STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GOLDEN RULE INSURANCE COMPANY, Petitioner, vs. DEPARTMENT OF FINANCIAL SERVICES, OFFICE OF INSURANCE REGULATION, Respondent.	)	Case No. 05-0159RP

FINAL ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings ("DOAH") held a final hearing in the above-styled case, commencing on February 24, 2005, and continuing on March 7 and March 30, 2005, in Tallahassee, Florida.

APPEARANCES

For Petitioner Golden Rule Insurance Company ("Golden Rule"):

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STATEMENT OF THE ISSUE

Whether the proposed amendment to Florida Administrative Code Rule 69O-149.041 constitutes an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

In 1992, the Florida Legislature enacted the Employers Health Care Access Act (Section 627.6699, Florida Statutes) to promote the availability of health insurance coverage for employees of small employers. The act mandated the development of a Standard and a Basic Benefit Plan. § 627.6699, Fla. Stat. (1992).

In 1992, Florida's Insurance Commissioner assembled a Small Employer Benefit Plan Committee ("Committee") to develop Standard and Basic Benefit Plans, pursuant to Section 627.6699. In 1995, the Committee completed its work and produced what is now commonly referred to as the 1995 Standard and Basic Health Benefit Plans (the "1995 SHBP" and the "1995 BHBP", collectively referred to hereafter as the "1995 S&BHBPs"). Later that same

year, in Florida Administrative Code Rule 4-149.041 (the predecessor to Florida Administrative Code Rule 69O-149.041), the 1995 S&BHBPs were adopted by rule. Rule 69O-149.041, as OIR now proposes to amend it, is the Rule at issue in this proceeding.

In 2002, Florida's Insurance Commissioner assembled a new Committee to consider updated Standard and Basic Health Benefit Plans (the"2003 SHBP" and the "2003 BHBP", collectively referred to hereafter as the "2003 S&BHBPs"). On July 25, 2003, OIR issued Order 69745-03-CO, approving the 2003 S&BHBPs, but did not repeal or amend Florida Administrative Code Rule 69O-149.041, which incorporated by reference the 1995 S&BHBPs. Until the proposed rule challenged in this proceeding was proposed, the 2003 S&BHBPs were not noticed for adoption as a rule.

In a letter dated September 24, 2004, OIR disapproved a rate filing made by Golden Rule which listed the 1995 SHBP as a conversion policy made available to terminating policyholders. As a basis for disapproving Golden Rule's rate filing, OIR noted that Golden Rule had failed to make the 2003 SHBP available to terminating individuals in violation of Order 69745-03-CO.

On October 6, 2004, in DOAH Case No. 04-3634RU, Golden Rule filed a petition challenging Order 69745-03-CO as an agency statement that violated Section 120.54(1)(a), Florida Statutes.

On October 8, 2004, OIR published a notice of rule development in the Florida Administrative Weekly in which OIR proposed to amend Rule 69O-149.041 to strike the reference to the 1995 S&BHBPs and incorporate the 2003 S&BHBPs. On October 18, 2004, OIR filed a motion to stay the proceedings in DOAH Case No. 04-3634RU, pending the outcome of the rulemaking process, and the motion was granted by the undersigned. As of the date of this final order, DOAH Case No. 04-3634RU remains in abeyance.

On January 21, 2005, Golden Rule filed the petition in this case challenging OIR's proposed amendment to Florida Administrative Code Rule 69O-149.041. Subsequently, OIR filed a motion for summary final order and a motion to dismiss Golden Rule's petition. Both motions were denied.

At the final hearing, Golden Rule presented the testimony of Mark Litow, an expert witness actuary, and Robert Roth, an expert witness regarding HIPAA requirements. OIR presented the testimony of James Swenson as an expert witness actuary, along with testimony of Glen Volk, Kenney Shipley, Amy Hardee, Frank Dino, and Richard Robleto. Golden Rule's Exhibits 1–16 and Golden Rule's Rebuttal Exhibits 1–3 were received into evidence. OIR's Exhibits 1–6 and 8–19 were received into evidence.

A transcript of the final hearing was filed with DOAH on April 14, 2005. The parties requested, and were granted, leave to file their proposed final orders more than 10 days after the

filing of the transcript. Each party timely submitted its proposed final order. A review of these post-hearing submittals has been completed and utilized where practicable in the composition of this final order.

Absent contrary indication, citations to Florida Statutes refer to the 2004 edition.

FINDINGS OF FACT

1. Golden Rule is a foreign insurer authorized to conduct insurance business in Florida and holds a certificate of authority authorizing it to transact the following lines of insurance in Florida: life, group life and annuities, and accident and health.[1/]

2. Pursuant to its certificate of authority, Golden Rule issues group health insurance policies in other states under which residents of Florida are provided coverage for hospital, surgical, or major medical expenses, or a combination of these, on an expense-incurred basis.

3. Golden Rule's group health insurance certificates have been issued pursuant to several master group contracts entered into between Golden Rule and group plan sponsors. The only conversion benefit for Florida certificate holders terminating their group health insurance policies under each of these master group contracts, which could have represented the agreed-upon

consideration of the contracting parties, was the then-existing 1995 SHBP.

4. Part VII of Chapter 627, Florida Statutes, governs group health insurance policies issued in Florida. Section 627.6675, Florida Statutes,[2/] governs conversion insurance policies issued to terminating members of insured group health plans in Florida and provides, in pertinent part, as follows:

> Subject to all of the provisions of this section, a group policy delivered or issued for delivery in this state by an insurer or nonprofit health care services plan that provides, on an expense-incurred basis, hospital, surgical, or major medical expense insurance, or any combination of these coverages, shall provide that an employee or member whose insurance under the group policy has been terminated for any reason, including discontinuance of the group policy in its entirety or with respect to an insured class, and who has been continuously insured under the group policy, and under any group policy providing similar benefits that the terminated group policy replaced, for at least 3 months immediately prior to termination, shall be entitled to have issued to him or her by the insurer a policy or certificate of health insurance, referred to in this section as a "converted policy."
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> * * *
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> (10) REQUIRED OPTION FOR MAJOR MEDICAL COVERAGE.--Subject to the provisions and conditions of this part, the employee or member shall be entitled to obtain a converted policy providing major medical coverage under a plan meeting the following requirements:
> (a) A maximum benefit equal to the lesser of the policy limit of the group policy from

which the individual converted or $500,000 per covered person for all covered medical expenses incurred during the covered person's lifetime.
(b) Payment of benefits at the rate of 80 percent of covered medical expenses which are in excess of the deductible, until 20 percent of such expenses in a benefit period reaches $2,000, after which benefits will be paid at the rate of 90 percent during the remainder of the contract year unless the insured is in the insurer's case management program, in which case benefits shall be paid at the rate of 100 percent during the remainder of the contract year. For the purposes of this paragraph, "case management program" means the specific supervision and management of the medical care provided or prescribed for a specific individual, which may include the use of health care providers designated by the insurer. Payment of benefits for outpatient treatment of mental illness, if provided in the converted policy, may be at a lesser rate but not less than 50 percent.
(c) A deductible for each calendar year that must be $500, $1,000, or $2,000, at the option of the policyholder.
(d) The term "covered medical expenses," as used in this subsection, shall be consistent with those customarily offered by the insurer under group or individual health insurance policies but is not required to be identical to the covered medical expenses provided in the group policy from which the individual converted.

(11) ALTERNATIVE PLANS.--<u>The insurer shall, in addition to the option required by subsection (10), offer the standard health benefit plan, as established pursuant to s. 627.6699(12).</u> The insurer may, at its option, also offer alternative plans for group health conversion in addition to the plans required by this section. (Emphasis added)

5. The underscored portion of Section 627.6675(11) above was enacted by Chapter 97-179, Laws of Florida, and became effective on May 30, 1997.

6. In 1997, when the Legislature amended Section 627.6675(11) as indicated in paragraph 4 above, Section 627.6699(12) read, in pertinent part, as follows:

> 1. By May 15, 1993, the commissioner shall appoint a health benefit plan committee composed of four representatives of carriers which shall include at least two representatives of HMOs, at least one of which is a staff model HMO, two representatives of agents, four representatives of small employers, and one employee of a small employer. The carrier members shall be selected from a list of individuals recommended by the board. The commissioner may require the board to submit additional recommendations of individuals for appointment. As alliances are established under s. 408.702, each alliance shall also appoint an additional member to the committee.
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> 2. The committee shall develop changes to the form and level of coverages for the standard health benefit plan and the basic health benefit plan, and shall submit the forms and levels of coverages to the department by September 30, 1993. The department must approve such forms and levels of coverages by November 30, 1993, and may return the submissions to the committee for modification on a schedule that allows the department to grant final approval by November 30, 1993.
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> * * *
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> 5. After approval of the revised health benefit plans, if the department determines

> that modifications to a plan might be appropriate, the commissioner shall appoint a new health benefit plan committee in the manner provided in subparagraph 1. to submit recommended modifications to the department for approval.

§ 672.6699(12), Fla. Stat. (Supp. 1996), Compare § 627.6699(12), Fla. Stat. (1999) (containing the same language).

7. In 1997, when the Legislature amended Section 627.6675(11), as indicated in paragraph 4 above, the 1995 S&BHBPs had been adopted by reference and incorporated in Florida Administrative Code Rule 4-149.041 (the predecessor to Florida Administrative Code Rule 69O-149.041).[3/] Given the adoption of the specific S&BHBPs by rule in 1995, given the language of Section 627.6699(12), Florida Statutes, in 1997 (which referred to the approval and adoption of a specific set of benefits on a specified time schedule), and given the meaning in the law and in common usage of the word "established,"[4/] it is reasonable to conclude, and it is concluded, that the statutory language in Section 627.6675(11) as passed in 1997--"the standard health benefit plan, as established pursuant to s. 627.6699(12)"--referred to the 1995 SHBP, which was then in existence and had been specifically adopted by rule at the time of enactment of Chapter 97-179, Laws of Florida.

8. On October 8, 2004, in Volume 30, No. 41 of the Florida Administrative Weekly, OIR noticed a proposed amendment to

Florida Administrative Code Rule 690-149.041, which would substitute the 2003 S&BHBPs, developed by a benefits committee convened in 2002, in place of the 1995 S&BHBPs, and would incorporate, by reference, Order 69745-03-CO into the proposed rule. The proposed amendment states, in the portion relevant to this challenge, as follows:

> (d) New and renewal policies for the Basic and Standard policies issued on or after August 1, 2003, ~~May 1, 1995,~~ must include the Basic and Standard Health Benefit Plans approved by Order 69745-03-CO signed by the Director on July 25, 2003, ~~(OIR B2 95)~~ pursuant to Section 627.6699(12), F.S., which is incorporated herein by reference .
> . . .

9. As specific authority for the proposed amendment to the Rule, OIR cited Section 626.9611, Florida Statutes (2004), which authorizes the Department of Financial Services or the Financial Services Commission ("FSC") to adopt rules necessary or proper to identify specific methods of competition or acts or practices which are prohibited by the Unfair Insurance Trade Practices Act; Section 627.6699(13)(i), Florida Statutes (2004), which provides that the FSC may establish regulations setting forth additional standards to provide for the fair marketing and broad availability of health benefit plans to small employers in this state; and Section 627.6699(16), Florida Statutes, which addresses the applicability of other state laws to Florida small employer groups.

10. As the laws being implemented by the proposed amendment to the Rule, OIR cited to Sections 626.9541(1)(b), (g)2., (x)3., and 627.6699(3)(g), (v), (5)(a), (7), (12)(c), (13)(b), Florida Statutes. The proposed amendment to the Rule, however, clearly also "implements, interprets, or prescribes law or policy,"[5/] as to Section 627.6675(11), Florida Statutes, and would appear to require insurers offering Conversion Policies under Section 627.6675 to offer the 2003 SHBP, rather than the 1995 SHBP, as the Conversion Policy option referred to in Section 627.6675(11), Florida Statutes. Section 120.54(3)(a), Florida Statutes, requires OIR to make reference in its notice of proposed rulemaking to the sections or subsections of the Florida Statutes being implemented. OIR did not do so with respect to Section 627.6675 or Subsection (11) thereof.

11. The FSC has not approved the proposed amendment to the rule.

12. As Litow and others testified, a mandatory conversion policy, sometimes referred to as a guaranteed issue policy, must be issued to an individual (whether previously insured in a small group market, or another group market) upon his request, without consideration of his risk characteristics (without underwriting). In contrast, an underwritten policy is an insurance policy issued after the health status of the

individual applying for coverage is evaluated, and the insurance company makes a decision whether to accept or reject the risk.

13. In the Small Employer Group market, governed by Section 627.6699, Florida Statutes, it is the employer who makes the decision about whether or not to purchase the health insurance policy at the quoted premium rate. By contrast, in the Converted Policy market, it is the covered individual who makes the decision about whether or not to purchase the health insurance policy at the quoted premium rate.

14. The concept of anti-selection in health insurance is that only those persons who would tend to benefit most from purchasing an insurance product would have incentive to do so, and others would not.

15. The credible and convincing testimony of Litow, corroborated by the testimony of OIR's own expert, James Swenson, shows that the benefits under the 2003 SHBP are more expansive than the benefits offered under the 1995 SHBP. For example, the lifetime benefits under the 2003 SHBP is five million dollars, as compared to one million dollars under the 1995 SHBP. Where the 1995 SHBP had a benefit limitation of $200,000 for organ transplants, the 2003 SHBP has no limitation and also covers several organ transplants, including liver, pancreas, and kidney, not covered under the 1995 SHBP.

Additionally, the 2003 SHBP includes a new benefit for alcohol and substance abuse not available under the 1995 SHBP.

16. As established by expert actuarial testimony at the final hearing, the actuarial impact on the Conversion Policy market (See Section 627.6675) of utilizing the 2003 SHBP instead of the 1995 SHBP would be to increase the expected average claims losses experienced by insurers participating in the Conversion Policy market.

17. While asserting the position that the 2003 SHBP would apply to Converted Policies for all insurers required to issue such policies under Section 627.6675(11), Florida Statutes, OIR has never reviewed or analyzed the actuarial impact of the 2003 SHBP mandated by the Department for use in the Converted Policy market.

18. The 2003 SHBP increases and/or adds benefits in the area of organ transplants, lifetime coverage limits, emergency room and hospital, and alcohol and drug abuse treatment. The actuarial impact of replacing the 1995 SHBP with the 2003 SHBP in the Converted Policy market governed under Section 627.6675 is substantial. However, the minutes of the 2002 Small Employer Benefits Plan Committee meetings between June 6, 2002, and September 27, 2002, in evidence in this proceeding, offers no reference to analysis of this type.

19. Also in evidence as Golden Rule Exhibit 7, the Florida Small Employer Benefit Plan Committee Report of 2002, does not refer to any data review or analysis of the impact of changes in the Converted Policy market. Nor is reference to data review or analysis of the impact of the Standard Health Benefit Plan changes in the Converted Policy market contained in the order approving the small employer standard and basic health benefit plans, signed by Insurance Commissioner McCarty on July 25, 2003.

20. Frank Dino, OIR's chief actuary and that agency's designated representative at this hearing, was an advisor to the Florida Small Employer Benefit Plan Committee. He testified that he did not know whether actuary members of the 2002 Committee ever analyzed differences between the 1995 and 2003 SHBPs using any sub-standard market data. He admitted, in his opinion as an actuary, that the use of substandard market data, as opposed to standard (underwritten) market data, would make a difference in the analysis.

21. By previous deposition taken in these proceedings, Dino testified that he was unable to formulate any actuarial opinion on whether Conversion Policies have a higher level of anti-selection than small employer carrier policies. He also testified that he did not know whether an increase of lifetime benefits from $1 million to $5 million would have a greater

actuarial effect in the Converted Policy market than the Small Employer market.

22. Similarly, Dino was without an opinion regarding the difference in effect between the Small Employer market and the Converted Policy market regarding other changes from the 1995 SHBP to the 2003 SHBP. As previously noted, compared to the 1995 SHBP, the 2003 SHBP eliminates the emergency room deductible, doubles outpatient rehabilitation benefits, adds alcohol and substance abuse benefits, adds benefits for preventative care, and removes caps on organ transplant benefits. Dino testified that it was unlikely that anyone at OIR would have a higher level of information about any of these topics than he.

23. Richard Robleto, the Deputy Insurance Commissioner, asserted that he attended every meeting of the 2002 Florida Small Employer Benefit Plan Committee. He was unable to recall any discussion by the 2002 Committee about whether changes from the 1995 SHBP to 2003 SHBP would have a different impact on Conversion Policies than on Small Employer policies.

24. Glen Volk, a consulting actuary, was a member of the 2002 Florida Small Employer Benefit Plan Committee. He performed a premium pricing comparison between the 1995 SHBP and the 2003 SHBP, but neither his database nor his assumptions included data from the Converted Policy market.

25. An OIR analysis of the actuarial impact of the 2003 SHBP in the Converted Policy market, undertaken by Dino following his deposition and before his hearing testimony on March 30, 2005, uses data provided by James Swenson of Blue Cross/Blue Shield of Florida, which confirms Litow's opinion that a very small number of very high claims, which would result from the benefit increases from the 1995 SHBP to the 2003 SHBP, are extremely detrimental to the insurer issuing Converted Policies. Swenson's Blue Cross data shows the following: 98.8 percent of claims averaged $10,000; only 1.2 percent of claims were over $100,000; but that 1.2 percent of the claims resulted in 22.3 percent of total the claims costs. Because the 2003 SHBP increases the potential of high cost benefits, and results in higher utilization of high cost medical services, the result is a very high trend increase in the whole insurance plan.

26. OIR and personnel have failed to take into account medical cost trends from the date of the collected data to the projected current date. The medical cost trend from 1988 to 2005 has averaged in excess of 10 percent per year. For high cost claims (such as organ transplantation claims), the average annual increase is even higher, as much as 25 percent. At this rate of trend, claims costs for high expense procedures will double in less than three years.

27. When claims costs for Converted Policies exceed what can be legally charged to the converted policyholders, that excess must be either absorbed by the carrier or passed on to the individually underwritten group members in the form of increased premiums. Those individually underwritten policyholders who are healthy, and can pass medical underwriting for new insurance coverage, will do so to lower their premiums. The result is that as the remaining insureds on average become less and less healthy as a result of this anti-selection process; and as claims among a carrier's insureds become higher as a percentage of the total number of insureds, claims costs will tend inevitably to spiral still higher than rate increases can cover. In these circumstances, the insurer, particularly a small to medium-sized insurer, can never collect enough premium to cover claim losses.

28. Applying appropriate actuarial analysis to the determination of the Impact of the 1995 SHBP contrasted to the 2003 SHBP, in the Converted Policy market, the evidence shows a significant adverse actuarial impact on Petitioner and similarly situated insurers of Converted Policies under Section 627.6675, Florida Statutes.

29. Actuarial impact is determined by comparing the cost of one insurance scenario to another. One first analyzes a base scenario, then makes a change in the base scenario, and compares

the expected cost of the base scenario to the expected cost of the changed scenario.

30. Contrasting the base scenario (the 1995 SHBP) to the changed scenario (the 2003 SHBP), a variety of actuarially significant changes occur. The 2003 SHBP increases benefits for organ transplants, both in terms of types of transplants covered, and the removal of the dollar limit on coverage. The 1995 SHBP limited coverage of organ transplants to $200,000. The 2003 SHBP provides unlimited coverage and additional types of organ transplants not covered under the 1995 SHBP. These additional transplant procedures are extremely expensive, ranging currently in price from $200,000 to more than $400,000. Further, the 1995 SHBP limited lifetime benefits to $1 million--the 2003 SHBP raises that limit five-fold.

31. Using actuarial standards and practices developed by the Society of Actuaries, Litow opined, and it is found, that the actuarial impact of the changes from the 1995 SHBP to the 2003 SHBP in the Converted Policy market could reasonably result in increased insurance claims costs of 40 percent or more.

32. The likely increased utilization caused by using the 2003 SHBP in the Converted Policy market is obvious when comparing the out-of-pocket expenses of someone needing a $350,000 transplant under the 1995 SHBP, compared to the 2003 SHBP. Assuming the transplant would have been covered at all

under the 1995 SHBP, the patient's out-of-pocket costs would have been $150,000. Under the 2003 SHBP, the out-of-pocket cost is $10,000. When out-of-pocket costs to the patient for the same procedure drop so dramatically, utilization will increase.

33. Consequently, the challenged rule's proposal to abandon the 1995 SHBP for use as a Converted Policy option and to substitute the 2003 SHBP in its place arbitrarily and capriciously exposes group carriers to unrecoverable business losses from Converted Policies issued under Section 627.6675(11).

34. OIR's asserted position and evidence presented in support of that position that compliance with the Federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. Law 104-191, requires that Sections 627.6675(11) and 627.6699(12), Florida Statutes, be read as requiring that the most current standard plan (policy form) developed for use in the Small Employer Group market under Section 627.6699(12) (presently, the 2003 SHBP), be the available Conversion Policy option under Section 627.6675(11), is not credited. Such an interpretation of the pertinent statutes in that manner, as a condition of Florida's maintaining an acceptable "State Alternative Mechanism" ("SAM") to HIPAA's guaranteed availability requirements in the individual market, is

unpersuasive in view of the more credible testimony at hearing from Robert Roth, an expert witness regarding HIPAA requirements.

35. Roth's testimony establishes that HIPAA did not require Florida (or any state) to adopt a SAM. When the State of Florida elected to adopt a SAM, nothing in HIPAA required the SAM to include the offering of conversion plans as an element of the SAM. The vast majority of states with a SAM do not require the offering of conversion plans to satisfy HIPAA's guaranteed availability requirements. Florida's SAM would not violate HIPAA, even if neither of the Small Employer Group standard plans (the "1995 SHBP" or the "2003 SHBP") were offered as a Conversion Policy.

36. The provisions of 45 CFR Section 148.128 (a)(1)(iii)(A), allows Florida's SAM to offer comprehensive coverage offered in the individual market. Availability of such coverage pursuant to Section 627.6675(10), Florida Statutes, allows Florida's SAM to meet those requirements without regard to the SHBPs. HIPAA allows Florida the flexibility to adopt a SAM that complies with either 45 CFR Section 148.128 (a)(1)(iii)(A) or 45 CFR Section 148.128 (a)(1)(iii)(B). In order for a SAM to be in compliance with HIPAA, there is no requirement that HIPAA eligible individuals be offered policies under both sub-paragraphs (A) and (B) of that regulation.

37. Even if Florida repealed Section 627.6675(11), Florida Statutes, altogether, such action would have no effect on Florida's SAM under HIPAA.

38. There is no evidence in the record that OIR referred to HIPAA in any of its notices or deliberations concerning development of the 2003 SHBP or the rule being challenged in these proceedings.

39. The activities of the 2002 Benefits Committee constituted free-form agency action, and offered no point of entry concerning whether the 2003 SHBP could or should be a required Converted Policy form.

40. OIR's Order 69745-03-CO provided no pre-final order point of entry under Chapter 120, Florida Statutes.

41. The proposed rule is arbitrary and capricious.

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the parties and this proceeding.

43. Section 120.56(1)(a), Florida Statutes, provides that 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.

44. Golden Rule is licensed to transact life and health insurance, including group and individual insurance, and it

issues conversion policies to covered persons who are terminating from their group health insurance policies, under Section 627.6675, Florida Statutes. Golden Rule is substantially affected by the proposed rule.

45. OIR's proposed amendment to Rule 69O-149.041, which purports to strike the incorporated reference in the existing rule to the 1995 SHBP and substitute the 2003 SHBP in its place, will substantially affect Golden Rule.

46. Golden Rule has standing to challenge the proposed rule. E.g. Ortiz v. Department of Health, Board of Medicine, 882 So. 2d 402 (Fla. 4th DCA 2004); Cole Vision Corporation v. Department of Business and Professional Regulation, Board of Optometry, 688 So. 2d 404 (Fla. 1st DCA 1997); Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995); Florida Dep't of Prof. Reg. v. Florida Dental Hygienist Ass'n., 612 So. 2d 646 (Fla. 1st DCA 1993).

47. Consideration of the validity of OIR's proposed amendment to the Rule must necessarily commence with Section 120.52(8), Florida Statutes. Section 120.52(8), Florida Statutes, states, in relevant part, as follows:

> (8) "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:

> (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.;
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> * * *
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> (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;

48. OIR's proposed rule amendment violates Section 120.52(8)(a), because OIR failed to follow the rulemaking procedures or requirements set forth in Section 120.54(3)(a)1., Florida Statutes, which provides as follows:

> Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, <u>setting forth a short, plain explanation of the purpose and effect of the proposed action</u>; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; <u>and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific</u>. (emphasis supplied)

49. Adoption of the rule amendment in the form proposed would require the offering of the 2003 SHBP as a Conversion

Policy option under Section 627.6675(11), Florida Statutes, in lieu of the 1995 SHBP. OIR's notices regarding the proposed rule amendment were silent in this regard, and did not list Section 627.6675 among the sections of laws to be implemented by the proposed rule, even though, as proposed, the rule amendment would implement, interpret or prescribe policy in relation to Section 627.6675(11).

50. As rulemaking authority, OIR first cites to Section 626.9611, Florida Statutes, which provides that the FSC may, in accordance with Chapter 120, adopt reasonable rules as are necessary or proper to identify specific methods of competition or acts or practices which are prohibited by Sections 626.9541 or 626.9551, Florida Statutes. The proposed rule amendment does not purport to identify any methods of competition or acts or practices prohibited by the referenced sections. Thus, the proposed rule amendment exceeds the rulemaking authority granted to OIR under Section 626.9611.

51. None of the rulemaking authorities cited in the proposed rule amendment grant OIR the authority to require companies that participate in the expense-incurred, group hospital, surgical or major medical expense market to offer the 2003 SHBP as a Converted Policy. An agency's authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute; otherwise, the rule is

not a valid exercise of delegated legislative authority. Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

52. OIR has the authority to carry out preliminary rulemaking activities under Sections 120.536–120.565, Florida Statutes, on behalf of the FSC. The OIR's delegated authority does not, however, include final rule-adoption authority, which is maintained by the FSC. § 20.121, Fla. Stat.

53. The proposed rule amendment violates Section 120.52(8)(e) because it is arbitrary and capricious. An "arbitrary" decision is one not supported by facts or logic, or is despotic. A "capricious" decision is one taken irrationally, or without thought or reason. Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998). Under any of the standards provided by the cited case, the proposed amended rule is arbitrary and capricious. There is no evidence in the rulemaking record for the proposed amended rule that imposing the 2003 SHBP as a Converted Policy form is supported by logic, facts, or reason. Moreover, the evidence shows that OIR did not consider the actuarial impact of substituting the 2003 SHBP for the 1995 SHBP, as a required Conversion Policy option, even though the actuarial impact of doing so is substantial. The proposed

amended rule is therefore arbitrary and capricious, as a matter of fact and law.

54. The proposed rule amendment would impair preexisting group policies, and preexisting master group policies, such as Golden Rule's. From the evidence, it appears likely that the Legislature had in mind the then-existing Small Employer Group Health Benefit Plan (the 1995 SHBP) when it adopted Section 627.6675(11), Florida Statutes, in 1997, which provided that "the standard health benefit plan, as established pursuant to s. 627.6699(12)" (emphasis added) was to be offered as a Conversion Policy option.

55. The word "established" has a definite meaning in the law and in common usage. "To establish is to make stable or firm; to fix in permanence and regularity, to settle or secure on a firm basis, to settle firmly or to fix unalterably." Wells Lamont Corp. v. Bowles, 149 F.2d 364, 366 (Emerg. Ct. App. 1945). Similarly, Webster's 3rd International Dictionary, p. 778 (G.&C. Merriam Co. 1976) defines "establish" as: "to make firm or stable; to settle; to bring into existence, create, or make permanent."

56. "Establish" is distinguished in meaning from words such as "prescribe"--an alternative choice of wording the Legislature has chosen in other portions of the Insurance Code, including in Section 627.6699, the statute which Subsection

627.6675 (11) explicitly cross-references.[6/] In contrast to "establish," "prescribe" means "to lay down authoritatively as a guide." Black's Law Dictionary, p. 1183 (6th Ed., West 1990) (emphasis added).[7/] It is thus reasonable to conclude that, if the Legislature intended in Subsection 627.6675(11) merely to "lay down a guide" or a "direction or rule of action" that future changes to the Standard Health Benefit Plan made under Subsection 627.6699(12) were to then become a Conversion Policy form that must be offered under Subsection 627.6675(11), the Legislature would have chosen the phrase "as prescribed pursuant to s. 627.6699(12)," or some similar phrase connoting a legislative intention to direct change over time. Instead, the Legislature chose the phase "as established pursuant to s. 627.6699(12)," which connotes a fixed or permanent object–-the then-existing, precisely defined benefit levels in the 1995 SHBP.

57. When the Legislature uses terms having distinct meanings, particularly in two statutes that are expressly cross-referenced and which are therefore to be read in pari materia, the well-established rule of statutory construction is that the Legislature is presumed to have intended differing meanings in selecting the language enacted. See, e.g., State v. Cyphers, 873 So. 2d 471 (Fla. 2nd DCA 2004); State v. Bradford, 787 So. 2d 811 (Fla. 2001).

58. OIR asserts that Subsections 627.6675(11) and 627.6699(12) should be read to mean that any benefit plan change made under Subsection 627.6699(12) for use in the Small Employer Group market automatically, by force of law, becomes the Converted Policy form thereafter to be required under Subsection 627.6675(11). This is the entire underpinning for OIR's argument--that the proposed rule only implements Section 627.6699. OIR asserts that its interpretation should be given deference.

59. The deference, however, commonly granted an agency's interpretation is not absolute. The agency's interpretation must be, for instance, a permissible one. Department of Natural Resources v. Wingfield Dev. Co., 581 So. 2d 193 (Fla. 1st DCA 1991) See also Secret Oaks Owner's Ass'n, Inc. v. Department of Environmental Protection, 704 So. 2d 702, (Fla. 5th DCA 1998). When an agency's construction amounts to an unreasonable interpretation, it cannot stand. Woodley v. Department of Health & Rehabilitative Servs., 505 So. 2d 676, 678 (Fla. 1987). In addition, the agency's interpretation should be measured against established rules of statutory construction.

60. In this regard, it must be observed that a reasonable construction of statutes under review that avoids constitutional issues and preserves the constitutionality of the statutes in question should be chosen whenever possible. E.g., Weber v.

State, 649 So. 2d 253, (Fla. 2nd DCA 1994); Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972).

61. OIR's interpretation of Sections 627.6675 and 627.6699, necessarily inherent in the proposed rule, is not entitled to deference. It is at odds with the commonly understood meaning of the key statutory language in Subsection 627.6677(11). It raises the specter of serious constitutional defects, rather than avoiding them; and constitutes the impairment of pre-existing contract rights and breach of the separation of powers requirement of Article II, section 3, of the Florida Constitution.[8/]

62. Insurers operating under Subsection 627.6675(11) bargained for a level of benefits to be offered under Conversion Policies no greater than the benefits afforded to converters under the 1995 SHBP, and, as discussed above, the 1997 law creating Subsection 627.6675(11) is fairly read to require no more than that level of benefits as a Conversion Policy option. The evidence plainly shows that the actuarial cost of replacing the 1995 SHBP level of benefits with the benefits of the 2003 SHBP as a Conversion Policy form is substantial, that insurers will not be able to recoup those additional costs from converters, and will likely not be able to pass those costs on in the form of increased premiums to the underwritten market. Insurers therefore would suffer unrecoupable losses in the

Conversion Policy market by virtue of the proposed rule, losses they did not bargain to undertake when issuing group policies governed by Section 627.6675, when they issued group contracts.

63. Article I, section 10, of the Florida Constitution provides that "[n]o . . . law impairing the obligation of contracts shall be passed." That provision is to be rigorously applied. See, e.g., Yamaha Parts Distributors, Inc. v. Ehrman, 316 So. 2d 557, 559 (Fla. 1975) ("Virtually no degree of contract impairment has been tolerated in this state."); Department of Transportation v. Chadbourne, 382 So. 2d 293, 297 (Fla. 1980) ("This Court has generally prohibited all forms of contract impairment."); Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774, 780 (Fla. 1979)(recognizing that the Yamaha standard compels less tolerance of contract impairment than would be acceptable under traditional federal contract clause analysis).

64. The courts have repeatedly recognized that the application of changed laws to insurance contracts entered into before the effective date of such change constitutes an impermissible impairment of contracts. See, e.g., Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987)(provision of insurance and tort reform statute that required a special credit or premium rebate was unconstitutional because it changed the agreed-to premiums of policies written before the statute's

effective date); Fireman's Fund Ins. Co. v. Pohlman, 485 So. 2d 418 (Fla. 1986)(retrospective application of statute permitting stacking of uninsured motorist coverage); State Farm Mut. Auto. Ins. Co. v. Gant, 478 So. 2d 25 (Fla. 1985)(retrospective application of statute permitting stacking of uninsured motorist coverage); Dewberry v. Auto-Owners Insurance Co., 363 So. 2d 1077, 1079-80 (Fla. 1978)(retrospective application of statute prohibiting stacking of uninsured motorist coverage); Metropolitan Property and Liability Insurance Co. v. Gray, 446 So. 2d 216, 218 (Fla. 5th DCA 1984)(retrospective application of statute removing antistacking provisions of earlier uninsured motorist legislation); Lumbermens Mut. Cas. Co. v. Ceballos, 440 So. 2d 612, 613 (Fla. 3d DCA 1983)(retroactive application of statute regarding insurer's liability for PIP benefits an unconstitutional impairment of contracts).

65. The proposed rule, implicitly construing Sections 627.6675 and 627.6699 as it does, and in a manner that would impose unrecoupable losses on insurers in the Conversion Policy market-–losses that insurers did not bargain to undertake when issuing group policies--would create a substantial risk of impairment of contracts.

66. Moreover, Sections 627.6675 and 627.6699 should not be interpreted in a manner that creates a substantial risk of running afoul of the non-delegation clause in Article II,

section 3, of the Florida Constitution. That constitutional article requires that the legislature not delegate open-ended authority to OIR, or to a committee appointed by OIR, to prescribe what the law shall be. B.H. v. State, 645 So. 2d 987 (Fla. 1994.) It prohibits the Legislature, and any other branch of government, from engrafting future undelimited decisions of non-legislative bodies into the governing law of the state. E.g State v. Welch 279 So. 2d 11, 14 (Fla. 1973). The only exception to this uniform prohibition is that the Legislature may direct an executive agency to use a precise, well-defined ministerial method, such as the consumer price index, to ascertain a future value. Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311 (Fla. 1984).

67. OIR may not lawfully interpret the in pari materia provisions of Sections 627.6675 and 627.6699 as allowing adoption of an undelineated future Standard Health Benefit Plan, to be arrived at without legislative delimitation as to its terms and limits, as a required Conversion Policy form under Subsection 627.6675(11). That is the result, however, of the rule amendment as OIR proposes it.

68. Nothing in HIPAA required Florida, in adopting a state alternative mechanism ("SAM") to meet HIPAA guaranteed availability requirements in the individual market to:

a. Amend Section 627.6675, Florida Statutes, to add Subsection (11) in 1997 to receive certification of a SAM, or

b. Ensure that one of the conversion plans offered to HIPAA-eligible individuals be the same as a standard plan offered in the Small Employer Group market.

69. Nothing in HIPAA or HIPAA's implementing regulations mandated that OIR adopt the 2003 SHBP by rule or otherwise.

70. OIR's reliance upon HIPAA in support of the challenged rule in this case is not persuasive. The proposed rule has the effect by its structure and terms of requiring the use of the 2003 SHBP as a Converted Policy form. Golden Rule has the right under Chapter 120 to challenge the proposed rule in this proceeding. OIR represented in companion Case No. 04-3634RU that the proposed rule was being adopted to address the policy position of OIR assailed by Golden Rule in that case. Golden Rule does not assail the development or terms of the 2003 SHBP for use as a policy form in the Small Employer Group market. Golden Rule instead challenges the structure and terms of the instant proposed rule, which, as proposed by OIR, would implement the relevant Florida Statutes to require that the 2003 SHBP be offered as a Converted Policy option to individuals losing group health insurance coverage. Accordingly, OIR's March 29, 2005 Motion to Dismiss is denied.

71. For the foregoing reasons, Golden Rule established, and OIR failed to refute, that the proposed amendment to Florida Administrative Code Rule 69O-149.041, constitutes an invalid exercise of delegated legislative authority.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the proposed amendment to Florida Administrative Code Rule 69O-149.041, constitutes an invalid exercise of delegated legislative authority within the meaning of Subsection 120.52(8), Florida Statutes.

DONE AND ORDERED this 8th day of June, 2005, in Tallahassee, Leon County, Florida.

S

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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of June, 2005.

ENDNOTES

[1/] Golden Rule's certificate of authority allows it to transact in the small group employer health line of insurance in Florida, should Golden Rule elect to do so. T. 479; P.1; P. 2 (p. 57, lines 15–22); T. 61-62.

[2/] Although Golden Rule's group policies covering Florida residents were issued in other states [P.2 (portions of the deposition of William Williams); P3, P.4], Section 627.6515 (2)(c), Florida Statutes, requires that these plans comply with Section 627.6675, Florida Statutes.

[3/] Rule 4-149.041 provided in pertinent part as follows:

> (g) New and renewal policies for the Basic and Standard policies issued on or after May 1, 1995, must include the 1995 Basic and Standard Health Benefit Plans (I-95) pursuant to section 627.6699(12), Florida Statutes, which is incorporated herein by reference and can be obtained from the Bureau of Life and Health Forms and Rates.

[4/] "To establish is to make stable or firm; to fix in permanence and regularity, to settle or secure on a firm basis, to settle firmly or to fix unalterably." Wells Lamont Corp. v. Bowles, 149 F.2d 364,366 (Emerg. Ct. App. 1945) (emphasis added). See also Webster's 3rd International Dictionary, p. 778 (G.&C. Merriam Co. 1976).

[5/] § 120.52(15)(a), Fla. Stat.

[6/] E.g. § 627.6699 (5)(d), Fla. Stat. ("A small employer carrier must file with the office, in a format and manner prescribed by the committee, a standard health care plan"); § 627.351, Fla. Stat. ("requirements prescribed by the Department of Highway Safety and Motor Vehicles"); § 627.192, Fla. Stat. ("as prescribed by law or rating organization procedures").

[7/] Similarly, the Merriam Webster On-Line Dictionary defines "prescribe" as " to lay down as a guide, direction, or rule of action. . . ."

[8/] The Division is to consider constitutional infirmities that would result from a proposed rule in a challenge to a proposed rule. Department of Env. Reg. v. Leon County, 344 So.2d 297, 298 (Fla. 1st DCA 1977). By eliminating the 1995 SHBP entirely, rather than preserving its use for Conversion Policies while adopting the 2003 SHBP for use in the Small Employer Group market governed by Section 627.6699, the proposed rule results in serious constitutional questions which must be considered in this proceeding.

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THE 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 agency 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.