate of the average number of pages of medical records that the Department obtains from a physician's office per disciplinary investigative case, and an estimate of the total number of investigative cases that the Department investigates in a given year. According to information obtained from the Department's Investigative Services Unit, the average number of medical records obtained from a physician's office per investigative case would be approximately 50-100 pages.[2] The estimated number of cases in any given year would be approximately 1055; this is based upon 1055 legally sufficient complaints against physicians for fiscal year 2013-2014.[3] For purposes of calculating the estimated cost to the agency the low end of 50 pages will be used as not every legally sufficient complaint contains medical records from a physician's office.

Thus, the estimated cost to the agency for 50 pages of medical records under the current rule is $31.25. The cost to the agency under the proposed rule is $50. The difference in cost per 50 pages of records between the current rule and the proposed rule is $18.75. Applying this cost difference to the number of legally sufficient complaints the Department investigates in one year (n=1055), the total difference in cost would be approximately $19,781.25 per year, with an aggregate of approximately $98,906.25 within five years after implementation of the proposed rule. However, this amount is likely an overestimation as patients often provide copies of medical records to the Department themselves and not every legally sufficient complaint requires the Department to request medical records from a physician's office.

(d) A good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to

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[2] Email from Chief of Investigative Services, Investigative Services Unit, Div. of Medical Quality Assurance, DOH (Dec. 19, 2014, 4:26 EST) (on file with author).

[3] Florida Board of Medicine, 2013-2014 Annual Report (2014).

comply with the requirements of the rule. As used in this section, "transactional costs" are direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, the cost of monitoring and reporting, and any other costs necessary to comply with the rule.

None. There are no costs to the regulated entities for complying with this rule. Medical doctors are required to provide copies of records to patients and this rule allows medical doctors to recover the costs associated with providing medical records. The rule change will increase the amount a physician may recover for reproducing medical records.

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

Positive Impact on Physicians

By changing the amount that a physician may charge for reproducing medical records to the reasonable costs, this rule change would not have a negative impact on small physician businesses in the state. By not increasing the rate a physician could charge for records for 26 years, physicians were likely absorbing the costs associated with reproducing records. Under the proposed rule, physicians will experience a positive impact on their business by being able to recover the reasonable costs associated with reproducing medical records.

Impact on law practices/offices defined as a small business under s. 288.703, F.S.

This rule change may have an adverse impact on those attorneys that represent patients in civil suits and are defined as a small business under s. 288.703, F.S. Attorneys that practice in certain areas of the law are required to obtain medical records in order to pursue or defend a claim on behalf of a client. Law practices that may be affected by the proposed rule include those that handle social security disability, medical malpractice, auto accidents, and other negligence cases.[4] Defense firms have

[4] Workers' compensation attorneys expressed concern over the rule change. However, this change would not affect those attorneys because Rule 69L-7.601, F.A.C., describes the amount a health care provider can charge an injured employee or his/her attorney for medical records. That rule limits the charge to .50/page.

always paid the "other entity" rate which is $1 per page. Therefore, the rule change has no effect on defense firms.

With the exception of social security disability cases and federal court actions, most cases involving patient records will be handled in circuit court. Most firms representing a plaintiff require the client to pay the costs associated with litigating a matter. Plaintiffs' attorneys typically require the client to pay these costs out of the amount the client recovers. The firms lose these costs when their client does not prevail. When a case is settled, the costs of the case are typically factored into the settlement and are paid to the plaintiff's attorney out of the client's recovery.

To analyze the impact on these small businesses the analysis will have to make certain legal assumptions, set a constant for the average number of medical records per case, and approximate the number of cases that law practices will have to cover their costs for obtaining copies of medical records. First, it has to be assumed that all law practices that would have to pay for the costs of copies of medical records would qualify as a small business under s. 288.703, F.S. Second, it has to be assumed that of all the civil cases that would require copies of medical records that those cases would contain records obtained from a physician office. Third, it must be assumed that the attorneys representing patients in these suits would be entitled to the patient rate under the current version of Rule 64B8-10.003(2), F.A.C. In addition, for purposes of this analysis we will set the average number of medical records copied from a physician office to 50 pages, the amount set above in section 3(c). It is possible that some cases may have many more pages and other cases may not have any medical records that were obtained from a physician's office. Thus, with the average number of pages set at 50, the cost difference between the current rule and proposed rule, as described above in 3(c), is approximately $18.75.

The Florida Office of the State Courts Administrator maintains a report of the disposition of the cases that are filed in circuit courts throughout Florida.[5] The relevant categories of cases that are included in the report and used for this estimation are medical malpractice, product liability, auto negligence, and other negligence (including environmental/ toxic tort, nursing home negligence, and premises liability). The Statistical Reference Guide breaks down circuit court civil dispositions in the categories of professional malpractice, product liability, auto negligence, and other negligence. Fiscal year 2012-2013 case numbers were used to estimate the number of case dispositions in any given year. To estimate the number of cases where a law practice

[5] See Florida Office of the State Courts Administrator, Florida's Trial Courts Statistical Reference Guide FY 12/13 (2014), *available at* http://www.flcourts.org/publications-reports-stats/statistics/trial-court-statistical-reference-guide.stml

may have to pay for the costs of copying medical records, the number of cases dismissed before and after hearing were added and then divided by the total number of disposed cases. This number came out to approximately 55% of civil case dispositions. For the purpose of this analysis, the cases that were disposed pursuant to a settlement agreement were eliminated because costs were likely factored into the agreement. Due to the limitations in the available data, it was not possible to discern the percentage of those cases disposed by judge or jury after hearing. For the purposes of this analysis it was assumed that plaintiffs' attorneys would have to pay the costs for medical records copies for approximately 55% of the disposed cases in each case category where medical records might be requested.

From the available data there are approximately 861 medical malpractice case dispositions a year. Attorneys may have to pay copying costs for 474 of those cases. The cost increase for copies of medical records associated with medical malpractice cases is approximately $8,887.50 per year. There are approximately 20,903 auto negligence case dispositions per year. Attorneys may have to pay copying costs for 11,497 of those cases. The cost increase for copies of medical records associated with auto negligence cases is approximately $215,568.75 per year. There are approximately 2,280 product liability case dispositions per year. Attorneys may have to pay copying costs for 1,254 of those cases. The cost increase for copies of medical records associated with product liability cases is approximately $23,512.50 per year. There are approximately 5,470 other applicable negligence case dispositions per year. Attorneys may have to pay copying costs for 3008 of those cases. The cost increase for copies of medical records associated with other negligence cases is approximately $56,400 per year. The total combined cost increase for civil cases could be approximately $304,368.75 per year.

In addition to attorneys handling negligence cases in circuit court, attorneys practicing in the area of social security disability have to pay the costs for obtaining medical records on behalf of their clients. As in personal injury matters, the client usually pays those costs out of the recovery, and does not pay the costs when there is no recovery. A review of the case disposition report from the Social Security Administration from September 29, 2012, through August 30, 2013, indicated that there were 13,306 social security disability claims denied in Florida in one year.[6] Therefore, assuming all these claimants were represented by an attorney, it is possible that those claimant's attorneys would have paid for the costs of obtaining these medical records without assistance from the client. Thus, it is possible that the cost increase for copies

[6] See Social Security Administration ALJ Disposition Data.

of medical records associated with social security disability claims could be as high as approximately $249,487.50 per year.

Based on this analysis, it is possible that law practices that have to request copies of medical records from physician offices on behalf of the patient will see cost increases between the current rule and proposed rule. However, as discussed above, this estimate is based upon limited data and several assumptions that are taken as true. In addition, this estimate is not based on valid statistical or economic methods or models. Overall, it is likely that the proposed rule will have some adverse impact on economic growth, private sector job creation or employment, or investment in excess of $1 million in the aggregate within 5 years. This impact will primarily result in increased costs of doing business to law firms and law practices that are defined as a small business under s. 288.703, F.S.

Consideration of Lower Cost Alternative

In making its decision to increase the cost for reproducing medical records, the Board took testimony from lawyers, patients, physicians and associations. The Board found that since the adoption of the rule in 1987, the costs for reproducing medical records have increased. However, the Board never increased the reimbursement amount over the last 26 years. Further, the limitations placed on providers by the Health Insurance Portability and Accountability Act (HIPAA) requires many offices to spend more time reviewing and redacting records depending on the person who is requesting the records. There are additional expenditures associated with hiring qualified staff to review the records before the records can be provided to the requesting party. In addition, the proposed rule considers that access of medical records through patient portals does not constitute the reproduction of medical records, thus there are no additional costs created by the proposed rule to patients who access their records in this manner.

The Board determined that the current amount in the rule was inadequate to allow physicians to recover the actual costs for reproducing medical records for a patient or any other entity. Based upon the testimony presented and the increased costs to physicians in the last 26 years since the adoption of the rule, the Board determined that there is no lower cost alternative.

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

Patients that obtain their medical records for personal reasons would also be affected by the rule change. However, those patients were not analyzed because those patients would not be required to obtain medical records as a part of a small business.

Physician practices and groups are increasingly utilizing patient portals to communicate with patients and to provide access to electronic medical records.[7] Patients and attorneys that represent patients may avoid paying the costs for reproducing medical records as provided in the proposed rule if the medical records can be accessed through a patient portal. Additionally, the proposed rule encourages physicians, and they often do, to provide their patients a copy of their medical records without cost.

[7] See Office of the Secretary for the U.S. Department of Health and Human Services, Office of National Coordinator for Health Information Technology, What is a patient portal?, *available at* http://www.healthit.gov/providers-professionals/faqs/what-patient-portal

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANIEL R. FERNANDEZ; DAX J. LONETTO, SR., PPLC; FLORIDA JUSTICE ASSOCIATION; AND FLORIDA CONSUMER ACTION NETWORK, INC.,

Petitioners,

vs.

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Respondent,

and

BACTES IMAGING SOLUTIONS, INC.; HEALTHPORT TECHNOLOGIES, LLC; AND FLORIDA MEDICAL ASSOCIATION,

Intervenors.
_____/

Case Nos. 15-1774RP
15-1775RP
15-1778RP
15-1794RP

FINAL ORDER

A final evidentiary hearing was held in these consolidated cases on September 8 and 9, 2015, in Tallahassee, Florida, before Lynne A. Quimby-Pennock, a duly-designated Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners, Daniel R. Fernandez; Dax J. Lonetto, Sr., PLLC; and Florida Consumer Action Network:

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STATEMENT OF THE ISSUE

At issue in this proceeding is whether the proposed amendments set forth in the Notice of Proposed Rule published on

May 15, 2013, in the Florida Administrative Register, Vol. 39, No. 95, pages 2609 through 2610 and modified by the Notice of Change, published on March 12, 2015, in the Florida Administrative Register, Vol. 41, No. 49, pages 1236 through 1237, constitute an invalid exercise of delegated legislative authority,[1/] and, if so, whether costs and attorney's fees should be assessed against Respondent and paid to Petitioner.

PRELIMINARY STATEMENT

In October 2012, the Florida Board of Medicine (Board, Respondent, or BOM) proposed the development of rule amendments to Florida Administrative Code Rule 64B8-10.003 to address the cost of the reproduction of medical records, which were stored in an electronic format. In May 2013, the Board proposed a rule amendment that was intended to set forth a single fee for reproducing medical records. In March 2015, the Board published a Notice of Change that provided additional changes to the May 2013 proposed rule.

On March 31, 2015, Petitioners, Daniel R. Fernandez (Fernandez), and Dax J. Lonetto, Sr., PLLC (Lonetto), each filed a Petition for Administrative Hearing Determining Invalidity of Proposed Rule. Fernandez's petition was assigned DOAH Case No. 15-1774RP. Lonetto's petition was assigned DOAH Case No. 15-1775RP. On April 1, Petitioner, Florida Justice

Association (FJA), filed a Petition for Determination of Invalidity of BOM's Proposed Medical Records Increase Rule. FJA's petition was assigned DOAH Case No. 15-1778RP. Also, on April 1, Petitioner Florida Consumer Action Network, Inc. (FCAN) filed a Petition for Administrative Hearing Determining Invalidity of Proposed Rule. FCAN's petition was assigned DOAH Case No. 15-1794RP. Fernandez, Lonetto, FJA, and FCAN will be collectively identified as Petitioners.

On April 2, the undersigned issued a Notice of Hearing and Order of Pre-Hearing Instructions. The notice scheduled the hearing for April 29.

On April 3, Respondent filed an Unopposed Motion to Abate, Continue, and Consolidate.[2/] The four petitions were consolidated to DOAH Case No. 15-1774RP. On April 7, an Order Denying Abatement and Granting Continuance (Order) was issued. The Order afforded Respondent's counsel time to present the Board with the lower cost regulatory alternatives that Petitioners had submitted. Additionally, the Order provided that the parties were to provide three mutually-agreeable dates prior to June 5 on which to conduct the hearing.

Leave to intervene, without any objections from Petitioners[3/] or Respondent, was granted to BACTES Imaging Solutions, Inc. (BACTES); HealthPort Technologies, LLC (HealthPort); and the Florida Medical Association (FMA).

At the hearing, Joint Exhibits JT-1 through JT-12[4/] were admitted into evidence. Petitioners' Exhibit, PT-1, was admitted over objection. Respondent's Exhibits BOM-1, BOM-2 and BOM-3 were admitted over objection, and BOM-4 and BOM-5 were admitted without objection. Petitioners and Respondent each listed (former Board Executive Director) Allison Dudley and (current Board Executive Director) Andre Ourso as their witnesses. In order to provide an orderly hearing flow and allow each party the opportunity to elicit the direct testimony of each witness, the undersigned allowed great leeway in each cross-examination.

At the conclusion of the hearing, Petitioner FJA offered an oral motion to amend its petition by adding an additional count, "specifically to address the failure of an agency to follow applicable rulemaking procedures or requirements set forth in the chapter," according to section 120.56, Florida Statutes. Following oral arguments, the motion was denied. Additionally, in light of the fast-approaching October Board meeting, Respondent requested to file the post-hearing submissions on October 23. None of the parties objected and the request was granted.

The three-volume Transcript of the final hearing was filed on September 21. On September 22, a Notice of Filing was issued, directing the parties to file their proposed final

orders (PFOs) on or before 5:00 p.m. on October 23. On October 19, an Unopposed Motion for Late Filed Exhibit was filed and requested that the second portion of Joint Exhibit 9 be admitted.[5/] This second portion of the Joint Exhibit 9 was admitted.

On October 22, an Unopposed Motion for Extension of Time to File Proposed Final Order and for Extending Page Limit on Proposed Final Order was filed. Both motions were granted. The parties were allowed to file their PFOs before the close of business on Friday, November 6, and the page limitation was raised to 60 pages.

On November 6, Petitioners filed a Joint Proposed Final Order and Respondent filed its Proposed Final Order. The Florida Medical Association filed a notice that it concurred with Respondent's PFO. BACTES and HealthPort did not file a PFO. Each submission has been carefully considered in the preparation of this Final Order.

Unless otherwise noted, all statutory references are to the 2015 version of the Florida Statutes.

FINDINGS OF FACT

I. The Petition

1. Petitioners have challenged the Notice of Proposed Rule and Notice of Change as an invalid exercise of delegated legislative authority. The petitions request that a formal

hearing be conducted, a final order be entered determining that the proposed rule is an invalid exercise of delegated legislative authority, award petitioners' costs and attorneys' fees, and provide such other relief as deemed necessary.

II. The Parties

2. Petitioner Fernandez is a Florida resident and patient with ongoing medical issues that requires him to request and obtain his medical records from his attending or treating physicians from time to time.

3. Petitioner Dax J. Lonetto, Sr., PPLC, is a Florida-based law firm. Dax Lonetto is a Florida-licensed attorney and sole shareholder of the Lonetto PPLC law firm. Eighty-five to 90 percent of Mr. Lonetto's practice involves social security disability benefits, and the remainder of his practice involves veteran's benefits and other basic personal injury claims.[6/] In order to pursue and obtain social security benefits or veteran's benefits for clients, Mr. Lonetto must first obtain his clients' medical records.

4. Petitioner FJA is a statewide, not-for-profit, professional association of approximately 2,500 plaintiff trial attorneys. FJA's purpose is engaging in advocacy efforts on behalf of its membership, strengthening and upholding Florida's civil justice system, and protecting the rights of Florida's citizens and consumers.

5. Paul D. Jess is a Florida-licensed attorney who serves as the general counsel and deputy executive director for FJA. Mr. Jess provided no documentary evidence to support the position that most physician "offices or vendors would charge the maximum [amount] permitted [by the rule]." Mr. Jess admitted that FJA is not "directly injured by this price hike as an association or as a corporation," because FJA does not order medical records. However, Mr. Jess testified that for the majority of FJA's members, ordering medical records is a routine practice on behalf of their clients. Further, Mr. Jess believed that a majority of FJA members would be adversely impacted by this proposed rule, based on the increased costs in obtaining their clients' medical records.

6. Petitioner FCAN is a Florida not-for-profit grassroots organization dedicated to advocating for the rights of Florida consumers. William Newton served as the corporate representative for FCAN. Mr. Newton previously relinquished the full-time executive director's position and now currently works part-time as FCAN's deputy director.

7. FCAN currently has about 7,000 individual members. FCAN is a nonpartisan organization which represents Florida consumers in four major issue areas: utilities, insurance, health care, and the environment.[7/] With respect to the health care area, FCAN stands for affordable and available health care for

everyone, with a focus on trying to improve accessibility, as well as to control the price of health care. Mr. Newton did not know how many of FCAN's 7,000 members would be affected by the proposed rule change; however, he believed that "almost all of them would be" because they go to the doctor.

8. The Board regulates the practice of medicine in Florida pursuant to chapters 456 and 458, Florida Statutes, and is the agency that is proposing the rule amendments at issue.

9. Intervener BACTES is a release of information (ROI) provider that contracts with physicians in Florida and throughout the country to process and fulfill requests for medical records received by such physicians. William Bailey founded BACTES and served as its CEO from 1991 until July 2013, when he assumed a consultant status with the provider. Mr. Bailey confirmed that BACTES is currently operating in Florida with three offices located in Orlando, Ft. Myers, and Jacksonville. BACTES has no plans to discontinue doing business in Florida.[8/]

10. Intervener HealthPort is also an ROI provider that contracts with physicians in Florida and throughout the country to process and fulfill requests for medical records received by such physicians. Kyle Probst, HealthPort's counsel and director of government relations, confirmed that HealthPort engaged Cynthia Henderson to approach the Board regarding making changes

to the rule to "clear up some apparent confusion about how medical records should be billed in the state of Florida."

11. Intervener FMA is a professional association dedicated to the service and assistance of allopathic and osteopathic physicians in Florida. Approximately 20,000 licensed Florida physicians are members of the FMA. The parties agreed there are approximately 75,000 physicians licensed and regulated by the Board. Not all 75,000 Florida licensed physicians are currently practicing in Florida.

III. The Statute and Current Rule

12. Section 456.057(17), Florida Statutes, provides:

> A health care practitioner or records owner furnishing copies of reports or records or making the reports or records available for digital scanning pursuant to this section shall charge no more than the actual cost of copying, including reasonable staff time, or the amount specified in administrative rule by the appropriate board, or the department when there is no board.

13. Section 458.309(1) provides in pertinent part:

> The board has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter conferring duties upon it.

14. Florida Administrative Code Rule 64B8-10.003 is the Board's rule governing the costs of reproducing medical records. The rule was first adopted on November 11, 1987, as rule 21M-26.003. It was transferred to rule 61F6-26.003, then to

rule 59R-10.003, amended on May 12, 1988, amended on March 9, 2009, and then finally transferred to rule 64B8-10.003. The rule currently provides:

> Costs of Reproducing Medical Records. Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records.
>
> (1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.
>
> (2) For patients and governmental entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than the following:
> (a) For the first 25 pages, the cost shall be $1.00 per page.
>
> (b) For each page in excess of 25 pages, the cost shall be 25 cents.
>
> (3) For other entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page.

> (4) Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs and overhead costs associated with such duplication.
>
> *Specific Authority 456.057(18),*[9/] *458.309 FS. Law Implemented 456.057(18) FS. History-New 11-17-87, Amended 5-12-88, Formerly 21M-26.003, 61F6-26.003, 59R-10.003, Amended 3-9-09.*

15. This rule was first created in 1987 and was effective in May 1988. In pertinent part, that first rule provided that chapter 458 licensees could condition the release of copies of patient medical records "upon payment . . . of reasonable costs of reproducing the records." The rule then defined "reasonable costs of reproducing copies . . . [should] not be more than" a $1.00 for the first 25 pages and 25 cents per page in excess of 25 pages.

16. In 2009, the rule was revised to allow patients and governmental entities to get copies of medical records at that same rate. For all other entities the "reasonable costs of reproducing copies . . . [should] not be more than $1.00 per page."

17. Over the course of 26 months, the Board had access to as much information as the Board staff and interested parties could provide it. The Board heard testimony in no fewer than

nine public hearings.[10/] The proposed rule language was dissected and discussed on multiple levels, and the Board devoted countless hours to listening to and evaluating those comments.

IV. Rule Development

18. In June 2012, the Department of Health (Department) and the Board received an email correspondence on behalf of HealthPort requesting clarification on the costs for reproducing electronic medical records. That correspondence, the current rule 64B8-10.003, and the applicable statutes were placed on the agenda for the Board's August 2012 Rules/Legislative Committee (RLC or Committee) meeting.

19. At the August RLC meeting, the Committee discussed the requested action and heard from an attorney representing HealthPort. The Committee voted to table the item and seek additional information.

20. The Board commenced rulemaking to amend rule 64B8-10.003 in early October 2012. At the RLC meeting on October 11, 2012, the Committee voted unanimously to recommend noticing this proposed change for rule development. The Board's counsel was to draft language for a proposed rule change to be presented at the next RLC meeting.

21. On October 30, 2012, a Notice of Development of Rulemaking (Notice) was published in the Florida Administrative

Register. The Notice listed the "PURPOSE AND EFFECT: [as] The Board proposed the development of rule amendments to address the cost of reproduction of medical records which are stored in an electronic format."

22. At the November 2012 RLC meeting, the Committee received a draft rule proposal, excerpts of the October RLC meeting report, and materials from the October meeting. The Committee heard from various speakers on the proposed rule language. One Committee member suggested that the RLC would benefit from knowing what other state medical boards allowed physicians to charge. Another suggested the Board staff look at a different charge for paper versus electronic production. Following the discussion, the Committee approved two motions: one to move to one rate (but undecided on what that rate would be); and the second to have then Executive Director, Alison Dudley, "come back to [the RLC] with the aspects of what costs are elsewhere so that [the RLC could] make that decision about what that rate and particular medium" is, in order to move forward.

23. The Board's staff prepared a survey that was sent to administrators in medicine via a web portal, asking the following specific questions:

> 1. Does your board have a rule or law that outlines what a physician can

charge for medical records? Flat rate or per page?

2. Does that law or rule delineate different charges for paper medical records versus electronic medical records? What are the charges?

3. Does the law or rule delineate different charges for producing the medical records on paper versus on a CD? What are the charges?

4. Does the law or rule contemplate charges for other services such as diagnostic tests or X-rays? What are the charges?

5. Does your law or rule define "electronic medical record?" If so, what is that definition?

6. Can you share your law and/or rule with us? Thank you for your responses.

Of the 50 or so administrators contacted, the Board staff received 13 responses. Those responses were provided to the RLC for review.

24. At the January 31, 2013, RLC meeting, the agenda included multiple items for the Committee's consideration: the transcript from the November 29, 2013, RLC meeting; excerpts of the RLC report dated December 2012; an email from Ms. Henderson; a 2003 White paper; the costs charged by Florida Clerk of Courts, Florida hospitals, and other Florida health care boards; costs charged by other state medical boards; and all the materials presented at the prior meetings.

25. The Committee received testimony from individuals regarding their understanding of how the proposed changes to the rule would or could affect their patient/clients. As a result of those comments and the RLC's discussion, the Committee voted to have draft language prepared that included one fee for any records release with the following specific language: "stored and delivered in any format or medium." The draft language was to be presented at the next RLC meeting.

26. At the April 4, 2013, RLC meeting, the Committee agenda included excerpts from its January meeting, draft language, and an article regarding the federal Health Portability and Accountability Act (HIPAA) requirements. The Committee heard from individuals again and considered the various recommendations regarding the appropriate language for the proposed rule. The draft language presented at this RLC meeting, in the underline/strike-through method, provided the following:

> Costs of Reproducing Medical Records. Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to

some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records stored and delivered in any format or medium.

(1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.

~~(2) For patients and governmental entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than the following:~~
~~(a) For the first 25 pages, the cost shall be $1.00 per page.~~
~~(b) For each page in excess of 25 pages, the cost shall be 25 cents.~~

(2)~~(3)~~ The ~~For other entities, the~~ reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page.

(3)~~(4)~~ Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs and overhead costs associated with such duplication.

Additionally, the Committee discussed the anticipated financial impact that the proposed changes would have on small businesses, including whether or not a statement of estimated regulatory costs (SERC)[11/] was necessary. The Department staff could not say whether the proposed change would increase the Department's

cost in excess of $200,000 a year. Following the discussion, the Committee voted to table the SERC decision until additional information could be brought before the Board and the proposed draft rule language was approved.

27. The full Board met on April 5 and approved the RLC report which included the approval of the draft rule language. Additionally, the Department staff reported that, after conferring with other staff in Tallahassee, the Department did not feel that the cost associated with the draft rule language would exceed $200,000 a year in the aggregate. The Board voted that a SERC was not required.

28. Between the October 2012 Notice and the May 2013 publication of the proposed rule changes, the RLC met in noticed public meetings discussing the potential rule revision. The rule record is clear that the proposed changes were discussed extensively by Committee members with input from attorneys, residents, association representatives and corporate representatives.

29. On May 15, 2013, a Notice of Proposed Rule (using the proposed language found in paragraph 26 above) was published in the Florida Administrative Register, Vol. 39, No. 95. The purpose for the proposed rule was to provide a single fee for reproducing medical records. The Board received a request for a hearing and numerous comments from the public on the proposed

changes. The rule hearing was scheduled for the next available Board meeting.

30. On August 2, 2013, the Board held a public hearing on the proposed rule in Deerfield Beach. The Board agenda included: the proposed rule 64B8-10.003; the rule hearing request; the rule hearing notice; a summary of the issue for Board consideration submitted by Ms. Henderson; copies of the notices sent regarding the hearing; meeting reports from the RLC meetings held on August 2, 2012, October 11, 2012, November 29, 2012, January 31, 2013, and April 4, 2013; and over 60 written comments. At the Board meeting over 15 people addressed the Board, expressing either opposition to or support of the proposed changes. As a result of the testimony received, the Board chair directed that the public rule hearing be transcribed and the transcript be sent to the RLC for its consideration and determination.

31. At the Orlando RLC meeting on October 3, 2013, the Committee conducted a rule hearing on the proposed rule language. The RLC's agenda included: draft proposed language for the rule; a draft RLC meeting report; a transcript from the August 2, 2013, rule hearing; an article regarding Florida doctors and medical records; and additional comments from seven different sources.

32. The Committee was charged to consider the testimony from the August 2013 public rule hearing, as well as the testimony from this rule hearing to make recommendations to the full Board. The Committee heard testimony from individuals who either opposed or supported the proposed rule.

33. The Committee members asked questions of the various presenters, and provided education to those presenters and attendees as to the multiplicity of medical practices, attendant issues, and personal experiences in dealing with medical records requests. The Committee agreed that the rule should be as set forth in the draft rule language. The Committee also agreed that there might be an "adverse impact" on small businesses, and that a SERC should be prepared.

34. In November 2013, Board staff distributed a survey to 1,419[12/] Florida-licensed physicians seeking responses to the following questions:

> 1. Do you handle the copying of your medical records with your own staff? If yes continue to 1a. If no, go to Question 2.
> Yes. No.
>
> 1a. Do you have a designated staff person who only handles the review and copying of medical records? If yes, continue to 1b. If no, continue to 1c.
> Yes. No.
>
> 1b. How much do you pay this person on a monthly basis, including any benefits that are provided?

1c. How much do you spend on special equipment and supplies (copier, paper etc.) for the copying of medical records annually?

2. If you send your medical records for copying by a service, how much do you pay each month for this service?

3. On average, how many requests for copies of medical records do you receive each month?

The Board staff received 28 responses from the 1,419 surveys sent out. Of those 28 responses, 27 handled the copying of medical records in-house. Twelve practitioners had a designated staff person to review and copy medical records, while 15 did not. Fifteen declined to provide how much their personnel were paid. There was a wide range of pay for the others. The costs associated for special equipment and supplies to provide copies of medical records ranged from $120 to $20,000 per month. Only one practitioner responded that medical records were sent out to a copying service. The number of medical record requests varied from one to more than 600 per month.

35. The next public hearing was held in Orlando on December 6, 2013. The Board materials included: the hearing notice for December 6, 2013; proposed rule language; the transcript of the October 3, 2013, meeting; section 164.524, Access of Individuals to Protected Health Information; new comments received; the survey results; and material from the

previous public hearings and meetings. The Board considered the testimony from the public hearings that had been held on August 2 and October 3. Each speaker was afforded the opportunity to express their position and comments received were either "opposed" or "supported" the proposed rule changes. Following the testimony, the Board voted to change proposed subsection (2) by adding the following language, which is underscored:

> [t]he reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page, <u>but shall not exceed actual costs</u>.

36. Thereafter, the Board again revisited the question of whether a SERC was necessary. The Board considered whether the newly revised language would adversely affect, or was likely to directly or indirectly increase regulatory costs to any entity in excess of $200,000 in the aggregate in Florida within one year of the implementation of the rule. The Board determined that a SERC was necessary.

37. On February 6, 2014, the RLC met in Kissimmee for another public hearing on the proposed rule amendments. The Committee was to consider changes authorized by the Board during its December meeting. The agenda materials included: draft language of the rule; additional correspondence; and the materials from the prior meetings/hearings. If the draft rule

language was approved, two questions had to be addressed: would the proposed rule have an adverse impact on small businesses; and would the proposed rule be likely to directly or indirectly increase regulatory costs to any entity in excess of $200,000 in the aggregate in Florida within one year after its implementation? Testimony was received from several individuals.

38. Following the testimony, the Committee members had a discussion about the terms "actual costs" versus "reasonable costs." The Committee voted to revise the draft rule language to "reasonable costs" and approved a "Notice of Change" to be published. The Committee also determined that the amendment would not have an adverse impact on small businesses, nor was it likely to directly or indirectly increase regulatory costs in excess of $200,000.

39. On April 3, 2014, the RLC held another public hearing in Deerfield Beach on the proposed rule. There remained some inconsistencies in the changes that were approved and the Committee reconsidered the proposed rule language. The material in the RLC's agenda included: materials presented at previous meetings including correspondence; draft changes to the rule; the hearing notice; an article regarding electronic records; an excerpt of the February 2014 meeting; and the transcript of the February 2014 meeting.

40. The Committee received testimony from several speakers who pointed out concerns about the proposed rule, and provided alternatives to it. After the testimony, the Committee voted to have new language prepared addressing those concerns and, in some instances, incorporated alternative suggestions. Additionally, the Committee understood that an additional public hearing would be necessary, and that the SERC might need to be revised.

41. On June 5, 2014, the RLC met in Tampa for another public hearing to consider the revised draft rule language. The agenda included: the hearing notice; the proposed draft language; a proposed SERC; multiple written comments; transcripts from prior RLC and Board meetings where the proposed rule was discussed; and RLC meeting reports. The Committee voted to table the discussion of the proposed rule until another hearing could be held in South Florida.

42. On October 9, 2014, the RLC met in Deerfield Beach and held a rule hearing regarding the revised rule language. The Committee received additional testimony from concerned individuals. The Committee voted to accumulate all the comments and present everything to the full Board at the December 2014 meeting.

43. In October 2014, Ms. Dudley was asked to speak at the Capital Medical Society in Tallahassee. Ms. Dudley took the

opportunity to hand out the survey (found in paragraph 34) to the participants. Although she received four additional responses to the survey, the audience was not physicians, but staff who primarily handled the medical records for medical offices.

44. On December 4, 2014, the RLC met in St. Petersburg for an additional rule hearing on the proposed rule language. The Committee was to review all the comments submitted. The RLC's agenda material included: the hearing notice; the suggested changes to the draft proposed rule from March and May 2014; the excerpt of the RLC meeting report in October 2014; multiple correspondence from concerned individuals; survey responses from physician offices (including the four additional surveys); materials from the prior hearings and RLC meetings; and the proposed SERC.

45. At the beginning of this rule hearing, the Board's executive director provided a suggested revision to the proposed rule by adding a new paragraph: "(4) Accessing medical records through patient portals does not constitute the reproduction of medical records." Testimony was received from various individuals regarding the proposed rule language. The Committee reviewed all the comments submitted. The Committee determined that a SERC should be prepared.

46. The Board held another rule hearing on the proposed rule language on February 6, 2015, in Stuart. The agenda material included: the hearing notice; the draft changes; the excerpt of the RLC meeting; survey responses from physician offices; newly received written comments; a proposed SERC; and materials presented at the previous hearings and meetings. The Board heard testimony from several individuals who either opposed or supported the proposed rule language. The Board reviewed the changes to the proposed rule and the proposed SERC, and heard testimony from presenters. Based on that testimony, the Board members further discussed the proposed rule language and voted to modify it again.

47. After the proposed rule language discussion, the Board then addressed whether it believed, with the latest revision to the draft rule, that a SERC was necessary. The Board voted to accept the SERC as presented.

48. On February 17, 2015, the Joint Administrative Procedures Committee (JAPC) wrote the Board regarding the SERC and inquired as to whether the draft rule would require legislative ratification.

49. As a result of the JAPC inquiry on March 4, 2015, the Board held a telephonic conference meeting. The Board heard from three individuals regarding whether the proposed rule required legislative ratification and the status of the SERC.

The Board determined that the rule would require legislative ratification and the SERC needed to be revised. The Board approved the following changes to the proposed rule (the initial paragraph and sections (1) and (2) are found in paragraph 26 above):

> (3) ~~(4)~~ Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs ~~and overhead costs~~ associated with duplication, plus postage.
>
> (4) Accessing medical records through patient portals does not constitute the reproduction of medical records.

50. On March 12, 2015, the Notice of Change was published in the Florida Administrative Register, and the four petitions were filed. Following the filing of the petitions at DOAH, the parties requested a continuance to allow the Petitioners the opportunity to present their lower-cost alternatives to the Board.

51. At the April 10, 2015, Board meeting, the Board addressed an allegation that the Board had failed to consider five lower-cost regulatory alternatives (Alternatives). The Board had not considered the Alternatives because they had not been filed for the Board's consideration. Once the Alternatives were filed, they were placed on the next available Board agenda.

52. The first Alternative was to leave the rule in its current state. After hearing from interested parties, the Board determined that it had evaluated the issues around the rule and the costs during the prior hearings and meetings. The Board agreed that the status quo was not viable for a variety of reasons. The Board voted to reject this Alternative.

53. The second Alternative asked that the medical record holder only be allowed to charge the actual cost of copying, including reasonable staff time consistent with section 457.057(17). The Board discussed that through the multiple public hearings it had determined that it would be impossible to determine the actual charge for copying. The actual cost for an urban multi-partner physician would be different than a solo practitioner's office in a rural location. The Board voted unanimously to reject this Alternative.

54. The third Alternative asked the Board to conduct an evaluation or study regarding what the actual costs of copying are for medical record holders based on the type of request, type of medical record, the format of the record, and the format of the record to be delivered. The Board discussed what it had heard about in the prior meetings: other states allowed higher levels of reimbursing; and hospitals charged $1.00 per page as authorized by statute. The Board attempted to obtain the data sought but was unsuccessful in obtaining any significant

response. Further, the Board does not have the statutory authority to require physicians to respond to any data or survey requests. The Board voted unanimously to reject this Alternative.

55. The fourth Alternative asked the Board to eliminate the per-page price and impose a restriction that the prices could not exceed the maximum price authorized by HIPAA. The Board did not concur that HIPAA set an exact amount, and trying to determine the costs for each practitioner in each type of practice would be frustrating to all involved. The Board voted unanimously to reject this Alternative.

56. The fifth Alternative asked the Board to keep the current rule, but separate the costs for electronic versus digital copies. The Board discussed the movement towards all electronic medical records, but paper records and other records will still exist. The Board determined that there is a need for the proposed rule to address the current circumstance. The Board voted unanimously to reject this Alternative.

57. Those opposed to the alleged increase testified there was no basis for the change, that the proposed change quadrupled the price for patients and governmental entities, and that it was arbitrary and capricious, especially with respect to electronic records. These opponents fail to recognize changes in medicine. HIPAA brought patient confidentiality and the need

to maintain that confidentiality into sharp focus. Medical practitioners are required to ensure that confidential patient information is not disseminated to unauthorized persons. Physicians must pay to have medical records copied, whether it is done "in-house" or by an ROI provider. Labor costs have increased and the tedious review to ensure that confidential information remains confidential is time-consuming and costly.

58. Medical practices can be quite varied in type, size, sophistication, location, and much more. Petitioners' claim that the proposed rule should be the "actual cost" to the practitioner is impracticable. A general practitioner in a rural solo practice, who receives one request for medical records, might be able to ascertain the "actual cost" to produce that one medical record. A specialist in an urban multi-partner practice group, who receives multiple requests for medical records, would find it nearly impossible to ascertain the "actual cost" to produce each requested medical record without extensive business record-keeping.

59. This proposed rule retains the suggestion that physicians "provide their patients with a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged." Physicians provide medical records, free of charge, to subsequent or specialty physicians

to ensure care. However, physicians are not in the business of repeatedly producing medical records.

60. Those in favor of the proposed rule testified that the cost to physicians for reproducing medical records has not increased in years. The stringent HIPAA requirements placed an additional requirement on health care providers to ensure that private individual health data is kept confidential.

61. The process to release medical records is not simply to pull a paper, digital or electronic medical record, copy it, and send it out the door. The process, as explained, takes valuable time from practitioners and their staff. In a simplified fashion once the request is made: staff must verify the requester's identity and right to obtain the copy; the request must be logged into a HIPAA log; staff must locate and retrieve the medical record in whatever format it is in; staff must redact confidential information; staff must review for specific health treatment records (mental health, alcohol or drug treatment, HIV status) that cannot be provided pursuant to statute; a copy may need to be made or a paper copy may need to be scanned to an electronic disc; and the practitioner must review it to make sure it can be provided as requested. It is a time-consuming process.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to sections 120.56, 120.569 and 120.57(1), Florida Statute. Jurisdiction attaches when a person who is substantially affected by an agency's rule claims that it is an invalid exercise of delegated legislative authority.

Standing

63. Section 120.56(1) provides in pertinent part:

> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.—
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
>
> (b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.
>
> * * *
>
> (e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. Hearings

> shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. Failure to proceed under this section shall not constitute failure to exhaust administrative remedies.

64. Standing is jurisdictional. See State of Fla., Dep't of HRS v. Alice P., 367 So. 2d 1045, 1052-53 (Fla. 1st DCA 1979); see also Abbott Labs. v. Mylan Pharm., Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009). The parties agreed that Mr. Fernandez, HealthPort, and the FMA have standing.

65. To establish that it is "substantially affected," a party must show (1) that the rule or policy will result in a real or immediate injury in fact and (2) that the alleged interest is within the zone of interest to be protected or regulated. Off. of Ins. Reg. & Fin. Servs. Comm'n v. Secure Enters., L.L.C., 124 So. 3d 332, 336 (Fla. 1st DCA 2013). A "real or immediate injury in fact" does not include an injury that is abstract, conjectural, speculative, or hypothetical. See Vill. Park Mobile Home Ass'n, Inc. v. State of Fla., Dep't of Bus. Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987). Rather, a rule challenge petitioner must allege that it has sustained or

is in immediate danger of sustaining some direct injury as a result of the challenged official conduct. Id. Stated a different way, Petitioners' allegations must be of sufficient immediacy and reality to confer standing. Id. (citing Fla. Dep't of Offender Rehab. v. Jerry, 353 So. 2d 1230, 1236 (Fla. 1st DCA 1978) (disapproved on other grounds by Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351 (Fla. 1982)).

66. In order to meet the substantially affected test, each individual or entity must establish that, as a consequence of the proposed rule, each, individually, will suffer injury in fact and that the injury is within the zone of interested to be regulated or protected. Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94 (Fla. 1st DCA 1999). With respect to Petitioner Dax Lonetto, Sr., PLLC, the law firm demonstrated that it would suffer a real or immediate injury should the proposed rule language become effective, thus evidencing an adverse impact.

67. With respect to organizations or associations, in order to be permitted to have standing, a "professional association must demonstrate that (1) a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule[;] . . . (2) the subject matter of the rule [is] within the association's general scope of interest and activity[;] and (3) the relief requested

[is] of the type appropriate for a trade association to receive on behalf of its members." Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351, 353-54 (Fla. 1982).

68. FJA, via Mr. Jess' testimony failed to meet the threshold test. Mr. Jess' "belief" that FJA's members would be adversely impacted is insufficient to find standing.

69. FCAN, via Mr. Newton's testimony also failed to meet the threshold test. Mr. Newton believed that "almost all" of FCAN members would be impacted simply because they go to the doctor. This begs the question of whether or not any member would seek a copy of their medical record or be adversely affected by the proposed rule. Mr. Newton's belief is insufficient to find standing.

70. With respect to Intervenor BACTES, BACTES has established that its "substantial interest" could be affected by the proposed rule language. BACTES' legal status is not the issue at present; the issue is whether or not BACTES' substantial interest could be affected. BACTES has standing.

Burden of Proof and Applicable Legal Standards

71. Section 120.56(2) provides in pertinent part:

> CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—
>
> (a) A substantially affected person may seek an administrative determination of the invalidity of a proposed rule by filing a petition seeking such a

determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a) . . . ; The petition must state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. A person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change. A person who is not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule.

(b) The administrative law judge may declare the proposed rule wholly or partly invalid. Unless the decision of the administrative law judge is reversed on appeal, the proposed rule or provision of a proposed rule declared invalid shall not be adopted. After a petition for administrative determination has been filed, the agency may proceed with all other steps in the rulemaking process, including the holding of a factfinding hearing. In the event part of a proposed rule is declared invalid, the adopting agency may, in its sole discretion, withdraw the proposed rule in its entirety. The agency whose proposed rule has been declared invalid in whole or part shall give notice of the decision in the first

> available issue of the Florida Administrative Register.
>
> (c) When any substantially affected person seeks determination of the invalidity of a proposed rule pursuant to this section, the proposed rule is not presumed to be valid or invalid.

72. The party challenging a proposed agency rule has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(2)(a), Fla. Stat. When any substantially affected person seeks a determination of the invalidity of a proposed rule pursuant to section 120.56(2), the proposed rule is not presumed to be valid or invalid. § 120.56(2)(b), Fla. Stat.

73. A petitioner satisfies its burden of going forward by establishing a factual basis for the objections to the proposed rule. See St. Johns River Water Mgmt. Dist. v. Consol.-Tomoka Land Co., 717 So. 2d 72, 76 (Fla. 1st DCA 1998) (parts superseded by ch. 99-379, §§ 2, 3, Laws of Fla.). This requires the petitioner to offer more than mere conclusions or allegations that a rule is arbitrary or capricious or is an invalid exercise of delegated legislative authority in some other way. See Combs Oil Co. v. Dep't of Fin. Servs., Div. of State Fire Marshall, Case No. 11-3627RP, ¶ 14 (Fla. DOAH Mar. 9,

2012). Rather, the petitioner must offer expert testimony, documentary evidence, or other competent evidence—otherwise, the petitioner's objections amount to nothing more than conjecture and speculation. Id. Only after the petitioner has met its burden of going forward does the burden shift to the agency to demonstrate by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

74. Section 120.52(8) defines what constitutes an "invalid exercise of delegated legislative authority":

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

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 enabling statute.

75. Section 120.536(1) provides in pertinent part:

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 enabling statute.

76. Section 120.54 provides in pertinent part:

(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

* * *

(2) RULE DEVELOPMENT; WORKSHOPS; NEGOTIATED RULEMAKING.—

(a) Except when the intended action is the repeal of a rule, agencies shall provide notice of the development of proposed rules by publication of a notice of rule development in the Florida Administrative Register before providing notice of a proposed rule as required by paragraph (3)(a). The notice of rule development shall indicate the subject area to be addressed by rule development, provide a

short, plain explanation of the purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available.

(b) All rules should be drafted in readable language. The language is readable if:

1. It avoids the use of obscure words and unnecessarily long or complicated constructions; and

2. It avoids the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions.

(c) An agency may hold public workshops for purposes of rule development. An agency must hold public workshops, including workshops in various regions of the state or the agency's service area, for purposes of rule development if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary. . . .

(3) ADOPTION PROCEDURES.—

(a) Notices.—

1. Prior to the adoption, amendment, or repeal of any rule . . . an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the grant of rulemaking

authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented or interpreted. The notice must include a summary of the agency's statement of the estimated regulatory costs, if one has been prepared, based on the factors set forth in s. 120.541(2); a statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by s. 120.541(1), must do so in writing within 21 days after publication of the notice; and a statement as to whether, based on the statement of the estimated regulatory costs or other information expressly relied upon and described by the agency if no statement of regulatory costs is required, the proposed rule is expected to require legislative ratification pursuant to s. 120.541(3). The notice must state the procedure for requesting a public hearing on the proposed rule. Except when the intended action is the repeal of a rule, the notice must include a reference both to the date on which and to the place where the notice of rule development that is required by subsection (2) appeared.

(b) Special matters to be considered in rule adoption.—

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

a. The proposed rule will have an adverse impact on small business; or
b. The proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in this state within 1 year after the implementation of the rule.
2. Small businesses, small counties, and small cities.—

a. Each agency, before the adoption, amendment, or repeal of a rule, shall consider the impact of the rule on small businesses as defined by s. 288.703 and the impact of the rule on small counties or small cities as defined by s. 120.52. Whenever practicable, an agency shall tier its rules to reduce disproportionate impacts on small businesses, small counties, or small cities to avoid regulating small businesses, small counties, or small cities that do not contribute significantly to the problem the rule is designed to address. An agency may define "small business" to include businesses employing more than 200 persons, may define "small county" to include those with populations of more than 75,000, and may define "small city" to include those with populations of more than 10,000, if it finds that such a definition is necessary to adapt a rule to the needs and problems of small businesses, small counties, or small cities. The agency shall consider each of the following methods for reducing the impact of the proposed rule on small businesses, small counties, and small cities, or any combination of these entities:

(I) Establishing less stringent compliance or reporting requirements in the rule.

(II) Establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements.

(III) Consolidating or simplifying the rule's compliance or reporting requirements.

(IV) Establishing performance standards or best management practices to replace design or operational standards in the rule.

(V) Exempting small businesses, small counties, or small cities from any or all requirements of the rule.

b. (I) If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to the rules ombudsman in the Executive Office of the Governor at least 28 days before the intended action.

(II) Each agency shall adopt those regulatory alternatives offered by the rules ombudsman in the Executive Office of the Governor and provided to the agency no later than 21 days after the rules ombudsman's receipt of the written notice of the rule which it finds are feasible and consistent with the stated objectives of the proposed rule and which would reduce the impact on small businesses. When regulatory alternatives are offered by the rules ombudsman in the Executive Office of the Governor, the 90-day period for filing the rule in subparagraph (e)2. is extended for a period of 21 days.

(III) If an agency does not adopt all alternatives offered pursuant to this sub-subparagraph, it shall, before rule

adoption or amendment and pursuant to subparagraph (d)1., file a detailed written statement with the committee explaining the reasons for failure to adopt such alternatives. Within 3 working days after the filing of such notice, the agency shall send a copy of such notice to the rules ombudsman in the Executive Office of the Governor.

(c) Hearings.—

1. If the intended action concerns any rule other than one relating exclusively to procedure or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice of intended agency action, give affected persons an opportunity to present evidence and argument on all issues under consideration. The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule. When a public hearing is held, the agency must ensure that staff are available to explain the agency's proposal and to respond to questions or comments regarding the rule. If the agency head is a board or other collegial body created under s. 20.165(4) or s. 20.43(3)(g), and one or more requested public hearings is scheduled, the board or other collegial body shall conduct at least one of the public hearings itself and may not delegate this responsibility without the consent of those persons requesting the public hearing. Any material pertinent to the issues under consideration submitted to the agency within 21 days after the date of publication of the notice or submitted to the agency between the date of publication of the notice and the end of the final public hearing shall be considered by the

agency and made a part of the record of the rulemaking proceeding.

* * *

(8) RULEMAKING RECORD.—In all rulemaking proceedings the agency shall compile a rulemaking record. The record shall include, if applicable, copies of:
(a) All notices given for the proposed rule.

(b) Any statement of estimated regulatory costs for the rule.

(c) A written summary of hearings on the proposed rule.

(d) The written comments and responses to written comments as required by this section and s. 120.541.

(e) All notices and findings made under subsection (4).

(f) All materials filed by the agency with the committee under subsection (3).

(g) All materials filed with the Department of State under subsection (3).

(h) All written inquiries from standing committees of the Legislature concerning the rule.

77. The Board's interpretation of section 456.057(17), a statute it is charged with administering, is entitled to great deference. Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Bellsouth Telecomms., Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). When an agency committed with authority to implement a statute construes the statute in a permissible

way, that interpretation must be sustained, even though another interpretation may be possible or even, in the view of some, preferable. Humhosco, Inc. v. Dep't of Health and Rehab. Servs., 476 So. 2d 258, 261 (Fla. 1st DCA 1985).

78. An agency is accorded broad discretion and deference in the interpretation of the statutes which it administers, and an agency's interpretation should be upheld when it is within a range of permissible interpretations and unless it is clearly erroneous. Pan Am. World Airways, Inc. v. Fla. Pub. Serv. Comm'n, 427 So. 2d 716 (Fla. 1983); see also Bd. of Podiatric Med. v. Fla. Med. Ass'n, 779 So. 2d 658, 660 (Fla. 1st DCA 2001).

79. An agency is empowered to adopt rules where there is both (1) a statutory grant of rulemaking authority, or statutory language explicitly authorizing or requiring the agency to adopt rules, and (2) a specific law to be implemented. Whiley v. Scott, 79 So. 3d 702, 710 (Fla. 2011). The Legislature delegates rulemaking authority to agencies because agencies generally have expertise in the particular area for which they are given oversight. Id.

80. Courts have, historically, given deference to agencies based on agency expertise in the areas regulated. See, e.g., Wallace Corp. v. City of Miami Beach, 793 So. 2d 1134 (Fla. 1st

DCA 2001) (noting that an agency's construction of a statute it is given power to administer will not be overturned unless clearly erroneous). Traditionally, agencies generally have more expertise in a specific area they are charged with overseeing, and courts have noted the benefit of the agency's technical and/or practical experience in its field. Rizov v. Bd. of Prof'l Eng'rs, 979 So. 2d 979 (Fla. 3d DCA 2008).

81. Section 456.057(17) (paragraph 12 above) and section 458.309 (paragraph 13 above) provide the specific statutory authority and the law implemented for the proposed rule.

82. At hearing, Petitioners failed to present any persuasive evidence that proposed rule 64B8-10.003 is an invalid exercise of delegated legislative authority. The controlling statute 456.057(17), provides for two independent options: a practitioner "shall charge no more than the actual cost of copying, including reasonable staff time, or the amount specified in administrative rule by the appropriate board, or department when there is no board." (Emphasis added).

83. Respondent received a request for a rule revision. Respondent acted on that request by holding multiple meetings and hearings to develop proposed rule language. Once the Board determined its course of action it followed the procedures to enact the rule.

84. The evidence fails to establish that the Respondent has exceeded its grant of rulemaking authority, or that the proposed rule enlarges, modifies or contravenes the specific provision of law being implemented. The evidence fails to establish that the proposed rule is vague, that it fails to establish adequate standards, or that it vests unbridled discretion in the agency. The evidence fails to establish that the proposed rule is an invalid exercise of delegated legislative authority, or is arbitrary or capricious as those terms are defined by section 120.52(8).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the proposed changes to rule 64B8-10.003 do not constitute an invalid exercise of delegated legislative authority. Accordingly, the petitions are DISMISSED.

DONE AND ORDERED this 8th day of December, 2015, in Tallahassee, Leon County, Florida.

LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of December, 2015.

ENDNOTES

[1/] In the "Relief Sought" section of Daniel R. Fernandez's Petition For Administrative Hearing Determining Invalidity of Proposed Rule; Dax J. Lonetto, Sr., PLLC's Petition for Administrative Hearing Determining Invalidity of Proposed Rule; and Florida Consumer Action Network, Inc.'s Petition for Administrative Hearing Determining Invalidity of Proposed Rule, the following was requested of the Division:

> a) Conduct a formal hearing on this Petition pursuant to Sections 120.56, 120.569, and 120.57, Florida Statutes,
>
> b) Enter a final order determining that the Proposed Rule is an invalid exercise of delegated legislative authority,
>
> c) Award Petitioner its costs and attorneys' fees incurred in this proceeding, and
>
> d) Provide such other relief as deemed appropriate.

The only difference (underlined below) between the above section of the "Relief Sought" in the Florida Justice Association's Petition for Determination of Invalidity of BOM's Proposed Medical Records Increase Rule is found in paragraph (b) which provides the following:

> b) Enter a final order determining that the Medical Records Increase Rule is an invalid exercise of delegated legislative authority.

[2/] Within this unopposed motion, the undersigned was advised that all the parties:

> [a]greed to waive the 30-day hearing deadline established by Section 120.56(1)(c), Florida Statutes, and

> agree that the final hearing date should be continued.

(See Respondent's Motion to Abate, Continue and Consolidate, page 3, paragraph 7.)

[3/] In BACTES' Motion for Leave to Intervene, filed on April 16, the undersigned was apprised of the following:

> Pursuant to Rule 28-106.204(3), F.A.C., the undersigned has conferred with David Caldevilla, counsel for Petitioners Daniel Fernandez, Dax J. Lonetto, Sr., PPLC and Florida Consumer Action Network, Inc., and is authorized to advise that such Petitioners consent to BACTES' request to intervene. The undersigned also sent an email to counsel for the Florida Justice Association on April 9, 2015 inquiring as to its position on the relief requested in this motion, but has not yet received responses. Upon receipt, the undersigned will supplement this filing and advise as [sic] the Florida Justice Association's position regarding the requested intervention. (Emphasis added).

On April 21, BACTES filed a Notice of Supplemental Conferral Regarding Bactes Imaging Solution, Inc.'s Motion For Leave To Intervene, and apprised the undersigned of the following:

> Pursuant to Rule 28-106.204(3), F.A.C., BACTES Imaging Solutions, Inc. ("BACTES") notifies the Court that following the filing of its Motion For Leave to Intervene on April 9, 2015, BACTES has conferred with the counsel for Florida Justice Association and is authorized to represent that Florida Justice Association does not object to BACTES' request to intervene. Consequently, none of the Petitioners object to the requested intervention. (Emphasis added).

In HealthPort's Motion for Leave to Intervene, filed on April 23, the undersigned was apprised of the following:

> As required by Rule 28-106.204(3), Florida Administrative Code, the undersigned attorneys for HealthPort have conferred with David Caldevilla and Scott R. Jeeves, counsel for Petitioners Daniel Fernandez, Dax J. Lonetto, Sr., PPLC, and Florida Consumer Action Network, Inc.: and G.C. Murray, Jr., counsel for Petitioner Florida Justice Association, all of whom have authorized the undersigned to represent that they have no objection to this Motion for Leave to Intervene, on the condition that the undersigned also represent that they reserve the right to later challenge HealthPort's standing in this matter. The undersigned have also conferred with Edward Tellechea, counsel for Respondent State of Florida, Department of Health, Board of Medicine; and Michael Fox Orr, counsel for Intervenor BACTES Imaging Solutions, Inc., who have authorized the undersigned to represent that they support this Motion for Leave to Intervene.

In the FMA's Motion for Leave to Intervene, filed on April 28, the undersigned was apprised of the following:

> Per Rule 28-106.204(3), F.A.C., the undersigned attorneys for the FMA have conferred with David Caldevilla, counsel for Petitioners Daniel Fernandez, Dax J. Lonetto, Sr., PPLC, and Florida Consumer Action Network, Inc., and G.C. Murray counsel for Florida Justice Association and is [sic] authorized to advise that such Petitioners consent to the FMA's request to intervene. The Florida Justice Association reserved the right to later challenge the FMA's standing in this matter. The undersigned have also conferred with Edward Tellechea, counsel for Respondent State of Florida,

> Department of health [sic], Board of Medicine; with Michael Fox Orr, counsel for Intervenor BACTES Imaging Solutions, Inc.; and with Dan R. Stengle, Counsel for HealthPort Technologies, LLC, who have authorized the undersigned to represent their support for this Motion for Leave to Intervene.

[4/] All admitted pages of the rule record from the multiple BOM meetings, public hearings and committee meetings were read. A chronologically concise rule record, without duplicates (duplicates were not read, but reviewed) would have been appreciated.

During the hearing, Petitioners voiced concerns over the status of objections interjected during the deposition of Mr. Newton. A review of that specific deposition does not reflect any "certified" questions for the undersigned to determine.

Each deposition was read. There were "certified questions" in the following depositions: Mr. Rohs; Mr. Probst; and Mr. Bailey. The 21 certified questions were covered in the Protective Order.

[5/] Respondent's cross-noticed deposition transcript of Alan Pillersdorf, M.D., was inadvertently treated as a separate deposition, and not included with the original deposition transcript, Exhibit JT-9.

[6/] Mr. Lonetto also has handled some long-term disability Employee Retirement Income Security Act claims, but they do not comprise a significant part of his practice.

[7/] FCAN will go outside these four main areas if it believes it is a consumer issue; however, these four areas are FCAN's mainstay.

[8/] During the August 13, 2015, deposition of Mr. Bailey, Petitioners elicited that BACTES Imaging Solution, Inc., had, in August 2013, voluntarily surrendered its authority to transact business or conduct affairs in Florida. While there may be a paper trail that BACTES is not authorized to transact business or conduct affairs in Florida, during the 29 months of the Board's committee hearings, Board meetings and workshops, BACTES' was in fact conducting business in Florida.

[9/] Section 456.057(18) was renumbered in 2013 to section 456.057(17) Florida Statutes. Petitioners, in a footnote on page 3 of their PFO averred that "[T] he parties agree that the statute being implemented is actually 456.057(17), not (18)."

Florida Administrative Code Rule 1-1.012,(4) provides: The rulemaking authority, law implemented and history notes shall be corrected or modified by writing a letter to the Administrative Code and Register Section. Such a change does not require notification in the Florida Administrative Register.

[10/] The undersigned finds that the June 2014 RLC meeting did not constitute a full public hearing because the proposed rule was tabled without taking any testimony and rescheduled to be heard in South Florida.

[11/] Section 120.541 provides the parameters of a statement of estimated regulatory costs.

[12/] Ms. Dudley explained that the 1,419 physicians are part of an "active campaign." The Board established a website, and physicians signed up to receive e-mail blasts from the Board. However, physicians were not (and are not) required to join the active campaign.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.