STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRYAN YAMHURE and HENRY YAMHURE,	)	
Petitioners,	)	
vs.	)	Case No. 02-4003RX
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
Respondent.	)	

FINAL ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tallahassee, Florida, on November 15, 2002.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Rule 5J-10.001, Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority, pursuant to Section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

By Petition to Determine Invalidity of Existing Rule filed October 15, 2002, Petitioners challenged Rule 5J-10.001, Florida Administrative Code. The petition alleges that Petitioner Bryan Yamhure has owned at least ten percent of Premier Travel International, Inc., Travelease International, Inc., and Brylec, Inc. The petition alleges that Petitioner Henry Yamhure previously owned ten percent or more of Premier Travel International, Inc.

The petition alleges that Respondent issued an Administrative Complaint on July 26, 2002, alleging, in part, that each Petitioner was individually liable for alleged violations by Premier Travel International, Inc., of the Sale of Business Opportunities Act, Chapter 559, Part VIII, Florida Statutes.

The petition alleges that, in DOAH Case No. 02-3374, Respondent's Amended Administrative Complaint relies on Rules 5J-10.001(3) and (4), Florida Administrative Code. The petition concludes that Petitioners are substantially affected by Rule 5J-10.001, Florida Administrative Code.

The petition alleges that Rule 5J-10.001, Florida Administrative Code, is an invalid exercise of delegated legislative authority because the rule, which cites Section 570.07(23), Florida Statutes, exceeds the rulemaking authority granted Respondent; in the rule, Respondent has exceeded its grant of rulemaking authority by adopting definitions broader than those established by statute; the rule enlarges, modifies, and contravenes the law implemented; the rule is arbitrary and capricious; the rule is not supported by competent substantial evidence; and Rule 5J-10.001(4) creates an unconstitutional irrebuttable presumption.

The petition seeks an order declaring Rule 5J-10.001, Florida Administrative Code, to be invalid and awarding Petitioners their reasonable costs and attorneys' fees, pursuant to Section 120.595(3), Florida Statutes.

In the Prehearing Stipulation filed November 14, 2002, the parties stipulated to numerous facts. At the hearing, Petitioners and Respondent called no witnesses. Petitioners offered into evidence three exhibits: Petitioners Exhibits 1-3. Respondent offered into evidence two exhibits: Respondent Exhibits 1-2. All exhibits were admitted. Additionally, the Administrative Law Judge took official notice of the Administrative Complaint in DOAH Case No. 02-3374, the Amended Administrative Complaint in DOAH Case No. 02-3374, the Immediate

Final Cease and Desist Order issued by Respondent on July 26, 2002, the rulemaking package accompanying the adoption of Rule 5J-10.001 in 1995 and filed by Respondent with the Secretary of State, and Section 570.07, Florida Statutes (Supp. 1994).

The court reporter filed the transcript on December 10, 2002. The parties filed their proposed final orders on December 24, 2002.

FINDINGS OF FACT

1. Pursuant to Sections 559.801(2) and 559.813(2), Florida Statutes, Respondent has exclusive administrative jurisdiction over the Sale of Business Opportunities Act, Chapter 559, Part VIII, Florida Statutes, and shares judicial enforcement over the Act with the Florida Department of Legal Affairs and the applicable office of the state attorney. (Unless stated otherwise, all references to "Sections" shall be to Florida Statutes, all references to the "Act" shall be to the Sale of Business Opportunities Act, and all references to "Rules" shall be to the Florida Administrative Code.)

2. The Act governs the sale or lease of certain business opportunities in Florida. Sections 559.803 and 559.804 respectively require sellers of covered business opportunities to provide timely disclosures to prospective purchasers and to file annual disclosure statements with Respondent prior to advertising or offering covered business opportunities for sale.

3. More relevant to this case, Section 559.801 sets forth the definitions that establish the coverage of the Act:

> 559.801 Definitions.--For the purpose of ss. 559.80-559.815, the term:
>
> (1)(a) "Business opportunity" means the sale or lease of any products, equipment, supplies, or services which are sold or leased to a purchaser to enable the purchaser to start a business for which the purchaser is required to pay an initial fee or sum of money which exceeds $500 to the seller, and in which the seller represents:
>
> 1. That the seller or person or entity affiliated with or referred by the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases, currency or card operated equipment, or other similar devices or currency-operated amusement machines or devices on premises neither owned nor leased by the purchaser or seller;
>
> 2. That the seller will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using in whole or in part the supplies, services, or chattels sold to the purchaser;
>
> 3. That the seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid or rent charged for the business opportunity or that the seller will refund all or part of the price paid or rent charged for the business opportunity, or will repurchase any of the products, equipment, supplies, or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity; or
>
> 4. That the seller will provide a sales program or marketing program that will enable the purchaser to derive income from the business opportunity, except that this paragraph does not apply to the sale of a sales program or marketing program made in

> conjunction with the licensing of a trademark or service mark that is registered under the laws of any state or of the United States if the seller requires use of the trademark or service mark in the sales agreement.
>
> For the purpose of subparagraph 1., the term "assist the purchaser in finding locations" means, but is not limited to, supplying the purchaser with names of locator companies, contracting with the purchaser to provide assistance or supply names, or collecting a fee on behalf of or for a locator company.
>
> (b) "Business opportunity" does not include:
>
> 1. The sale of ongoing businesses when the owner of those businesses sells and intends to sell only those business opportunities so long as those business opportunities to be sold are no more than five in number;
>
> 2. The not-for-profit sale of sales demonstration equipment, materials, or samples for a price that does not exceed $500 or any sales training course offered by the seller the cost of which does not exceed $500; or
>
> 3. The sale or lease of laundry and drycleaning equipment.
>
> (2) "Department" means the Department of Agriculture and Consumer Services.
>
> (3) "Purchaser" includes a lessee.
>
> (4) "Seller" includes a lessor.

4. An important question in this case is the extent to which the Act addresses affiliates of a seller. In fact, the Act does so only once. In describing the various disclosure requirements imposed upon a "seller," Section 559.803 mentions an affiliate in Section 559.803(1), which requires the

disclosure of "the name of any parent or affiliated company that will engage in business transactions with the purchasers or who takes responsibility for statements made by the seller." In describing the annual filings, Section 559.805 does not mention "affiliates." Nor do the main enforcement provisions of the Act mention "affiliates." Section 559.809 prohibits 14 specified acts by "sellers". Section 559.813(2)(a) specifies five violations by "a seller or any of the seller's principal officers or agents" that may result in the penalties set forth in Section 559.813(2)(b).

5. In connection with the sale or lease of business opportunities, Respondent has adopted three rules at Chapter 5J-10, Florida Administrative Code. Petitioners have challenged, in its entirety, Rule 5J-10.001, which supplies several definitions.

6. Rule 5J-10.001 states:

> 5J-10.001 Definitions.
>
> The definitions contained in Section 559.801, Florida Statutes, and the following apply:
>
> (1) “Initial Fee or sum of money,” as used in Section 559.801(1)(a), F.S., shall include the total funds paid by the purchaser to the seller, including all monies paid for deposits, down payments, prepaid rents, equipment costs, materials, samples, products, training, services or inventory purchases.

(2) “Material change” shall include any fact, circumstance, or set of conditions which has a substantial likelihood of influencing a purchaser or a reasonable prospective purchaser in the making of a significant decision relating to a named business opportunity or which has any significant financial impact on a purchaser or prospective purchaser.

(3) “Sales program or marketing program” means:

(a) A written or oral procedure or plan provided by the seller to a purchaser of a business opportunity concerning products, equipment, supplies, services or training that the seller represents will be provided on how to sell or market the product or service; or

(b) Where the seller provides to the purchaser the following devices, techniques, training or materials which will assist the purchaser in deriving income from the business opportunity:

1. Sales or display equipment or merchandising devices;

2. Specific sales or marketing techniques; or

3. Sales, marketing or advertising materials which are intended for use by the purchaser to influence a consumer to purchase a product or service.

(4) “Seller” includes any person who has an ownership interest of 10% or greater in an entity which sells or leases business opportunities.

Specific Authority 570.07(23) FS. Law Implemented 559.801, 559.803, 559.805 FS. History–New 11-15-94, Amended 6-4-95.

7. Respondent adopted Rule 5J-10.001 effective November 15, 1994, and amended it effective June 4, 1995. The specific authority cited for the rule, Section 570.07(23),

provides only that Respondent "shall have and exercise the following functions, powers, and duties: To adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it." However, in 1997, the Legislature adopted Section 559.813(8), which broadens Respondent's rulemaking authority under the Act by providing: "The department has the authority to adopt rules pursuant to chapter 120 to implement this part."

8. In defining "seller" in Rule 5J-10.001(4), Respondent relied on the Federal Trade Commission (FTC) regulations at 16 Code of Federal Regulation (CFR) Part 436 (collectively, the "Franchise Rule"). In particular, Respondent relied on 16 CFR 436.2, explaining in a response to an interrogatory that Rule 5J-10.001(4) "was intended to clarify the identity of persons sufficiently affiliated with the sale of a business opportunity by virtue of their share ownership (16 C.F.R. 436.2) upon whom a duty should be imposed to make the required statutory disclosures in the sale of a business opportunity."

9. In 16 CFR Sections 436.2(a)(1)(i) and (ii), the FTC identifies two types of franchises covered under the FTC Act: the package and product franchise and the business opportunity. As the name implies, the business opportunity described in 16 CFR Section 436.2(a)(1)(ii) bears the closer resemblance to the Act.

10. Under 16 CFR Section 436.2(a), both types of franchises require an arrangement and, more importantly, "any continuing commercial relationship." For the business opportunity, 16 CFR Section 436.2(a)(1)(ii)(A) requires that a franchisee offer, sell, or distribute to a person other than the franchisor goods or services that are supplied by the franchisor, supplied by a third person with whom the franchisor requires the franchisee to do business, or supplied by an affiliate of the franchisor with whom the franchisee is advised by the franchisor to do business. In addition, for the business opportunity, 16 CFR Section 436.2(a)(1)(ii)(B) requires that the franchisor secure for the franchisee retail outlets or accounts, locations or sites for product sales displays (such as vending machines or rack displays), or the services of a person to secure these retail outlets, accounts, locations or sites.

11. Also, 16 CFR Section 436.2(i) defines an "affiliated person" as a person that "directly or indirectly controls, or is controlled by, or is under common control with, a franchisor"; that "directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of a franchisor"; or that "has, in common with a franchisor, one or more partners, officers, directors, trustees, branch managers, or other persons occupying similar status or performing similar functions."

12. However, the definitions in 16 CFR Section 436.2 apply only to terms "used in this part," and 16 CFR Part 436 does not cover enforcement and liability issues--only disclosures and definitions, including coverage definitions. In fact, the sole purpose of the affiliate definition in 16 CFR Section 436.2 is to explain the disclosure requirements set forth in 16 CFR Sections 436.1(a)(7) (total funds required to be paid to franchisor or its affiliates), 436.1(a)(8) (recurring funds required to be paid to franchisor or its affiliates), 436.1(a)(9) (names of affiliates with which franchisee is required or advised to do business), 436.1(a)(11) (basis for calculating actual revenue to be received by franchisor or its affiliates), 436.1(a)(12) (financing conditions offered by franchisor or its affiliates), and 436.1(a)(14) (extent to which franchisee--or, if a corporate, franchisee's affiliates--to participate directly in the franchised operation). Nowhere in the Franchise Rule does the affiliate definition broaden the scope of the persons liable for violations of the federal law.

13. On July 26, 2002, Respondent filed an Administrative Complaint against Petitioners and three allegedly related corporations and transmitted the matter to the Division of Administrative Hearings (DOAH) for a formal hearing. This proceeding was designated DOAH Case No. 02-3374. At the same time, Respondent imposed an Immediate Final Cease and Desist

Order ordering that Petitioners and three allegedly related corporations discontinue the sale of business opportunities in Florida. (The First District Court of Appeal later stayed the enforcement of this order.) On October 11, 2002, Respondent served an Amended Administrative Complaint. The undersigned Administrative Law Judge completed the hearing in DOAH Case No. 02-3374 on November 25, 2002. As of the date of this final order, the parties have not yet filed their proposed recommended orders.

14. In the Administrative Complaint, Amended Administrative Complaint, and Immediate Final Cease and Desist Order, Respondent relies on Rules 5J-10.001(3) and (4), but not Rules 5J-10.001(1) and (2). With respect to Rule 5J-10.001(3) ("Sales or Marketing Program Rule"), Respondent alleges that the business opportunities are covered by the Act because of the presence of a "sales program or marketing program." With respect to Rule 5J-10.001(4) ("Seller Rule"), Respondent alleges that Petitioners are liable as owners of one or more named corporations that are "sellers" who have violated the Act.

15. With respect to Rules 5J-10.001(1) and (2), respectively, the regulatory definitions of an "initial fee or sum of money" or "material change" play no significant role in DOAH Case No. 02-3374. For this reason, Petitioners are not substantially affected by these rules, and the Conclusions of

Law below determine that Petitioners lack standing to challenge Rules 5J-10.001(1) and (2), which are not further discussed in this final order.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter. Sections 120.56(1) and (3).

17. Section 120.56(1) provides: "Any person substantially affected by a 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." As to the Sales or Marketing Program Rule and Seller Rule, Petitioners have amply demonstrated standing. In reliance upon these rules, Respondent ordered that Petitioners discontinue the sale of business opportunities in Florida and continues to prosecute Petitioners and their allegedly related corporations. However, Petitioners have failed to show how they are substantially affected by the remaining rules.

18. The burden of proof is on Petitioners to show that the Sales or Marketing Rule and Seller Rule are invalid exercises of delegated legislative authority. Grove Isle, Ltd. v. Department of Environmental Regulation, 454 So. 2d 571, 573 (Fla. 1st DCA 1984). For proposed rules, Section 120.56(2)(a) now imposes the burden of proof upon agencies, after a preliminary showing by

the rule challenger. The absence of a similar provision in Section 120.56(3), which applies to existing rules, reveals the Legislative intent not to disturb the longstanding imposition of the burden of proof on the challenger to an existing rule.

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

> "Invalid exercise of delegated legislative authority" means action which 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:
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> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
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> (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;
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> (e) The rule is arbitrary or capricious;
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> (f) The rule is not supported by competent substantial evidence; or
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> (g) 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.
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> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret

> the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

20. Section 120.56(3)(b) provides: "The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires."

21. Petitioners' first contention in their proposed final order is that Section 570.07(23) does not authorize Respondent to adopt rules implementing the Act because these statutory provisions are in different chapters. The last sentence of the flush language of Section 120.52(8) prohibits a construction of statutory language granting rulemaking authority or describing the powers and functions of an agency as extending any further than implementing or interpreting the specific powers and duties conferred by the "same statute." As Petitioners point out, the "same statute" does not likely encompass a statutory provision in a different chapter.

22. However, Section 559.813(8), which is in the same part as the other statutory provisions on which Respondent relies, was enacted in 1997 to grant Respondent the "authority to adopt rules pursuant to chapter 120 to implement this part." The Legislature presumably intended the explicit authorization of Section 559.813(8) to adopt rules to implement the Act to satisfy the same-statute requirement. This requirement apparently exists merely to assure that agencies do not rulemake in one area in reliance upon statutes in another area that the Legislature never intended to be used for such a purpose.

23. It is irrelevant that Section 559.813(8) was not in existence when Respondent adopted the Sales and Marketing Program Rule and Seller Rule. The determination of whether an agency has exceeded its grant of rulemaking authority should not be limited to the facts in existence at the time of the adoption of the rule, but should extend at least to the time of the filing of the rule challenge. To limit the facts to those in existence at the time of the adoption of the rule would ignore later Legislative enactments granting the necessary rulemaking authority and would only add needlessly to regulatory costs, as an agency would be required to readopt the same rule, this time citing the new rulemaking authority.

24. Petitioners contend in their proposed final order that Section 559.813(8) is unavailable to Respondent because Section

120.52(8)(b) requires that the rule cite to the grant of rulemaking authority. The main prohibition of Section 120.52(8)(b) forbids an agency from exceeding its grant of rulemaking authority. The dependent clause attached to the end of this prohibition refers to the citation requirement contained in Section 120.54(3)(a)1. This reference to the citation requirement contained in Section 120.54(3)(a)1 does not elevate this procedural requirement to a higher level than other procedural requirements. If a challenger wishes to rely on a deficient citation as a basis for invalidating a rule, the challenger must proceed under Section 120.52(8)(a), which provides that procedural deficiencies may invalidate a rule only if the deficiencies are "material." Applicable to all subsections of Section 120.52(8), the last sentence of Section 120.56(1)(c) elaborates upon this materiality requirement in rule challenges based on procedural defects:

> The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.

25. The record demonstrates that the procedural defect of omitting the citation to Section 559.813(8) has not impaired the substantial interests of either Petitioner and has not impaired

the fairness of any proceeding. Petitioners could not possibly have been affected by this harmless omission. The omission is likely due to the enactment of Section 559.813(8) after the adoption of the Sales or Marketing Rule and Seller Rule, not due to some attempt by Respondent to conceal its authority and undermine the fairness of administrative proceedings. Under these circumstances, invalidating the rule due to the absence of the correct statutory citation is unwarranted under Section 120.52(8)(b).

26. Petitioners contend in their proposed final order that the Sales or Marketing Program Rule and Seller Rule are unauthorized by even Section 559.813(8) because Respondent is not implementing the Act by adopting this rule. This contention is correct as to the Seller Rule and the second half of the Sales or Marketing Program Rule (Rule 5J-10.001(3)(b)), but the deficiencies of these rules are better covered in the following paragraphs. As for the first half of the Sales or Marketing Program Rule (Rule 5J-10.001(3)(a)), Respondent clearly exercised the authority provided in Section 559.813(8) to implement Section 559.801(1)(a)4, which provides that a sale of a business opportunity takes place if the seller represents that it will provide a sales program or marketing program.

> The most important of Petitioners' contentions in their proposed final order is that the Sales and Marketing Program Rule

> and Seller Rule enlarge, modify, or contravene the statutes purportedly implemented.

27. Without a doubt, the Seller Rule enlarges, modifies, and even contravenes the Act. Not a single provision of the Act offers the slightest support for the Seller Rule, which unlawfully broadens the scope of potential liability for violations of the Act from actual sellers to many, if not most, owners of sellers.

28. As Respondent uses it in DOAH Case No. 02-3374, the Seller Rule pierces the corporate veil by identifying the corporate seller as a mere alter ego of its significant owners--without regard to any acts or omissions of the owners besides their status as owners. In other words, the sole criterion for piercing the corporate veil is extent of ownership. Prior to the adoption of the Administrative Procedure Act, agencies lacked the authority to pierce the corporate veil. Roberts Fish Farm v. Spencer, 153 So. 2d 718 (Fla. 1963). Even when considered by courts, piercing the corporate veil requires more than mere ownership. See, e.g., Dania Jai-Alai Palace v. Sykes, 450 So. 2d 1114 (Fla. 1984).

29. Respondent argues that the Legislature intended to leave to Respondent the discretion of identifying the persons who would qualify as sellers because Section 559.801(4) defines a seller as "including" a lessor. The Act reveals two facts

relevant to this contention. First, the Legislature added lessors under the definition of sellers to extend the scope of the Act to persons who were marketing business opportunities in a leasing transaction that was not otherwise covered by the Act. Second, the Legislature chose to redefine a seller so as to avoid the necessity of adding "lessor" after "seller" and adding "leasing" to "purchasing" or "selling" each time "seller," "purchasing," or "selling" occurred in the Act.

30. In no way does this modest addition to the Act justify Respondent's attempt in the Seller Rule penetrate the noncompliant seller (or lessor) and impose liability upon the individual owners of the seller (or lessor). It is simply impossible that the Legislature, when deciding to cover lessors under the Act, intended also to cover all owners of at least 10 percent of the noncompliant seller (or lessor)--even passive, noncontrolling persons, such as minority owners, holders of debt that converted to equity, and devisees of relatively small ownership interests.

31. In adopting the Seller Rule, Respondent's reliance upon the Franchise Rule was probably not misplaced at the time. As noted above, Respondent explains that the purpose of the Seller Rule was to ensure that the required disclosures would be meaningful. After all, if an unsavory seller creates a new entity for the sale of business opportunities, disclosure

limited to the new entity is less meaningful than disclosure that extends to the unsavory seller. The Franchise Rule clearly uses the concept of affiliates to broaden the disclosure requirement under the FTC Act.

32. However, two problems arise here. First, regardless of how sensible it would be to broaden the concept of the seller for disclosure purposes, as is done by the Franchise Rule, the Act does not justify even such a limited broadening of the disclosure requirement in Florida. The Act uses "affiliate" only in Section 559.801(1)(a)1, which covers the seller's representations that it or its affiliate will provide locations or help the purchaser find locations for vending machines, racks, display cases, or similar equipment.

33. Second, even if the Act authorized a broadening of the concept of the seller for disclosure purposes, Respondent has wandered far from its original intent to broaden disclosure. The Seller Rule goes beyond the Franchise Rule by extending liability for violations of the Act to most owners of the sellers--again, strictly on the basis of ownership, not culpability. Although courts have so extended the reach of the Franchise Rule, they have not done so with respect to all owners, only owners whose involvement in the unlawful activities merits punishment. See, e.g., Federal Trade Commission v. Amy Travel Service, Inc., 875 F.2d 564 (7th Cir. 1989).

34. As noted above, the Sales or Marketing Program Rule divides into two parts: Rules 5J-10.001(3)(a) and (b). The former does not enlarge, modify, or contravene the Act, but the latter does.

35. Rule 5J-10.001(3)(b) enlarges, modifies, and contravenes the Act because it unlawfully shifts the focus from ongoing or future services from the seller to the purchaser to the present, possibly one-time, delivery of goods or services, likely at the closing at which the purchaser acquires the business opportunity.

36. Rule 5J-10.001(3)(a) clearly incorporates the element of ongoing or future services when it describes the goods and services "that the seller represents will be provided . . .." By contrast, Rule 5J-10.001(3)(b) describes only goods and services that "the seller provides . . .." Even though these goods and services "will assist" the purchaser in the future, Rule 5J-10.001(3)(b) covers only goods and services that the seller "provides." It is true that the Sales or Marketing Rule defines only "a sales or marketing program," and the statutory language states that the seller "will" provide such a program. But the difference in focus between Rule 5J-10.001(3)(a) (ongoing or future transactions) and Rule 5J-10.001(3)(b) (present or one-time transaction) invites misapplication,

especially if Respondent seeks the misapplication under a deference principle.

37. This difference in focus between the two parts of the Sales or Marketing Program Rule highlights an important feature of the Act. As noted above concerning the Franchise Rule, the common requirement imposed upon both package and product franchises and business opportunities is a "continuing commercial relationship." The Act incorporates this requirement by defining a business opportunity in Section 559.801(1)(a)1-4 in terms of the support that the seller "represents" that it will supply the purchaser after the purchase of the business opportunity. Section 559.801(1)(a)1 covers the representation that the seller "will" provide locations or help the purchaser find locations for vending machines, racks, display cases, and similar equipment. Section 559.801(1)(a)2 covers the representation that the seller "will" purchase products made by the purchaser using supplies or services sold to the purchaser. Section 559.801(1)(a)3 covers the representation that the seller "will" refund the purchase price if the purchaser is unsatisfied with the business opportunity or that the purchaser "will" derive income from the business opportunity in excess of the purchase price. Section 559.801(1)(a)4 covers the representation that the seller "will" provide a "sales program or marketing program."

38. The focus on an ongoing business relationship reflects an important feature of the Act, as well as the Franchise Rule, Both the Act and the Franchise Rule are consumer-protection laws and regulations. Recognizing that unsophisticated persons may be purchasing business opportunities, often from sophisticated sellers, these consumer-protection laws and regulations address the potentially exploitative situation in which the presumably unsophisticated purchaser completes a relatively large degree of his obligations by paying at closing for the business opportunity, and the presumably sophisticated seller completes a relatively large degree of his obligations by supplying goods and services into the future. This mismatching of the time of performance leaves the purchaser vulnerable; if the seller performed all of his obligations at closing, the transaction would not be so risky and thus not so deserving of protective legislation and regulation.

39. Rule 5J-10.001(3)(b) materially modifies Section 559.801(1)(a)4 by turning the focus from the future, probably ongoing, performance by the seller to the present, possibly one-time, performance. This seemingly subtle change in some cases may extend coverage to transactions not covered under Section 559.801(1)(a)4 and in other cases may fail to extend coverage to transactions covered under Section 559.801(1)(a)4. Ignoring the purpose of this section and the Act to cover the ongoing

business relationship, which is expressed as a "continuing commercial relationship" under the Franchise Rule, Rule 5J-10.001(3)(b) enlarges, modifies, and contravenes Section 559.801(1)(a)4.

40. However, Rule 5J-10.001(3)(a) does not enlarge, modify, or contravene Section 559.801(1)(a)4 or the Act. Nothing in this first part of the Sales or Marketing Program Rule opposes any part of the Act.

41. Petitioners also contend that the rule is arbitrary and capricious, the rule is not supported by competent substantial evidence, and the Seller Rule creates an unconstitutional irrebuttable presumption. A discussion of these issues would not change the result.

42. Section 120.595(3) provides, in part:

> If the court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.

43. In Department of Insurance v. Florida Bankers' Association, 764 So. 2d 660 (Fla. 1st DCA 2000), the court

remanded an attorneys' fee award for the insufficiency of the record and the findings of fact.

44. The Seller Rule was inspired by the Franchise Rule. However, either due to sloppy draftsmanship or an aggressive enforcement philosophy, Respondent drafted, and in DOAH Case No. 02-3372 used, the Seller Rule so that it extended the liability for violations of the Act to many, if not most, owners of noncompliant entities, even if those owners were not themselves guilty of any acts or omissions besides the act of ownership. Petitioners' broad-based attack on the Seller Rule necessitated that Respondent provide in this record all available facts justifying the adoption of the rule. Therefore, no purpose would be served by giving Respondent an opportunity to present additional facts showing that its adoption of the rule was substantially justified. No reasonable factual justification exists for the Seller Rule.

45. Under Section 120.595(3), a reasonable basis "in law and fact" at the time of the adoption of the Seller Rule is necessary for Respondent to avoid liability for attorneys' fees and costs under the "substantially justified" defense. Regardless of the state of the factual record, there was, as a matter of law, no reasonable basis for Respondent to have adopted the Seller Rule. This extension of liability or even disclosure is unsupported by the Act. Even prior to the

Administrative Procedure Act, Florida law prohibited agencies from piercing the corporate veil. And even the Franchise Rule, which is no legal basis for rule promulgation in Florida, provides no support for a rule that broadens the scope of persons liable for violations of the law to owners of at least ten percent of a noncompliant entity.

46. However, nothing in Petitioners' attack on the Seller Rule necessitated that Respondent provide in this record any special circumstances that would make an award of attorneys' fees unjust. Such special circumstances could be of a factual nature.

47. Perhaps Petitioners would argue that, by failing to present such evidence in the main hearing, after having ample notice of Petitioners' claim for attorneys' fees under Section 120.595(3), Respondent waived its right to present such evidence in a subsequent hearing. That seems a harsh result, especially given the relatively recent enactment of this attorneys' fee provision and the relative scarcity of cases interpreting this statute and establishing practical litigation procedures for its implementation. In any event, Petitioners did not present their evidence concerning the amount of attorneys' fees or costs, so an additional hearing may be necessary on this issue, and the special-circumstances issue should not significantly lengthen the time required for hearing.

48. The adoption of the invalid portion of the Sales or Marketing Program Rule was substantially justified. Resolution of the challenge to the second part of that rule presented a number of difficult legal issues.

ORDER

It is

ORDERED that:

1. Rule 5J-10.001(3)(b) and Rule 5J-10.001(4), Florida Administrative Code, are invalid exercises of delegated legislative authority.

2. The remainder of the rule challenge is dismissed.

3. The Administrative Law Judge reserves jurisdiction to determine whether, under Section 120.595(3), Florida Statutes, special circumstances exist with respect to the adoption of Rule 5J-10.001(4), Florida Administrative Code, that would make an award of attorneys' fees and costs unjust and, if not, the amount of reasonable attorneys' fees and costs. If the parties are unable to resolve these issues within 45 days after the date of this Final Order, Petitioners shall file a notice advising the Administrative Law Judge of this fact and requesting that he set a hearing on these issues.

DONE AND ORDERED this 30 day of December, 2002, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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 appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.