Aida S. Montano *Legislative Service Commission*

Sub. S.B. 265*

124th General Assembly
(As Reported by H. Civil & Commercial Law)

Sens. Hottinger, Amstutz, Spada, Finan, Harris

BILL SUMMARY

- Permits the incorporation of a text or other material into an administrative rule by reference if certain specified procedures are followed.

- Permits the Joint Committee on Agency Rule Review to recommend the adoption of a concurrent resolution invalidating a rule or a proposed rule if the rule incorporates a text or other material by reference and the agency that adopted or proposed the rule failed to file, deposit, or display the incorporated text or material as required by the bill or the incorporation by reference fails to meet the bill's standards.

- Requires an agency that files an original rule or a revised version of a rule in either proposed form or for review and that incorporates a text or other material by reference to file in electronic form with the Joint Committee on Agency Rule Review (JCARR) one complete and accurate copy of the text or other material incorporated by reference or to deliver one such copy to JCARR if it is not feasible to file it electronically.

- Requires an agency that files a rule in final form that incorporates a text or other material by reference to deposit one copy of the text or other material at a specified depository library or to display on a web site the text or other material incorporated by reference in the administrative rule.

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* *This analysis was prepared before the report of the House Civil and Commercial Law Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Provides exemptions to the requirements for filing, depositing, or displaying text or other material that has been incorporated by reference in an administrative rule.

- Expands the information that must be contained in a rule summary and fiscal analysis submitted to JCARR when the proposed rule incorporates a text or other material by reference.

- Requires the State Library Board to designate by rule five depository libraries so as to provide statewide, geographically distributed accessibility to agency deposits of texts or other materials that have been incorporated by reference into rules, for the deposit of text or other material that has been incorporated by reference in an administrative rule and requires the Board to use emergency rule-making procedures to designate the libraries in anticipation of the first applicability of the bill's provisions.

- Permits certain emergency rules to be readopted as emergency rules during the legislative review carry-over period.

- Provides special rules and procedures for the applicability and the implementation of the provisions of the bill.

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CONTENT AND OPERATION

Incorporation into administrative rules of a text or other material by reference

The bill permits a rule, proposed rule, amendment to a rule, or rescission of a rule to incorporate a text or other material by reference if the agency promulgating the rule complies with the bill's requirements outlined below (R.C. 111.15(B)(1)(b) and 119.03(B)).

The bill provides that an agency incorporates a text or other material into a rule by reference when it states in the rule that a text or other material not contained in the rule is to be treated as if it were contained in the rule. The agency is required to explain in the rule how persons who reasonably can be expected to be affected by the rule can obtain copies of the text or other material that has been incorporated by reference. As part of that explanation, the agency must state whether the incorporated text or other material is, or is to be, deposited in depository libraries or displayed on a web site. If the text or other material incorporated by reference in the rule was, is, or reasonably can be expected to be subject to change, the agency, as part of the explanation, must identify, and specify the date of, the particular edition or other version of the text or other material that is incorporated by reference in the rule. As used in these provisions, "rule" means a new rule or an amendment to an existing rule and includes an appendix or an attachment to a rule. (R.C. 121.72 and 121.71(B).)

Rules filings with JCARR

If an agency files the original or a revised version of a rule, including the rescission of an existing rule, in proposed form to the Joint Committee on Agency Rule Review (JCARR) or files a rule for review with JCARR and if that rule incorporates a text or other material by reference, the bill requires the agency to also file with JCARR in electronic form, one complete and accurate copy of the text or other material incorporated by reference in the rule. An agency is not, however, required to file the incorporated text or other material with JCARR if the agency revises a rule in proposed form that incorporates a text or other material by reference and the incorporation by reference in the revised version of the rule is identical to the incorporation by reference in the preceding version of the rule.

If it is infeasible for the agency to file a text or other material incorporated by reference in a rule electronically, the bill requires the agency to deliver one complete and accurate copy of the text or other material incorporated by reference in the rule to JCARR and to attach a memorandum to the text or other material identifying the rule to which it relates. The bill requires the filing of the copy of the text or other material as soon as possible, but not later than three days, after completing the electronic filing of the rule.

An agency is not required to file a text or other material incorporated by reference into a rule that is proposed for rescission if it is infeasible for the agency to do so.

An agency is prohibited from filing a copy of the text or other material incorporated by reference in a rule with the Secretary of State or with the Director of the Legislative Service Commission (LSC). (R.C. 121.73(A).)

Upon completing its review of a rule in proposed form, or its review of a rule that incorporates a text or other material by reference, JCARR is required to forward its copy of the text or other material incorporated by reference in the rule to the Director of LSC. The bill requires the Director to maintain a file of texts and other materials that are or were incorporated by reference into rules. (R.C. 121.73(B).)

Rule, as used in these provisions, has the same meaning as described above in "***Incorporation into administrative rules of a text or other material by reference***," and also includes the rescission of an existing rule (R.C. 121.73 and 121.71(B)).

Depositing in depository libraries or displaying on a web site text or other material incorporated in a rule by reference

The bill states that when an agency files a rule, including the rescission of an existing rule, in final form to JCARR, the Secretary of State, and the Director of LSC that incorporates or incorporated a text or other material by reference, the agency, prior to the effective date of the rule, must either: (1) deposit one complete and accurate copy of the text or other material incorporated by reference in each of the five depository libraries designated by the State Library Board, or (2) display a complete and accurate copy of the text or other material incorporated by reference on a web site maintained or made available by the agency.

The bill does not require an agency to comply with the above provision if the text or other material incorporated by reference in the rule that is being filed in its final form is identical to a text or other material the agency, at the time compliance with the above provision otherwise would be required, already is depositing or displaying pursuant to that provision. (R.C. 121.74.)

Rule, as used in these provisions has the same meaning as described above in "***Incorporation into administrative rules of a text or other material by reference***," and also includes the rescission of an existing rule (R.C. 121.74 and 171.71(B)).

Exemptions to the filing, depositing, or displaying of text or other material incorporated by reference in a rule

The bill states that the above requirements for the filing of a rule and for the depositing in depository libraries or the displaying on a web site of text or other material incorporated by reference in that rule do not apply to certain specified texts or other materials described below so long as the incorporation by reference consists of both of the following: (1) a citation that will be intelligible to the persons who reasonably can be expected to be affected by the rule, and (2) a citation that identifies, and specifies the date of, the particular edition or other version of the text or other material that is incorporated if the incorporated text or other material was, is, or reasonably can be expected to be subject to change.

The specified texts or other materials specifically exempted from the requirements for the depositing or displaying of text or other material incorporated by reference in a rule are as follows: (1) a section of the United States Code, (2) an uncodified federal statute, if it has been appended as a legislative note to a section in the United States Code, (3) an act of this state in the Laws of Ohio or a federal act in the Statutes at Large, (4) a regulation in the Federal Register or Code of Federal Regulations, or (5) a text or other material including, without limitation, generally accepted industry standards, that is generally available to persons who reasonably can be expected to be affected by the rule. (R.C. 121.75.)

Other exemptions

The above provisions do not apply to the incorporation by reference of: (1) a section of the Revised Code, (2) an uncodified statute of this state, or (3) a rule in the Administrative Code.

The above provisions of the bill do not apply to an internal management rule (see **COMMENT** 1) or a rule insofar as the rule is necessary to obtain or maintain authorization of a federally delegated program in Ohio, or insofar as it is necessary to maintain compliance with federal requirements in order to receive federal funds for a federally funded program, and, in regard to that authorization or compliance, incorporates a text or other material by reference. The bill recommends that a rule exempt because it is necessary to obtain or maintain authorization of a federally delegated program in Ohio or to maintain compliance with federal requirements to receive federal funds for a federally funded program, nevertheless incorporate by reference a particular edition or other version of the text or other material. (R.C. 121.76.)

Failure to comply with text or other material incorporated by reference standards

Existing law provides that JCARR may recommend to the General Assembly the adoption of a concurrent resolution invalidating a proposed rule, amendment, rescission, or part of the proposed rule, amendment, or rescission if it finds any of the following: (1) that the rule-making agency has exceeded the scope of its statutory authority in proposing the rule, amendment, or rescission, (2) that the proposed rule, amendment, or rescission conflicts with another rule, amendment, or rescission adopted by the same or a different rule-making agency, (3) that the proposed rule, amendment, or rescission conflicts with the legislative intent in enacting the statute under which the rule-making agency proposed the rule, amendment, or rescission, or (4) that the rule-making agency has failed to prepare a complete and accurate rule summary, fiscal analysis, or both, of the proposed rule, amendment, or rescission. The bill adds the following finding to those under which JCARR may recommend the adoption of a invalidating concurrent resolution: the proposed rule, amendment, or rescission incorporates a text or other material by reference, and either the rule-making agency has failed to file electronically with JCARR the text or other material incorporated by reference as required by the bill or failed to deliver one copy of such to JCARR if electronic filing is not feasible, or, in the case of a proposed rule or amendment, the incorporation by reference fails to meet the standards stated in the bill as described above (R.C. 119.03(I).)

Review of existing rules

Existing law requires all the rules of an agency to be reviewed every five years, by both the agency and JCARR, generally reviewing 20% each year. Prior to the review date of a rule, the agency that adopted the rule is required to review the rule to determine whether a number of specified actions should be taken on the rule. The bill adds to those specified review criteria a requirement that the agency determine whether the rule incorporates a text or other material by reference and, if so, whether the text or other material incorporated by reference is deposited or displayed as required by the bill and described above and whether the incorporation by reference meets the standards stated in the bill as described above. (R.C. 119.032(C)(3).)

Existing law further provides that after JCARR receives a notice that a rule has been reviewed by an agency, JCARR, by a two-thirds vote of the members present, may recommend the adoption of a concurrent resolution invalidating the rule if it determines that either of the following applies: (1) the agency improperly applied the criteria necessary in reviewing the rule and in recommending its continuance without amendment or rescission, or (2) the agency failed to file proper notice with JCARR regarding the rule. The bill additionally permits JCARR to recommend the adoption of a concurrent resolution invalidating the rule

if it determines that the rule incorporates a text or other material by reference, that the agency failed to file, deposit, or display the text or other material incorporated by reference as required by the bill as described above or the incorporation by reference fails to meet the standards stated in the bill as described above. (R.C. 119.032(E)(3)(b).)

Rule summary and fiscal analysis

Existing law

Under existing law, a rule-making agency must prepare, in the form prescribed by JCARR, a complete and accurate rule summary and fiscal analysis of each proposed rule that it files under R.C. 111.15(D) or 119.03(H). Existing law specifies information that the rule summary and fiscal analysis must include. (R.C. 127.18(B).) This information includes (R.C. 127.18(B)):

(1) The name, address, and telephone number of the rule-making agency, and the name and telephone number of an individual or office within the agency designated by that agency to be responsible for coordinating and making available information in the possession of the agency regarding the proposed rule;

(2) The Ohio Administrative Code rule number of the proposed rule;

(3) A brief summary of, and the legal basis for, the proposed rule;

(4) An estimate, in dollars, of the amount by which the proposed rule would increase or decrease revenues or expenditures during the current biennium;

(5) A citation identifying the appropriation that authorizes each expenditure that would be necessitated by the proposed rule;

(6) A summary of the estimated cost of compliance with the rule to all directly affected persons;

(7) The reasons why the rule is being proposed;

(8) If the rule has a fiscal effect on school districts, counties, townships, or municipal corporations, an estimate in dollars of the cost of compliance with the rule, or, if dollar amounts cannot be determined, a written explanation of why it was not possible to ascertain dollar amounts;

(9) If the rule has a fiscal effect on school districts, counties, townships, or municipal corporations and is the result of a federal requirement, a clear explanation that the proposed state rule does not exceed the scope and intent of the requirement, or, if the state rule does exceed the minimum necessary federal

requirement, a justification of the excess cost, and an estimate of the costs, including those costs for local governments, exceeding the federal requirement;

(10) If the rule has a fiscal effect on school districts, counties, townships, or municipal corporations, a comprehensive cost estimate that includes the procedure and method of calculating the costs of compliance and identifies major cost categories including personnel costs, new equipment or other capital costs, operating costs, and indirect central service costs related to the rule. The fiscal analysis must also include a written explanation of the agency's and the affected local government's ability to pay for the new requirements and a statement of any impact the rule will have on economic development.

(11) Any other information the Joint Committee on Agency Rule Review considers necessary to make the proposed rule or the fiscal effect of the proposed rule fully understandable.

Operation of the bill

The bill requires that the rule summary and fiscal analysis additionally include the following information (R.C. 127.18(B)(11), (12), and (13)):

(1) If the rule incorporates a text or other material by reference, and the agency claims the incorporation by reference is exempt from compliance with the standards stated in the bill as described above because the text or other material is generally available to persons who reasonably can be expected to be affected by the rule, an explanation of how the text or other material is generally available to those persons;

(2) If the rule incorporates a text or other material by reference, and it was infeasible for the agency to file the text or other material electronically, an explanation of why filing the text or other material electronically was infeasible;

(3) If the rule is being rescinded and incorporates a text or other material by reference, and it was infeasible for the agency to file the text or other material, an explanation of why filing the text or other material was infeasible.

Definitions

The bill for the purposes of its new provisions generally defines "agency" to mean an agency as defined in R.C. 111.15 and 119.01 (see **COMMENT** 2) (R.C. 121.71(A)).

The bill for the purposes of its new provisions generally defines "rule" to mean a new rule or an amendment to an existing rule. "Rule" also includes an appendix or an attachment to a rule. (R.C. 121.71(B).)

State Library Board powers

The State Library Board is responsible for the State Library of Ohio and a statewide program of development and coordination of library services. The Revised Code specifies the powers that the Board may exercise in fulfilling its mission. The bill requires the Board to designate by rule five depository libraries so as to provide statewide, geographically distributed accessibility to agency deposits of texts or other materials that have been incorporated by reference into rules. (R.C. 3375.01(J).)

Emergency rules during the legislative review carry-over period

Existing law permits a proposed rule, amendment, or rescission that is filed with JCARR to be carried over for legislative review to the next succeeding regular session of the General Assembly if the original or any revised version of the proposed rule, amendment, or rescission is filed with JCARR on or after the first day of December of any year (R.C. 119.03(I)(2)(a)). However, existing law also provides that an emergency rule, amendment, or rescission becomes invalid at the end of the 90th day after it is in effect. Prior to that date, the agency may adopt the emergency rule, amendment, or rescission as a nonemergency rule, amendment, or rescission by complying with the specified procedure for the adoption, amendment, and rescission of nonemergency rules. The agency must not use the procedure to readopt the emergency rule, amendment, or rescission so that, upon the emergency rule, amendment, or rescission becoming invalid under the above provision, the emergency rule, amendment, or rescission will continue in effect without interruption for another 90-day period. The bill provides that an emergency rule, amendment, or rescission may be readopted as an emergency rule if the legislative carry-over provision prevents the agency from adopting the emergency rule, amendment, or rescission as a nonemergency rule, amendment, or rescission within the specified 90-day period. (R.C. 119.03(F).)

Applicability and implementation of provisions of the bill

The bill states that the existing sections amended by the bill and the sections enacted by the bill first apply one month after the effective date of the bill. The bill requires the State Library Board to use the existing emergency rule-making procedure to designate depository libraries as specified in the bill in anticipation of the depository provision of the bill becoming first applicable. (See **COMMENT** 3) The bill further states that the amendment by the act relating to emergency rules during the legislative review carry-over period first applies on the effective date of the bill. (Section 3.)

The bill states that if, on the date of first applicability, an agency has proposed a new rule or the amendment of an existing rule that incorporates a text or other material by reference pending in a rule-making proceeding, the agency is

not required to revise the proposed new rule or the amendment of an existing rule solely to bring the incorporation by reference into compliance with the standards stated in R.C. 121.72, 121.75, and 121.76, as enacted by the bill. But if the agency on or after the date of first applicability otherwise revises the proposed new rule or the amendment of an existing rule, the agency must ensure the incorporation by reference meets the standards stated in those sections and must file, and eventually deposit or display, the text or other material incorporated by reference as required by those sections. (Section 4(A).)

An agency may adopt and file in final form a proposed new rule or the amendment of an existing rule that, on the date of first applicability, incorporates a text or other material by reference, is pending in a rule-making proceeding, and is not on or after the date of first applicability otherwise revised. The agency is not required to have filed, or to deposit or display, the text or other material incorporated by reference as required by the bill, and the incorporation by reference is not required to meet the standards stated in the bill. So long as all other applicable rule-making procedures have been complied with, the new rule or the amendment of an existing rule as adopted and filed in final form is ratified. The provisions of this bill first apply with regard to the incorporation by reference when the new rule or the amendment of an existing rule is next amended or next reviewed. (Section 4(B).)

The bill states that a new rule or the amendment of an existing rule that incorporates a text or other material by reference and that is effective, or that has been adopted and filed in final form, on or before the date of first applicability, is ratified. The adopting agency is not required to amend the rule solely to bring the incorporation by reference into compliance with the standards stated in the bill and is not required to deposit or display the text or other material incorporated by reference as required by the bill. But when the new rule or the amendment of an existing rule is next otherwise amended, or next otherwise reviewed, the agency must ensure that the incorporation by reference meets the standards stated in this bill, and that the text or other material incorporated by reference is filed, and eventually deposited or displayed, as required by this bill. (Section 5.)

The bill states that if, on the date of first applicability, an agency has a proposed rescission of an existing rule that incorporates a text or other material by reference pending in a rule-making proceeding, the agency is not required to file the incorporated text or other material as required by the bill. But if the agency on or after the date of first applicability otherwise revises the proposed rescission, the agency must file, and eventually deposit or display, the incorporated text or other material as required. (Section 6(A)(1)(a).)

The bill states that an agency may adopt and file in final form a proposed rescission of an existing rule that on the date of first applicability incorporates a text or other material by reference, is pending in a rule-making proceeding, and is

not on or after the date of first applicability otherwise revised. The agency is not required to have filed, or to deposit or display, the text or other material incorporated by reference as required by the bill. So long as all other applicable rule-making procedures have been complied with, rescission of the existing rule is ratified. (Section 6(A)(1)(b).)

A rescission of an existing rule that incorporates a text or other material by reference that has been adopted and filed in final form on or before the date of first applicability is ratified. The adopting agency is not required to have filed, or to deposit or display, the incorporated text or other material as required by R.C. 121.73 or 121.74, as enacted by the bill. (Section 6(A)(2).)

The bill states that if an agency rescinds an existing rule subject to division (B) of Section 4 or to Section 5 of the bill that is not amended or reviewed after the date of first applicability as contemplated by those sections, the agency must file the incorporated text or other material as required by the bill and must deposit or display the incorporated text or other material as required (Section 6(A)(3)).

The bill further states that a rescinded existing rule as contemplated above that, while previously effective, incorporated a text or other material by reference without conforming in essence to the bill, is ratified insofar as the incorporation by reference might raise a question of the existing rule's validity as applied to facts occurring while the existing rule was effective (Section 6(B)).

The bill states that a previously effective rule or version of a rule, not effective on the date of first applicability, that, while previously effective, incorporated a text or other material by reference without conforming in essence to what the bill in future would provide, is ratified insofar as the incorporation by reference might raise a question of the rule's or version's validity as applied to facts occurring while the rule or version previously was effective. As used in this paragraph, "rule" means a pre-existing rule that has been rescinded, or a provision, formerly part of an existing rule, that has been removed from the existing rule by amendment. (Section 7.)

The bill also states that the above paragraph is cumulative to Section 59 of Am. Sub. H.B. 524 of the 124th General Assembly and is a remedial law as that term is used in R.C. 1.11 (Section 7).

COMMENT

1. "Internal management rule" means any rule, regulation, bylaw, or standard governing the day-to-day staff procedures and operations within an agency (R.C. 111.15(A)(3)).

2. R.C. 111.15(A)(2) defines "agency" to mean any governmental entity of the state and includes, but is not limited to, any board, department, division, commission, bureau, society, council, institution, state college or university, community college district, technical college district, or state community college. "Agency" does not include the General Assembly, the Controlling Board, the Adjutant General's department, or any court.

R.C. 119.01(A) defines "agency" to mean, except as specifically limited, any official, board, or commission having authority to promulgate rules or make adjudications in the Civil Service Commission, the Division of Liquor Control, the Department of Taxation, the Industrial Commission, the Bureau of Workers' Compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to R.C. 119.01 to 119.13, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

Except as otherwise provided, R.C. 119.01 to 119.13 do not apply to the Public Utilities Commission. Sections 119.01 to 119.13 of the Revised Code do not apply to the Utility Radiological Safety Board; to the Controlling Board; to actions of the Superintendent of Financial Institutions and the Superintendent of Insurance in the taking possession of, and rehabilitation or liquidation of, the business and property of banks, savings and loan associations, savings banks, credit unions, insurance companies, associations, reciprocal fraternal benefit societies, and bond investment companies; or to any action that may be taken by the Superintendent of Financial Institutions under R.C. 1113.03, 1121.05, 1121.06, 1121.10, 1125.09, 1125.12, 1125.18, 1155.18, 1157.01, 1157.02, 1157.10, 1163.22, 1165.01, 1165.02, 1165.10, 1733.35, 1733.361, 1733.37, 1733.412, or 1761.03.

Sections 119.01 to 119.13 of the Revised Code do not apply to actions of the Industrial Commission or the Bureau of Workers' Compensation under R.C. 4123.01 to 4123.94 with respect to all matters of adjudication, and to the actions of the Industrial Commission and Bureau of Workers' Compensation under R.C. 4121.32(D), 4123.29, 4123.34, 4123.341, 4123.342, 4123.40, 4123.411, 4123.44, 4123.442, and R.C. section 4131.14(B), (C), and (E).

R.C. 119.01(A) also defines "agency" to mean any official or work unit having authority to promulgate rules or make adjudications in the Department of Job and Family Services, but only with respect to both of the following: (1) the adoption, amendment, or rescission of rules that R.C. 5101.09 requires be adopted in accordance with that chapter, and (2) the issuance, suspension, revocation, or cancellation of licenses.

3. Unless otherwise specified, "date of first applicability" means one month after the effective date of this act.

4. The Franklin County Court of Appeals, in *B&T Express, Inc. v. Pub. Util. Comm.* (2001 Oh. App. 10 Dist.), 145 Ohio App.3d 656, held that the Federal Motor Carrier Safety Regulations (FMCSRs) adopted by the Public Utilities Commission of Ohio (PUCO) are "rules" for purposes of R.C. 111.15. Therefore, the PUCO was required to file the FMCSRs that it adopted with the Secretary of State, LSC, and JCARR pursuant to R.C. 111.15(B) and (D). Because the PUCO failed to comply with these filing requirements, the FMCSRs that it adopted are invalid and it appears that any material adopted in a rule by reference without publication would also be invalid.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-09-02	p. 1759
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