STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ATTORNEYS' TITLE INSURANCE FUND, INC., and FLORIDA LAND TITLE ASSOCIATION, INC.,	)	
Petitioners,	)	
vs.	)	
FINANCIAL SERVICES COMMISSION, and OFFICE OF INSURANCE REGULATION,	)	Case No. 05-2630RP
Respondents,	)	
and	)	
FIRST AMERICAN TITLE CO.,	)	
Intervenor.	)	

SUMMARY FINAL ORDER

This matter was presented to Patricia M. Hart, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings. Based on the record in this case, the stipulations of fact, the arguments of counsel, and the relevant statutory and case law, this matter is appropriate for summary disposition.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Proposed Rule 69O-186.003(1)(c) should be invalidated on the grounds that it is an invalid delegation of legislative authority as defined in Section 120.52(8), Florida Statutes (2005).[1]

PRELIMINARY STATEMENT

On July 25, 2005, the Petitioners, the Attorneys' Title Insurance Fund, Inc. ("Fund"), and the Florida Land Title Association, Inc. ("Association"), filed with the Division of Administrative Hearings a Petition to Determine the Invalidity of Proposed Rules, in which they challenged Proposed Rule 69O-186.003(1)(c) as an invalid exercise of delegated legislative authority. Proposed Rule 69O-186.003(1)(c) establishes premium rates for junior loan title insurance policies ("JLPs"), and was published by the Financial Services Commission ("Commission"), Office of Insurance Regulation ("OIR"), in the June 3, 2005, edition of Florida Administrative Weekly ("FAW"). The

Petitioners asserted in the Petition that the proposed rule fails in various respects to satisfy the substantive requirements of Section 627.782, Florida Statutes, and that, therefore, the proposed rule and the proposed JLP rate are invalid because they "exceed the Commission's and the OIR's grant of rulemaking authority; they enlarge, modify, or contravene the specific provisions of law implemented; they are vague, fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; and they are arbitrary and capricious."

On August 31, 2005, the Fund and Association filed a Motion for Summary Final Order in which they contended that there were no disputed issues of material fact and that a final order should be entered invalidating Proposed Rule 69O-186.003(1)(c) as an invalid exercise of delegated legislative authority.[2] In the motion, the Petitioners argued that the publication of the proposed rule constituted a material failure of the Commission and the OIR to follow applicable rulemaking procedures because it was not approved by the agency head prior to its publication as a proposed rule, which constituted a violation of Section 120.54(3)(a)1., Florida Statutes, and because it was promulgated pursuant to a delegation of rulemaking authority that was not, itself, enacted as a rule. Neither the Commission nor the OIR filed a written response to the Petitioners' Motion

for Summary Final Order within the time specified in Florida Administrative Code Rule 28-106.204(1). Oral argument was held on the motion on September 20, 2005.

At the request of the undersigned, the OIR filed a written response to the Petitioners' motion on September 23, 2005. In addition, the Petitioners filed an Unopposed Motion for Leave to File Amended Petition. The motion was granted in an order entered September 23, 2005, and, on September 26, 2005, the Petitioners filed an Amended Petition to Determine the Invalidity of Proposed Rules and of Agency Statements Required to be Adopted as Rules Pursuant to Section 120.54. In the Amended Petition, the Petitioners included as grounds for invalidating Proposed Rule 69O-186.003(1)(c) the material failure of the Commission and the OIR to follow the rulemaking procedures set forth in Chapter 120, Florida Statutes, by causing the proposed rule to be published without the approval of the agency head and by promulgating the proposed rule in accordance with a rulemaking procedure that was not itself enacted as a rule. Finally, the parties filed a Joint Stipulation of Facts on September 26, 2005, which includes all facts material to entry of this Summary Final Order.

FINDINGS OF FACT

Based on the record of this proceeding, the following findings of fact are made:

Background

1. The Commission was created by statute effective January 7, 2003. It is composed of the Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture. The Commission members "serve as agency head of the Financial Services Commission." § 20.121(3), Fla. Stat.

2. The OIR is an "office" of the Commission and is "responsible for all activities concerning insurers and other risk bearing entities . . . ." The OIR is headed by a director, who is also known as the Commissioner of Insurance Regulation. § 20.121(3)(a)1., Fla. Stat.

3. Pertinent to this proceeding, the legislature delineated the powers to be exercised by the Commission and the OIR, respectively, in Section 20.121(3), Florida Statutes, as follows:

> (c) Powers.--Commission members shall serve as the agency head for purposes of rulemaking under ss. 120.536-120.565 by the commission and all subunits of the commission. Each director is agency head for purposes of final agency action under chapter 120 for all areas within the regulatory authority delegated to the director's office.[3]

Stipulated Facts (verbatim)

The following stipulated facts are adopted as findings of fact for the purpose of this Final Order:

4. On February 25, 2003, the Commission met, considered, and approved an agenda item involving the rulemaking process to be used by the Commission, the OIR, and the Office of Financial Regulation. The rulemaking procedure that is under consideration in this case involves the Commission's delegation to the OIR of the authority to engage in certain rulemaking activities. A true and correct copy of that agenda item, as approved by the Commission, and the relevant pages of the transcript of that meeting, are attached hereto as "Appendix A."

5. On May 13, 2003, the Commission met and without objection approved the minutes of the Commission's February 25, 2003, meeting.

6. The rulemaking process and delegation set forth in Appendix A permit the OIR to initiate rulemaking and to publish a proposed rule without the prior approval of the Commission, but require the Commission to approve the proposed rule prior to its filing for final adoption pursuant to Section 120.54(3)(e), Florida Statutes.

7. Since its adoption in 2003, the Commission and the OIR have routinely employed the rulemaking process described in Appendix A and used this delegation of rulemaking authority in promulgating rules regulating the insurance industry.

8. The Commission and the OIR employed the rulemaking process described in Appendix A and used this delegation of

rulemaking authority in promulgating the proposed JLP rule that is the subject of the pending rule challenge.

9. In May 2005, the OIR issued an order approving the JLP forms that had previously been submitted by First American Title Insurance Company. Shortly thereafter, on June 3, 2005, the OIR published a proposed rule in the Florida Administrative Weekly that would set an industry-wide premium rate for the newly approved JLP forms.

10. Pursuant to the OIR's notice of proposed rulemaking, a public hearing was held on July 13, 2005, at which interested parties had the opportunity to speak and address the provisions of the proposed rule. The OIR's counsel specifically stated on the record during the hearing that the rulemaking process was ongoing and that the "final" hearing for the proposed rule would be subsequently noticed in the Florida Administrative Weekly and held before the Governor and Cabinet sitting as the Commission.

11. On or about July 25, 2005, the Fund and the Association filed a petition with the Division of Administrative Hearings challenging the validity of the proposed JLP rule.

12. Consistent with the Commission's routine practice, a notice of the "final" hearing before the Commission on the proposed JLP rule will be published in Part VI of the Florida Administrative Weekly ("Notices of Meetings, Workshops and Public Hearings"), and a copy of the notice will be mailed to

all persons who notified the OIR of their interest in the proposed JLP rule, including the Fund and the Association.

Statutory rulemaking procedures

13. A "rule" is defined in Section 120.52(15), Florida Statutes, as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule."

14. Section 120.54, Florida Statutes, sets forth the rulemaking procedures that are to be followed by all Florida agencies, including the Commission, see § 120.52(1)(b)4., Fla. Stat., and these procedures constitute the exclusive process for the promulgation and adoption of rules in Florida. See § 120.54(1)(a) and (3)(c)2., Fla. Stat. The rulemaking procedures mandated in Section 120.54, Florida Statutes, are detailed and comprehensive and contain two primary requirements: public notice at each step of the rule-development and rule-adoption process and an opportunity, throughout the rulemaking process, for the public and substantially affected persons to be heard with respect to any rule an agency proposes to adopt. See § 120.54(2) and (3), Fla. Stat.

15. Generally, the first step in the rulemaking process is "rule development," as described in Section 120.54(2), Florida Statutes. The agency is required to give notice of its intent to develop proposed rules in the FAW "before providing notice of a proposed rule as required by paragraph (3)(a)," and the notice must "indicate the subject area to be addressed by rule development, provide a short, plain explanation of the purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available . . . ." § 120.54(2)(a), Fla. Stat. The agency may also hold public workshops during the rule development process, and it must hold a public workshop "if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary." Id.

16. Once the agency has developed a proposed rule, it must follow the adoption procedures set forth in Section 120.54(3), Florida Statutes. Foremost among these procedures is publication of notice of the agency's "intended action" in the FAW. This notice must be published by the agency "[p]rior to the adoption, amendment, or repeal of any rule other than an emergency rule" and only "upon approval of the agency head." § 120.54(3)(a)(1), Fla. Stat. The notice "must state the

procedure for requesting a public hearing on the proposed rule" and must include

> a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific.

§ 120.54(3)(a)1., Fla. Stat.

17. If requested in writing, a public hearing must be conducted by the agency prior to adoption of a proposed rule in order to "give affected persons an opportunity to present evidence and argument on all issues under consideration." See § 120.54(3)(c)1., Fla. Stat. Once this public hearing has been held, the agency may modify or withdraw the proposed rule or may adopt the proposed rule by filing it with the Department of State. See § 120.54(3)(d) and (e), Fla. Stat. If the agency decides to modify the substance of a proposed rule after the final public hearing or after the time for requesting a public hearing has passed, any substantive change in the rule "must be supported by the record of public hearings held on the rule, must be in response to written material received on or before the date of the final public hearing, or must be in response to a proposed objection by the [Administrative Procedures] committee." § 120.54(3)(d)1., Fla. Stat. The agency must also,

among other things, publish notice of the change and the reasons for the change in the FAW. Id.

18. When the agency has determined that the proposed rule is ready for adoption, it must file with the Department of State "three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule. § 120.54(3)(e)1., Fla. Stat. The proposed rule must be filed for adoption "no less than 28 days nor more than 90 days after the notice required by paragraph (a) [of Section 120.54(3), Florida Statutes]," § 120.54(3)(e)2., Fla. Stat.; the proposed rule is adopted upon filing with the Department of State and becomes effective 20 days after it is filed. § 120.54(3)(e)6., Fla. Stat.

19. In addition to the opportunities to be heard at public hearings specified in Section 120.54, Florida Statutes, persons who are substantially affected by a proposed rule may file a petition with the Division of Administrative Hearings requesting an administrative hearing to determine the validity of the proposed rule, pursuant to Section 120.56, Florida Statutes, which provides in pertinent part:

> 1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.--
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an

administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

* * *

(e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. Hearings shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. . . .

(2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.--

(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition seeking such a determination with the division [of Administrative Hearings] within 21 days after the date of publication of the notice required by s. 120.54(3)(a), within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c), within 20 days after the preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, if applicable, or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). The petition shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Any person who is substantially affected by a change in the proposed rule may seek a determination of

> the validity of such change. Any person not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule.
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> * * *
>
> (c) When any substantially affected person seeks determination of the invalidity of a proposed rule pursuant to this section, the proposed rule is not presumed to be valid or invalid.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.56, Florida Statutes.

21. The primary issue presented by the Amended Petition to Determine the Invalidity of Proposed Rules and of Agency Statements Required to be Adopted as Rules Pursuant to Section 120.54 is whether the Commission's delegation to the OIR of the authority to publish in the FAW the notice of intent to adopt Proposed Rule 69O-186.003(1)(c), without the prior approval of the Commission, constitutes a material failure to follow the statutory rulemaking procedures set forth in Section 120.54(3), Florida Statutes, which would render Proposed Rule 69O-186.003(1)(c) invalid pursuant to Section 120.52(8)(a), Florida Statutes.

22. The Fund and the Association have "the burden of going forward" with the production of evidence to establish the bases for their assertion that Proposed Rule 69O-186.003(1)(c) is an invalid exercise of delegated legislative authority. § 120.56(2)(a), Fla. Stat. The OIR then has "the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Id.

23. Based on the findings of fact herein, the Fund and the Association have established that the rulemaking procedures used by the Commission and the OIR with respect to Proposed Rule 69O-186.003(1)(c) deviated from the rulemaking procedures set forth in Section 120.54(3), Florida Statutes. Specifically, the publication by the OIR in the June 3, 2005, edition of the FAW of a notice of intent to adopt Proposed Rule 69O-186.003(1)(c) constituted a deviation from the rulemaking procedures set forth in Section 120.54(3), Florida Statutes, because it was done without the Commission's having approved either the text of the proposed rule or the publication of the notice.

24. The plain language of Section 120.54(3)(a), Florida Statutes, requires the approval of the "agency head" before publication in the FAW of the notice of an agency's intent to adopt a proposed rule. In Section 20.121(3)(c), Florida Statutes, the Legislature specifically designated the Commission

as the "agency head for purposes of rulemaking under ss. 120.536-120.565 by the commission and all subunits of the commission". (Emphasis added.) For purposes of final agency action under Chapter 120, Florida Statutes, the authority of the director of the OIR to act as agency head is specifically limited in Section 20.121(3)(c), Florida Statutes, to "areas within the regulatory authority delegated to the director's office."

25. Furthermore, the Commission's delegation to the director of the OIR of its responsibility as agency head to approve proposed rules prior to publication of the notice required by Section 120.54(3)(a)1., Florida Statutes, is not supported by the general grant of power in Section 20.05(1)(b), Florida Statutes, that permits department heads

> to execute any of the powers, duties, and functions vested in the department or in an administrative unit thereof through administrative units and through assistants and deputies designated by the head of the department from time to time, unless the head of the department is explicitly required by law to perform the same without delegation.

It is a maxim of statutory construction "that a specific statute controls over a general statute covering the same subject matter." Cone v. Florida Dep't of Health, 886 So. 2d 1007, 1012 (Fla. 1st DCA 2004), citing Gretz v. Unemployment Appeals Comm'n, 572 So. 2d 1384, 1386 (Fla. 1959)("It is a well settled

rule of statutory construction, . . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms."); State, Bd of Trustees of the Internal Improvement Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 701 (Fla. 1st DCA 2001). Section 20.121(3)(c), Florida Statutes, expressly identifies the Commission as the agency head for purposes of rulemaking within the area of its jurisdiction over insurance, and the provisions of Section 20.121(3)(c), Florida Statutes, control the general power to delegate responsibility given to department heads set forth in Section 20.05(1)(b), Florida Statutes. Therefore, the Commission, as the agency head, must approve proposed rules for publication in the FAW as intended agency action pursuant to Section 120.54(3)(a), Florida Statutes, and the failure of the Commission to do so constitutes a deviation from the rulemaking requirements in Section 120.54(3), Florida Statutes.

26. The question then becomes whether the Commission's delegation of authority to the OIR to approve the publication of proposed rules constitutes a material failure to follow rulemaking procedures that renders Proposed Rule 69O-186.003(1)(c) invalid pursuant to Section 120.52(8)(a), Florida Statutes. Section 120.56(1)(c), Florida Statutes, provides in pertinent part:

> . . . 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 proceeding have not been impaired.

The OIR argues that it has presented credible evidence that neither the substantial interests of the Fund and/or the Association nor the fairness of the proceeding have been impaired by the deviation from the rulemaking procedures and that, therefore, the Commission and the OIR have materially followed the rulemaking procedures in Section 120.54, Florida Statutes. This argument is, however, rejected: The conclusion urged by the OIR, that it has materially adhered to the applicable statutory rulemaking procedures with respect to Proposed Rule 69O-186.003(1)(c), would not logically follow even if the OIR were to present evidence sufficient to rebut the presumption set forth in Section 120.56(2), Florida Statutes.

27. Presumptions were addressed at length by the court in Caldwell v. Division of Retirement, Department of Administration, 372 So. 2d 438, 440 (Fla. 1979), which observed:

> A presumption has been defined as an inference required by a rule of law to be drawn as to the existence of one fact from the existence of some other established basic fact or combination of facts. 3 B. Jones, Jones on Evidence § 3.1 (6th ed. 1972). The Florida courts recognize one type of rebuttable presumption as a

"bursting bubble" presumption or vanishing presumption. The Court in Nationwide Mutual Insurance Co. v. Griffin, 222 So.2d 754, 756 (Fla. 4th DCA 1969), discussed the vanishing presumption as follows:

> A presumption is a rule of law which attaches to certain evidentiary facts and is productive of certain procedural consequences. The presumption is not itself evidence and has no probative value. Florida follows generally (albeit not always) what is sometimes called the Thayerian rule to the effect that when credible evidence comes into the case contradicting the basic fact or facts giving rise to the presumption, the presumption vanishes and the issue is determined on the evidence just as though no presumption has ever existed. . . .

See also § 90.302(1), Fla. Stat.; Ehrhardt, C. W., Florida Evidence (2005), §§ 302.1 and 303.1.

28. The statutory presumption in Section 120.56(1)(c), Florida Statutes, is a "bursting bubble" or "vanishing" presumption that does not affect the burden of proof in this case but only serves to shift the burden of persuasion to the OIR to present evidence to rebut the presumption that any

deviation by an agency from the statutory rulemaking procedures is material. Accordingly, if the OIR were to offer credible evidence to establish that the substantial interests of the Fund and the Association and the fairness of the proceeding were not impaired by the deviation from the applicable rulemaking procedures, the statutory presumption that the deviation is material would vanish, and the case would proceed "as though no presumption has ever existed."

29. In this case, the Fund and the Association have challenged the validity of a proposed rule on the grounds that "[t]he agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter." § 120.52(8)(a), Fla. Stat. The OIR, therefore, has the burden of proving by a preponderance of the evidence that the deviation from the statutory rulemaking procedures was not material. See § 120.56(2)(a), Fla. Stat. Even had the OIR presented evidence sufficient to rebut the presumption in Section 120.56(2), Florida Statutes, the presumption would merely have vanished, but the evidentiary burden would remain with the OIR. Accordingly, it is not necessary to consider whether the OIR has rebutted the presumption of materiality.

30. Based on the findings of fact herein, the OIR has failed to prove by a preponderance of the evidence that the rulemaking procedure adopted by the Commission as an agenda item

at its February 25, 2003, meeting, delegating to the OIR the authority to publish proposed rules in the FAW without the Commission's approval does not constitute a material failure to follow the rulemaking procedures set forth in Section 120.54, Florida Statutes.

31. First, the delegation of authority by the Commission to the OIR to publish proposed rules in the FAW prior to approval by the Commission constitutes a material failure to follow applicable statutory rulemaking procedures because neither the Commission nor any agency has the authority to adopt rulemaking procedures that are not consistent with those set forth in Section 120.54, Florida Statutes. The only grant in Chapter 120, Florida Statutes, of legislative authority for an agency to enact rules relating to the procedures for the development and adoption of rules is found in Section 120.54(5), Florida Statutes, which requires the Administration Commission to adopt uniform rules establishing "procedures that comply with the requirements of this chapter." § 120.54(5)(a)1., Fla. Stat. Pursuant to this requirement, the Administration Commission enacted the Uniform Rules of Procedure, Florida Administrative Code Rule Chapters 28-101 through 110, which include in Florida Administrative Code Rule Chapter 28-103 provisions relating to rulemaking. Nothing in this rule chapter authorizes the procedures adopted by the Commission, and, even though an agency

such as the Commission "may seek exceptions to the uniform rules of procedure by filing a petition with the Administration Commission," there is no authority in Chapter 120, Florida Statutes, for an agency to adopt rules or non-rule procedures that deviate from the explicit requirements for rule development or adoption set forth in detail in Section 120.54, Florida Statutes.

32. Among the rules that the Administration Commission was directed to adopt were "[u]niform rules for the scheduling of public meetings, hearings, and workshops" and "[u]niform rules for use by each agency that provide procedures for conducting public meetings, hearings, and workshops, and for taking evidence, testimony, and argument at such public meetings, hearings, and workshops, in person and by means of communications media technology. . . ." § 120.54(5)(b), Fla. Stat. Florida Administrative Code Rule 28-103.004(4), Uniform Rules of Procedure, provides:

> (4) If the notice of intent to adopt, amend, or repeal a rule did not notice a public hearing and the agency determines to hold a public hearing, the agency shall publish notice of a public hearing in the same manner as is required for publication of a notice of rulemaking at least 7 days before the scheduled public hearing. The notice shall specify the date, time, and location of the public hearing, and the name, address, and telephone number of the agency contact person who can provide information about the public hearing.

It is the practice of the OIR to make a verbal announcement at the public hearing referenced in the notice of intent to adopt a proposed rule that there will be another "final" public hearing conducted by the Commission before the proposed rule is filed with the Florida Department of State for adoption. The written notice of this "final" public hearing is not published in the section of the FAW in which notices of rule development and of the intent to adopt proposed rules are published but, rather, is routinely published in a separate section of the FAW which includes notices of meetings such as meetings of the Governor and Cabinet and the agendas for these meetings. The routine practice of the Commission and the OIR with respect to notice of the public hearing at which a proposed rule is considered for adoption by the Commission is, therefore, inconsistent with Florida Administrative Code Rule 28-103.004(4).

33. This practice of the Commission and the OIR in publishing notice of the "final" public hearing in a section of the FAW that does not include publication of proposed rules could seriously impede the right of the public to participate in the rulemaking process. A member of the public that is interested in a proposed rule but does not attend the public hearing conducted by the OIR after publication of the notice of intent to adopt a proposed rule, is not familiar with the

February 25, 2003, agenda item, and is not aware that the notice of the "final" public hearing before the Commission is not published in the section of the FAW dealing with proposed rules could lose the opportunity to be heard. As articulated by the Florida Supreme Court in NAACP, Inc. v. Florida Bd. of Regents, 863 So. 2d 294, 298 (Fla. 2003), a case involving the question of standing to challenge a proposed rule, ". . . a key purpose of the [Florida Administrative Procedures Act] was to expand rather than restrict public participation in the administrative process." See also Florida Home Builders Ass'n v. Department of Labor & Employment Security, 412 So. 2d 351, 353 (Fla. 1982)(quoted with approval in the NAACP case)("Expansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative Procedure Act.")

34. In addition, the procedure adopted by the Commission constitutes a material failure to follow the applicable statutory rulemaking procedures because it interjects uncertainty into a rulemaking procedure that has been defined in great detail by statute. The publication in the FAW of the notice of an agency's intent to adopt a proposed rule is a signal to persons interested in the proposed rule that the agency has gone through the rule-development process set forth in Section 120.54(2), Florida Statutes; that the agency has

formulated the final articulation of an agency policy or procedure or of the implementation or interpretation of a statutory grant of power; and that this final articulation has been approved by the agency head. The procedure adopted by the Commission, and under which Proposed Rule 69O-186.003(1)(c) was developed, however, allows the OIR to publish as a proposed rule only a preliminary statement of intended agency action. Consequently, an interested person may submit written material to the OIR and/or attend and present evidence and argument at the public hearing referenced in the notice of intent to adopt a proposed rule in the expectation of addressing the agency head's final version of the proposed rule, only to be required to engage in the same process before the Commission when it considers the proposed rule for "final" adoption. This results in duplication of effort on the part of the agency and of persons interested in the proposed rule.

35. In this case, the expectation that the text of Proposed Rule 69O-186.003(1)(c) published in the June 3, 2005, edition of the FAW was the final articulation of the OIR's proposed rule was explicitly elicited by the statement in the notice that the proposed rule had been approved by the "agency head." The Fund and the Association requested a public hearing as directed in the notice and appeared and presented evidence and argument at the public hearing. It was only at the July 13,

2005, public hearing that the attendees were advised that it was not the final public hearing on the proposed rule but that another hearing would be held by the Commission, at some unspecified time in the future, at which Proposed Rule 69O-186.003(1)(c) would be considered for "final" adoption.

36. The deviation from statutory rulemaking procedures by the Commission's delegation of authority to the OIR to publish the notice of intent to adopt a proposed rule in the FAW also introduces ambiguity into the timelines for challenging the validity of a proposed rule. Section 120.56(2)(a), Florida Statutes, requires a substantially affected person to file a petition with the Division of Administrative Hearings requesting a determination of the validity of a proposed rule "within 21 days after the publication of the notice required by s. 120.54(3)(a)" or "within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c)." If a public hearing is not timely requested in response to the notice of intent to adopt a proposed rule, a substantially affected person must file a petition to challenge the proposed rule with the Division of Administrative Hearings within 21 days after the notice is published. Formal rule-challenge procedures will, therefore, be initiated even though the Commission must, under its procedure, conduct a final hearing before the rule is finally adopted and may, as a result

of that hearing, choose to withdraw or modify the proposed rule prior to final adoption.

37. When, as in this case, a public hearing is requested and held on the date included in the notice of intent to adopt a proposed rule, a substantially affected person could reasonably question the legal significance on the statutory timeframe for filing a petition challenging the proposed rule of an oral announcement made at the public hearing that the Commission would consider final approval of the proposed rule at another public hearing to be held at an unspecified time in the future. The public hearing held pursuant to the notice of intent to adopt a proposed rule is the last action required by statute prior to adoption of the proposed rule, see §120.54(3)(e), Fla. Stat., and, but for the extra-statutory procedure adopted by the Commission, the OIR could file the proposed rule for adoption after this public hearing. An issue, therefore, arises as to whether an oral announcement of the intent to hold a subsequent public hearing is sufficient to transform the duly-noticed public hearing into a "preliminary" hearing of no significance in calculating the time within which a petition challenging the validity of the proposed rule would have to be filed pursuant to Section 120.56(2)(a), Florida Statutes. The procedure adopted by the Commission, therefore, interjects uncertainty into statutory rulemaking procedures that are intended to be

comprehensive and not subject to alteration by an agency except under very limited circumstances. See 120.54(5)(a), Fla. Stat.

38. Finally, and perhaps most importantly, the procedure adopted by the Commission constitutes a material failure to follow the applicable statutory rulemaking procedures because the Commission has abdicated to the OIR its responsibility as agency head for the purpose of rulemaking to formulate policy and procedures and to interpret and implement statutory grants of power in the area of insurance regulation. The Commission has delegated to the OIR the responsibility for formulating proposed rules and for conducting all of the pre-adoption rulemaking procedures specified in Section 120.54(2) and (3), Florida Statutes, without oversight by the Commission. The Commission does not review the substance of the proposed rule until after the notice of intent to adopt a proposed rule, which includes the text of the proposed rule, has been published in the FAW and after a public hearing has been held on the proposed rule or after 21 days from publication of the notice have expired without a request for a public hearing. At this point, however, the ability of the Commission to modify the text of the proposed rule is limited by the provisions of Section 120.54(3)(d)1., Florida Statutes, which provides in pertinent part:

> After the public hearing on the proposed rule, or after the time for requesting a hearing has expired, if the rule has not been changed from the rule as previously filed with the [Administrative Procedures] committee, or contains only technical changes, the adopting agency shall file a notice to that effect with the [Administrative Procedures] committee at least 7 days prior to filing the rule for adoption. Any change, other than a technical change that does not affect the substance of the rule, must be supported by the record of public hearings held on the rule, must be in response to written material received on or before the date of the final public hearing, or must be in response to a proposed objection by the [Administrative Procedures] committee. . . .
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> 2. After the notice required by paragraph (a) and prior to adoption, the agency may withdraw the rule in whole or in part.

(Emphasis added.)

39. Public hearings on proposed rules are for the purpose of "giv[ing] affected persons an opportunity to present evidence and argument on all issues under consideration. § 120.24(3)(c)1., Fla. Stat. Florida Administrative Code Rule 28-103.004 provides in pertinent part:

> (5) The purpose of a public hearing is to provide affected persons and other members of the public a reasonable opportunity for presentation of evidence, argument and oral statements, within reasonable conditions and limitations imposed by the agency to avoid duplication, irrelevant comments,

> unnecessary delay, or disruption of the proceeding.
>
> (6) The agency head, any member thereof, or any person designated by the agency head may preside at the public hearing. The agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the proposed rule.

The Commission is not, therefore, free to modify a proposed rule after it conducts the "final" public hearing prior to adoption to correspond with its notion of appropriate agency policy or procedures or statutory interpretation and implementation; the Commission may only withdraw the proposed rule and begin the rulemaking process anew or make modifications in accordance with the provisions of Section 120.54(3)(d)2., Florida Statutes.

40. Based on careful consideration of the stipulated facts, the statutory rulemaking procedures, and the relevant legal authority, it is concluded that Proposed Rule 69O-186.003(1)(c) is an invalid exercise of delegated legislative authority because publication of Proposed Rule 69O-186.003(1)(c) without the approval of the Commission, as agency head, constitutes a material failure to follow the applicable statutory rulemaking procedures.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Proposed Rule 69O-186.003(1)(c) constitutes an invalid exercise of delegated legislative authority and is, therefore, invalid.

DONE AND ORDERED this 17th day of May, 2006, in Tallahassee, Leon County, Florida.

PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 2006.

ENDNOTES

[1]/ All references herein are to the 2005 edition of the Florida Statutes unless otherwise indicated.

[2]/ On August 22, 2005, the OIR, on behalf of itself and the Commission, filed a Motion for Entry of a Summary Final Order, in which it requested entry of an order dismissing the Petition to Determine the Invalidity of Proposed Rules filed with the Division of Administrative Hearings. The OIR included two grounds in support of the Motion for Summary Final Order: First, the OIR argued that the Division does not have

jurisdiction to conduct proceedings on the Petition to Determine the Invalidity of Proposed Rules because Proposed Rule 69O-186.003(1)(c) has not been finally approved for adoption by the Commission. Second, the OIR argued that the Fund and the Association do not have standing to pursue their challenge because they are not "substantially affected" by the proposed rule. The OIR's motion was denied in an order entered October 25, 2005.

[3]/ The legislature also created the Office of Financial Regulation ("OFS") as an "office" of the Commission. The OFS is responsible for regulating banks and other financial institutions, finance companies, and the security industry. The Commission is the agency head of the OFS, which is itself headed by a director, also known as the Commissioner of Financial Regulation. § 20.121(3)(a)2., Fla. Stat.

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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 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.