STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JM AUTO, INC., d/b/a JM LEXUS, Petitioner, vs. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent, and WINTER PARK IMPORTS, INC., d/b/a LEXUS OF ORLANDO, FLORIDA AUTOMOBILE DEALERS ASSOCIATION, AND SOUTH FLORIDA AUTO-TRUCK DEALERS ASSOCIATION, INC., Intervenors.	)	Case No. 07-0603RX

FINAL ORDER

On March 8, 2007, a hearing was held in Tallahassee, Florida, pursuant to the authority granted in Sections 120.56, 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 15C-7.005 is a invalid exercise of legislatively delegated authority in violation of Section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

On February 2, 2007, a Petition to Determine Invalidity of Florida Administrative Code Rule 15C-7.005 was filed on behalf of

Petitioner, JM Auto, Inc., d/b/a JM Lexus (JM Lexus). The case was assigned to the undersigned on February 6, 2007, and a Notice of Hearing was issued setting the final hearing for March 8, 2007, in Tallahassee, Florida. The case proceeded to hearing as scheduled.

On February 12, 2007, Petitioners filed a request for approval of David Kurtzer-Ellenbogan, an attorney licensed in another jurisdiction, as a qualified representative. Winter Park Imports, Inc., d/b/a Lexus of Orlando (Lexus of Orlando), and the Florida Automobile Dealers Association (FADA), filed petitions to intervene on the side of the Department of Highway Safety and Motor Vehicles (DHSMV or the Department). Petitioner did not object to intervention but did object to the expansion of issues from those alleged in its petition, and filed a Motion in Limine to limit the evidence accordingly.

On February 19, 2007, an Order was issued granting the approval of Mr. Kurtzer-Ellenbogan as a qualified representative; granting the petitions for intervention filed by Lexus of Orlando and FADA; and granting Petitioner's Motion in Limine. The South Florida Auto-Truck Dealers Association, Inc. (SFADA) also filed a Petition to Intervene that was granted by Order dated February 23, 2007.

On February 28, 2007, Lexus of Orlando filed a Motion to Take Judicial or Administrative Notice of a variety of materials.

At the commencement of the hearing, the undersigned indicated that official recognition would be taken of the items numbered one through seven in the request only.

No witnesses were presented by any party at hearing. Exhibits numbered 1, and 10 through 15 were admitted for Lexus of Orlando; and SFADA's Exhibits numbered 1 and 2 were admitted. The parties were given until ten days from the filing of the transcript to file their proposed final orders. All submissions were timely filed and have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Department is an agency of the State of Florida. The Department adopted Florida Administrative Code Rule 15C-17.005, which became effective March 3, 1996. The Rule has not been amended since its initial adoption.

2. JM Lexus and Lexus of Orlando are both licensed franchised motor vehicle dealers in the State of Florida.

3. Lexus of Orlando has filed a complaint in the Ninth Circuit Court, Orange County, Florida, alleging, that JM Lexus violated Rule 15C-7.005 in connection with the alleged sale for resale of new Lexus vehicles to non-Lexus dealerships.

4. FADA and SFADA are trade associations whose members are licensed motor vehicle dealers in the State of Florida and are substantially affected by the rule.

5. Florida Administrative Code Rule 15C-7.005 provides the following:

> 15C-7.005 Unauthorized Additional Motor Vehicle Dealerships - Unauthorized Supplemental Dealership Locations.
>
> (1) An additional motor vehicle dealership, as contemplated by Sections 320.27(5) and 320.642, Florida Statutes, shall be deemed to be established when motor vehicles are regularly and repeatedly sold at a specific location in the State of Florida for retail purposes if the motor vehicle dealer transacting such sales:
> (a) Is not located in this state, or
> (b) Is not a licensed motor vehicle franchised for the specific line-make, or
> (c) Is a licensed motor vehicle dealer franchised for such line-make, but such sales are transacted at a location other than that permitted by the license issued to the dealer by the Department. Such sales are not subject to this rule, however, when a motor vehicle dealer occasionally and temporarily (not to exceed seven days) sells motor vehicles from a location other than the motor vehicle dealer's licensed location provided such sales occur within the motor vehicle dealer's area of sales responsibility (except a motor vehicle dealer who may be deemed a licensee under this rule).
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> (2) For the purpose of this rule, a sale for retail purposes is the first sale of the motor vehicle to a retail customer for private use, or the first sale of the motor vehicle for commercial use, such as leasing, if such commercial motor vehicle is not resold for a period of at least ninety days. Furthermore, this rule shall apply regardless of whether the titles issued, either in this or another state, pursuant to such sales are designated as "new" or "used."
>
> (3) An additional motor vehicle dealership established in this fashion is unlawful and in violation of Section 230.642, Florida Statutes. A licensed motor vehicle dealer of

the same line-make, as the vehicle being sold in violation of this rule, may notify the Department of such violation. The notice shall include motor vehicle identification numbers or other data sufficient to identify the identity of the selling dealer and initial retail purchaser of the motor vehicles involved.

(a) Within 30 days from receipt of a request from the Department containing motor vehicle identification numbers or other data sufficient to identify the motor vehicles involved, the licensee shall provide to the Department, to the extent such information is maintained by the licensee, copies of documents showing the dealer to whom each vehicle was originally delivered, any inter-dealer transfer and the initial retail purchaser as reported to the licensee. Upon a showing of good cause, the Department may grant the licensee additional time to provide the information requested under this paragraph. Examples of good cause include, but are not limited to, request for information on more than 100 vehicles, information on vehicle sales which accrued more than 2 years prior to the date of the request, and information which is no longer maintained in the licensee's current electronic data base.

(b) Within forty days of receipt of notice from the motor vehicle dealer, the Department shall make a determination of probable cause and if it determines that there is probable cause that a violation of this rule has occurred, the Department shall mail, by certified mail, return receipt requested, to the line-maker motor vehicle dealership or dealerships involved a letter containing substantially the following statement:

> Pursuant to Rule 15C-7.005, F.A.C., the undersigned has received a notice that you have allegedly supplied a substantial number of vehicles on a regular and repeated basis, which were sold at a location in the State of Florida, at which you are not franchised or licensed to sell motor vehicles. If these allegations are true, your conduct

may violate Florida law including, but not limited to, the above-mentioned rule, Sections 320.61 and 320.642, Florida Statutes. It may also cause you to be deemed a licensee, importer and/or distributor pursuant to Florida law and subject you to disciplinary action by the Florida Department of Highway Safety and Motor Vehicles, including fines and/or suspension of your Florida Dealer license, if applicable. The Division of Motor Vehicles is putting you on notice, if you are conducting such activity, that you cease and desist such activity immediately. If you fail to do so, this agency will take appropriate action.

(c) If the dealer supplying vehicles in violation of subsections (1) and (4) is not located in the State of Florida, the Department shall notify such dealer in writing that they may be operating as a distributor of motor vehicles without proper authorization in violation of Section 320.61, Florida Statutes, and may be violating Section 320.642, Florida Statutes.

(4) A motor vehicle dealer, whether located in Florida or not, which supplies a substantial number of vehicles on a regular and repeated basis which are sold in the manner set forth in subsection (1), shall be deemed to have established a supplemental location in violation of Section 320.27(5), Florida Statutes, and Rule 15C-7.005, F.A.C. Furthermore, a motor vehicle dealer which supplies vehicles in this manner shall be deemed to have conducted business within the State of Florida and acted as a "licensee," "importer" and "distributor" as contemplated by Section 320.60, Florida Statutes, and thus such activity shall constitute a violation of Sections 320.61 and 320.642, Florida Statutes. Furthermore, this paragraph neither imposes any liability on a licensee nor creates a cause of action by any person against the licensee, except a motor vehicle dealer who may be deemed to have acted as a licensee under this paragraph.

> (5) Furthermore, no provision of this entire rule creates a private cause of action by any person against a licensee, other than a dealer who is deemed a licensee pursuant to the provisions of subsection (4) of this rule, for civil damages; provided, however, if a licensee fails to comply with the requirements of paragraph (3)(a) of this rule, the Department may bring an action for injunctive relief to require a licensee to provide the information required. No other action can be brought against the licensee pursuant to this entire rule other than a dealer who is deemed to be a licensee pursuant to the provisions of subsection (4) of this rule.
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> (6) Any franchised motor vehicle dealer who can demonstrate that a violation of, or failure to comply with, the provisions of subsection (4) of this rule by a motor vehicle dealer, or a motor vehicle dealer which pursuant to subsection (4) shall be deemed to have conducted business and acted as a licensee, importer, and distributor, has adversely affected or caused pecuniary loss to that franchised motor vehicle dealer, shall be entitled to pursue all remedies against such dealers, including, but not limited to the remedies, procedures, and rights of recovery available under Sections 320.695 and 320.697, Florida Statutes.

6. Rule 15C-7.005 identifies as specific authority Section 320.011, Florida Statutes. Section 320.011 states:

> The department shall administer and enforce the provisions of this chapter and has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement them.

7. The Rule lists as "Law Implemented" Sections 320.27 and Sections 320.60-.70, Florida Statutes.

8. Sections 320.60 through 320.70, Florida Statutes, are commonly referred to as the Motor Dealers Act.

9. Section 320.27(1)(c), Florida Statutes, provides the following definitions for a motor vehicle dealer and a franchised motor vehicle dealer:

> (c) "Motor vehicle dealer" means any person engaged in the business of buying, selling, or dealing in motor vehicles or offering or displaying motor vehicles for sale at wholesale or retail, or who may service and repair motor vehicles pursuant to an agreement as defined in s. 320.60(1). Any person who buys, sells, or deals in three or more motor vehicles in any 12-month period or who offers or displays for sale three or more motor vehicles in any 12-month period shall be prima facie presumed to be engaged in such business. The terms "selling" and "sale" include lease-purchase transactions. . . The transfer of a motor vehicle by a dealer not meeting these qualifications shall be titled as a used vehicle. The classifications of motor vehicle dealers are defined as follows:
> 1. "Franchised motor vehicle dealer" means any person who engages in the business of repairing, servicing, buying, selling, or dealing in motor vehicles pursuant to an agreement as defined in s. 320.60(1).

10. Subsection 320.27(2), Florida Statutes, requires motor vehicle dealers to be licensed. Subsection (5) of this same provision requires that "any person licensed hereunder shall obtain a supplemental license for each permanent additional place or places of business not contiguous to the premises for which the original license is issued."

11. Section 320.27(9) authorizes the Department to discipline motor vehicle dealers for a variety of enumerated offenses. Among those enumerated offenses is the willful failure to comply with any administrative rule adopted by the

department or the provisions of Section 320.131(8), Florida Statutes. § 320.27(9)(a)16., Fla. Stat.

12. Section 320.60, Florida Statutes, provides definitions for terms used in Sections 320.61 through 320.70, Florida Statutes. Pertinent to this case are the following:

> (1) "Agreement" or "franchise agreement" means a contract, franchise, new motor vehicle franchise, sales and service agreement, or dealer agreement or any other terminology used to describe the contractual relationship between a manufacturer, factory branch, distributor, or importer, and a motor vehicle dealer, pursuant to which the motor vehicle dealer is authorized to transact business pertaining to motor vehicles of a particular line-make.
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> (5) "Distributor" means a person, resident or nonresident, who, in whole or in part, sells or distributes motor vehicles to motor vehicle dealers or who maintains distributor representatives.
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> (7) "Importer" means any person who imports vehicles from a foreign country into the United States or into this state for the purpose of sale or lease.
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> (8) "Licensee" means any person licensed or required to be licensed under s. 320.61.
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> (10) "Motor vehicle" means any new automobile, motorcycle, or truck, including all trucks, regardless of weight . . . the equitable or legal title to which has never been transferred by a manufacturer, distributor, importer, or dealer to an ultimate purchaser;

> (11)(a) "Motor vehicle dealer" means any person, firm, company, corporation, or other entity, who,
>
> 1. Is licensed pursuant to s. 320.27 as a "franchised motor vehicle dealer" and, for commission, money, or other things of value, repairs or services motor vehicles or used motor vehicles pursuant to an agreement as defined in subsection (1), or
> 2. Who sells, exchanges, buys, leases or rents, or offers, or attempts to negotiate a sale or exchange of any interest in, motor vehicles, or
> 3. Who is engaged wholly or in part in the business of selling motor vehicles, whether or not such motor vehicles are owned by such person, firm, company, or corporation.
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> * * *
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> (14) "Line-make vehicles" are those motor vehicles which are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the manufacturer of same.

13. Section 320.61, Florida Statutes, requires all manufacturers, factory branches, distributors or importers to be licensed.

14. Section 320.63, Florida Statutes, describes the application process for obtaining licensure for manufacturers, factory branches, distributors or importers. The section authorizes the Department to require certain enumerated information as well as "any other pertinent matter commensurate with the safeguarding of the public interest which the department, by rule, prescribes." § 320.63(7), Fla. Stat.

15. Section 320.64, Florida Statutes, provides in pertinent part:

> 320.64 Denial, suspension, or revocation of license; grounds.--A license of a licensee under s. 320.61 may be denied, suspended, or revoked within the entire state or at any specific location or locations within the state at which the applicant or licensee engages or proposes to engage in business, upon proof that the section was violated with sufficient frequency to establish a pattern of wrongdoing, and a licensee or applicant shall be liable for claims and remedies provided in ss. 320.695 and 320.697 for any violation of any of the following provisions. A licensee is prohibited from committing the following acts:
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> * * *
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> (3) The applicant or licensee willfully has failed to comply with significant provisions of ss. 320.60-320.70 or with any lawful rule or regulation adopted or promulgated by the department.
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> * * *
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> A motor vehicle dealer who can demonstrate that a violation of, or failure to comply with, any of the preceding provisions by an applicant or licensee will or can adversely and pecuniarily affect the complaining dealer, shall be entitled to pursue all of the remedies, procedures, and rights of recovery available under ss. 320.695 and 320.697.

16. Section 320.642, Florida Statutes, provides the process for a licensee to establish additional motor vehicle dealerships or to relocate existing dealerships to a location where the same line-make vehicle is presently represented by a franchised motor vehicle dealer or dealers. Section 320.642, does not, by its terms, authorize rulemaking.

17. Section 320.69, Florida Statutes, states in its entirety that "the department has the authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this law."

18. Section 320.695, Florida Statutes, which contains no additional grant of rulemaking authority, provides:

> In addition to the remedies provided in this chapter, and notwithstanding the existence of any adequate remedy at law, the department, or any motor vehicle dealer in the name of the department and state and for the use and benefit of the motor vehicle dealer, is authorized to make application to any circuit court of the state for the grant, upon a hearing and for cause shown, of a temporary or permanent injunction, or both, restraining any person from acting as a licensee under the terms of ss. 320.60-320.70 without being properly licensed hereunder, or from violating or continuing to violate any of the provisions of ss. 320.60-320.70, or from failing or refusing to comply with the requirements of this law or any rule or regulation adopted hereunder. Such injunction shall be issued without bond. A single act in violation of the provisions of ss. 320.60-320.70 shall be sufficient to authorize the issuance of an injunction. However, this statutory remedy shall not be applicable to any motor vehicle dealer after final determination by the department under s. 320.641(3).

19. Section 320.697, Florida Statutes, which also contains no additional grant of rulemaking authority, provides:

> Civil damages.--Any person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of ss. 320.60-320.70, notwithstanding the existence of any other remedies under ss. 320.60-320.70, has a cause of action against the licensee for damages

> and may recover damages therefor in any court of competent jurisdiction in an amount equal to 3 times the pecuniary loss, together with costs and a reasonable attorney's fee to be assessed by the court. Upon a prima facie showing by the person bringing the action that such a violation by the licensee has occurred, the burden of proof shall then be upon the licensee to prove that such violation or unfair practice did not occur.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.56, 120.569 and 120.57(1), Florida Statutes.

21. Petitioner and all Intervenors have standing to participate in this case, and the parties have stipulated that this is so. Section 120.56, Florida Statutes, allows a person who is substantially affected by a rule or agency statement to initiate a challenge. To establish standing under the "substantially affected" test, a party must demonstrate that 1) the rule will result in a real and immediate injury in fact, and 2) the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Florida Board of Medicine, 917 So. 2d 358 (Fla. 1st DCA 2005); see also Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, 808 So. 2d 243, 250 (Fla. 1st DCA 2002), superseded on other grounds, Department of Health v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006). Both Petitioner and Lexus of Orlando are licensees regulated by the Department and subject to the rule in question.

22. Intervenors FADA and SFADA likewise have standing to participate. See NAACP, Inc. v. Board of Regents, 863 So. 2d 294, 300 (Fla. 2003); Florida Homebuilders Association v. Department of Labor and Employment Security, 412 So. 2d 351, 353-54 (Fla. 1982)(association may meet standing requirements if a substantial number of members, although not necessarily a majority, are substantially affected by the rule).

23. As the Petitioner, JM Lexus "has the burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised." § 120.56(3)(a), Fla. Stat. The standard of review is de novo. § 120.56(1)(e), Fla. Stat.

24. Petitioner challenges the proposed rule in accordance with the definition of "invalid exercise of delegated legislative authority" in Section 120.52(8)(b), Florida Statutes (2006), which states:

> (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 which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory directives.
>
> 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 and 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 any agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

25. Specifically, Petitioner asserts that the rule violates the requirements of subsections (b) and (c).

Whether the Department Has Exceeded Its Authority

26. The crux of Petitioner's argument with respect to Section 120.52(8)(b), Florida Statutes, is that a general grant of rulemaking authority, such as Section 320.011, Florida Statutes, is not enough without the specific law being implemented also directing the adoption of rules. Respondent and the Intervenors, on the other hand, insist that as long as Rule 15C-7.005 is supported by a general grant of authority and implements specific powers and duties granted to the Department, it is within the parameters provided in Section 120.536, Florida Statutes.

27. In order to determine the merits of Petitioner's argument, it is necessary to examine the appellate cases interpreting Sections 120.52(8) and 120.536 since the 1999 amendments to those sections. The First District first considered the 1999 amendments to the rulemaking provisions of Chapter 120 when it decided Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000). In Save the Manatee, the court affirmed a decision invalidating portions of Florida Administrative Code Rule 40D-4.051, because the exemptions from permitting requirements created within the rule had no specific statutory authority. The Court recounted the 1996 amendments, its judicial interpretation of those amendments as articulated in St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d

72 (Fla. 1st DCA 1998), and the Legislature's reaction to the Consolidated-Tomoka decision. In discussing the legislative amendments to the rulemaking process, the court stated:

> One significant feature of the new statute is that it contains an additional statement of the factors that are *not* sufficient to justify the adoption of an administrative rule. Section 120.52(8) now provides that an agency shall not have the authority to adopt a rule merely because the rule "is within the agency's class of powers and duties." By including this language in the 1999 version of the statute, the Legislature has rejected the standard we adopted in Consolidated-Tomoka. An administrative rule must certainly fall within the class of powers and duties delegated to the agency, but that alone will not make the rule a valid exercise of legislative power.
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> In the absence of a special statutory definition, we may assume that the word "specific" was used according to its ordinary dictionary definition. . . .The ordinary meaning of the term "specific" is "limiting or limited; specifying or specified; precise, definite, [or] explicit.". . . "Specific is used as an adjective in the 1999 version of section 120.52(8) to modify the phrase "powers and duties." In the context of the entire sentence, it is clear that the 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.

773 So. 2d at 599 (emphasis in original).

28. Ultimately, the First District determined that the question to be answered is "whether the statute contains a specific grant of authority for the rule, not whether the grant

is specific enough. Either the enabling statute authorizes the rule at issue or it does not." Id. With this test in mind, the First District concluded that the rule at issue was invalid because it did not implement or interpret any specific power or duty granted by the applicable enabling statute. Section 373.414(9), Florida Statutes, upon which the District relied for its statutory authority, authorized rules to "establish exemptions and general permits, if such exemptions and general permits do not allow significant adverse impacts to occur individually or cumulatively." The rule, however, allowed exemptions from the permitting requirements based entirely on prior approval. Thus, the court held that there was no specific authority for the rule.

29. The First District again considered the requirements of Sections 120.52(8) and 120.536, Florida Statutes, in Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001). In Day Cruise, the Trustees of Internal Improvement Trust Fund had noticed a rule for adoption that would prohibit "cruises to nowhere." The proposed rule cited to Section 253.03(7), Florida Statutes, as its rulemaking authority, and Sections 253.001, .03, .04, and .77, Florida Statutes (1999), along with Article X, Section 11, Florida Constitution, as the law to be implemented. Like the Court in Save the Manatee, the First District discussed

the amendments to Sections 120.52(8) and 120.536 and the case law interpreting those amendments. It stated:

> It is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class or powers or duties the Legislature has conferred on the agency.

794 So. 2d at 700. The court further noted that provisions governing rulemaking "must be interpreted in light of the Legislature's stated intent to clarify significant restrictions on agencies' exercise of rulemaking authority." Id. The court examined Section 253.03(7)(a) and (b), Florida Statutes, upon which the agency had relied for its statutory authority. The court stated:

> Subparagraph (7)(a) describes the Trustees' duties in very general terms and confers equally general rulemaking authority:
>
> > The Board of Trustees of the Internal Improvement Trust Fund is hereby authorized and directed to administer all state-owned lands and shall be responsible for the creation of an overall and comprehensive plan of development concerning the acquisition, management, and disposition of state-owned lands so as to ensure maximum benefit and use. The Board of Trustees of the Internal Improvement Trust Fund has the authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this act.

> § 253.(7)(a), Fla. Stat. (1999). Subparagraph (7)(a) confers no rulemaking authority specific to submerged lands. Unlike subparagraph (7)(b), subparagraph (7)(a) makes no mention of submerged lands whatsoever.
>
> As comprehensive as its grant of rulemaking authority is, subparagraph (7)(a) should not be read as setting at naught the restrictions on rulemaking authority set out in subparagraph (7)(b), which applies specifically to submerged lands. . . .
>
> While subparagraph (7)(b) does confer rulemaking authority with respect to submerged lands, it does not authorize adopting the proposed rule, because it qualifies the grant of rulemaking authority in ways that are incompatible with the adoption of the proposed rule.
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> Id. at 701.

30. The Florida Supreme Court noted the 1999 amendments to Section 120.536(1), Florida Statutes, when it considered a challenge to the "disconnect authority rule" adopted by the Florida Public Service Commission. The specific authority for the rule stated that "the commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons." § 364.19, Fla. Stat. The Supreme Court, citing Save the Manatee, held that the "disconnect authority rule is directly and specifically related to the authority granted the commission over telecommunications contracts pursuant to section 364.19." Osheyack v. Garcia, 814 So. 2d 440 (Fla. 2001).

31. In Hennessey v. Department of Business and Professional Regulation, 818 So. 2d 697 (Fla. 1st DCA 2002), several horse trainers challenged the "absolute insurer rule" which makes race-animal trainers the absolute insurers of the condition of the animals entered into races at Florida pari-mutuel facilities. The authorizing statutes for the rule were Sections 550.0251(3) and 550.2415(2) and (13), Florida Statutes. Section 550.0251(3) required the Division of Pari-Mutuel Wagering to adopt reasonable rules for the control, supervision, and direction of all licensees, and for the holding, conducting and operating of all races. Subsections 550.2415(2) and (13) provided as follows:

> (2) Administrative action may be taken by the division against an occupational licensee responsible pursuant to rule of the division for the condition of the animal that has been impermissibly medication or drugged in violation of this section.
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> * * *
>
> (13) The division shall adopt rules to implement this section. The rules may include a classification system for prohibited substances and a corresponding penalty schedule for violations.

(Emphasis added). The First District reiterated the holding in Save the Manatee and held that a plain reading of the authorizing statutes demonstrates that the Legislature granted the department the specific authority to hold a trainer responsible for the condition of the horses he or she trains and races, should drugs be found in their system.

32. In Department of Children and Family Services v. I.B., 891 So. 2d 1168 (Fla. 1st DCA 2005), the petitioners attacked a rule providing that adoptive applicants did not have the right to appeal the Department's decision on the selection of an adoptive home for a particular child. The court affirmed the administrative law judge's conclusion that there were no statutes, collectively or individually, that provide to the Department the necessary specific legislative authority to exempt the selection of adoptive homes from Chapter 120, Florida Statutes. Moreover, the court specifically stated that after adoption of a rule, the Department may not rely on statutory provisions not cited in the proposed rule as statutory authority. Id. at 1172.

33. As late as this year, the First District considered the reach of specific authority in Hanger Prosthetics and Orthotics, Inc. v. Department of Health, 948 So. 2d 980 (Fla. 1st DCA 2007). The Board of Orthotists proposed a rule that defined the term "direct supervision." Section 468.802, Florida Statutes, directed the Board to implement the provisions of the Orthotists, Prosthetics and Pedorthics Act, including rules relating to standards of practice. The court found that a licensed professional's "direct supervision" qualifies as a standard of practice, and thus the Board acted within its grant of rulemaking authority.

34. Finally, in Smith v. Department of Corrections, 920 So. 2d 638 (Fla. 1st DCA 2005), the court considered a rule of the Department of Corrections which allowed the Department to charge inmates for copying services and found it to be invalid for lack of a specific grant of authority. The following portions of the First District's decision are pertinent to our inquiry here:

> "[A]n administrative rule must certainly fall within the class of powers and duties delegated to the agency, but that alone will not make the rule a valid exercise of legislative power." [Save the Manatee] at 599. "The question is whether the statute contains a specific grant of authority for the rule, not whether the grant of authority is specific enough." Id. (emphasis in original). "Either the enabling statute authorizes the rule at issue or it does not." Id. In addition, under the standard set forth in section 120.52(8), the Department's arguments as to the wisdom of the challenged portions of the rule in light of past experience . . . cannot save the challenged portions of the rule in the absence of specific statutory authority for those provisions.
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> * * *
>
> Finally, even though not initially cited in the rule as statutory authority for the rule, an analysis as to whether section 944.09, Florida Statutes, provides authority for the rule appears to be necessary given the Department's explicit reliance on this provision below and the Department's subsequent amendment of the rule to include a citation to this statute as statutory authority for the rule. Section 944.09 merely sets forth the general rulemaking authority of the Department with regard to, among other things, "[t]he rights of inmates," "[t]he operation and management of the correctional institution or facility and its personnel and functions," "[v]isiting

> hours and privileges," and "the determination of restitution, including the amount to how it should be paid. . . ." Once again, there is no specific grant of authority in this statute for the assessment by the Department of monetary costs for any particular service provided to inmates by the Department. In fact, the supreme court has recognized that "section 944.09 is merely the general statutory authority for the Department to promulgate rules," and that the Department has "long looked" to other statutory provisions for the specific authority to promulgate rules. See Hall v. State, 752 So. 2d 575, 579 (Fla. 2000). Consequently, the language in section 944.09, relied upon by the Department . . . does not contain a specific grant of legislative authority for those provisions under the standard set forth in section 120.52(8) as interpreted in Save the Manatee.

Id. at 641, 642-43.

35. None of the cases discussed above hold that a general grant of authority such as that found in Section 320.011, Florida Statutes, provides the specific grant of authority required in Sections 120.52(8)(b) and 120.536(1), Florida Statutes. To do so would nullify the directive of the last sentence of the "flush left" portion of both sections, which states, "[s]tatutory 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." It is a fundamental rule of statutory construction that statutory language cannot be construed so as to render it meaningless. Day Cruise Association, 794 So. 2d at 701. The question which must

be addressed is what the Legislature intended by the phrase "by the same statute."

36. The undersigned concludes that "by the same statute" was intended to refer to the specific statutory section cited as authority for a rule. Therefore, while the subject matter of Rule 15C-7.005 is within the class of powers and duties conferred upon the Department by Chapter 320, Florida Statutes, that is, by definition, not enough.

37. This conclusion is also supported by the fact that, where the Legislature has intended for the Department to engage in rulemaking, it has provided specific authority for it to do so. See, for example, §§ 320.02(1), (2)(b), (14)(a); 320.025(1); 320.03(1)&(7); 320.0657(5); 320.08053(3); 320.084(4)(c); 320.0841(2); 320.0848(10); 320.131(8); 320.08053(3); and 320.27(3), Fla. Stat.

38. In their reply to the Petition, Intervenors asserted:

> "Specific" authority is not required for each and every rule. Rather, such "additional authority" may be required only with respect to subjects where an agency makes rules in order to define areas which do not readily submit to legislation, such as what constitutes a wetland, or how water quality is to be measured. In sum, a statutory provision which generally grants authority for an agency to adopt rules enforcing the statutes the agency is charged with enforcing satisfies the requirements of the post-1996 rulemaking statutes. A specific statute authorizing each and every rule is unnecessary.

39. Intervenors' position is unsupported in current law, and contradicts the express rulemaking requirements of Section 120.54(3)(a)1., Florida Statutes:

> 1. 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, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the 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.

Section 120.54(3)(a)1. clearly anticipates reference to specific, as opposed to general, rulemaking authority for all rules adopted through the normal rulemaking procedures.

40. Under these circumstances, Rule 15C-7.001 is invalid because the Department has exceeded its rulemaking authority in violation of Section 120.52(8)(b), Florida Statutes.

Whether Rule 15C-7.005 Enlarges, Modifies, or Contravenes The Law Implemented

41. Petitioner also asserts that Rule 15C-7.005 is an invalid exercise of legislatively delegated authority because it enlarges, modifies, or contravenes the specific provisions of law implemented, in violation of Section 120.52(8)(c), Florida Statutes. In support of this contention, Petitioner asserts that the rule is invalid because it purports to implement a series of statutory provisions as opposed to a single section; that it

enlarges and modifies terms defined by statutes; and modifies the statutory scheme balancing agency enforcement and private actions.

42. Petitioner's claim of invalidity because the rule implements more than one statute is without merit. As long as specific authority exists, there is no prohibition cited by any party to the Department addressing a series of inter-related provisions in a single rule.

43. Petitioner's claim that the Rule enlarges the provisions of the implementing statutes focuses on the term "importer" and the phrase "permanent additional place or places of business not contiguous to the premises." The term "importer" is defined statutorily as "any person who imports vehicles from a foreign country into the United States or into this state for the purpose of sale or lease." § 320.60(7), Fla. Stat. Petitioner's argument focuses on a comparison of the statutory definition compared to sections (1) and (4) of Rule 15C-7.005:

> (1) An additional motor vehicle dealership, as contemplated by Sections 320.27(5) and 320.642, Florida Statutes, shall be deemed to be established when motor vehicles are regularly and repeatedly sold at a specific location in the State of Florida for retail purposes if the motor vehicle dealer transacting such sales:
> (a) Is not located in this state, or
> (b) Is not a licensed motor vehicle franchised for the specific line-make, or
> (c) Is a licensed motor vehicle dealer franchised for such line-make, but such sales are transacted at a location other than that permitted by the license issued to the dealer by the Department. Such sales are not

> subject to this rule, however, when a motor vehicle dealer occasionally and temporarily (not to exceed seven days) sells motor vehicles from a location other than the motor vehicle dealer's licensed location provided such sales occur within the motor vehicle dealer's area of sales responsibility (except a motor vehicle dealer who may be deemed a licensee under this rule.
>
> * * *
>
> (4) A motor vehicle dealer, whether located in Florida or not, which supplies a substantial number of vehicles on a regular and repeated basis which are sold in the manner set forth in subsection (1), shall be deemed to have established a supplemental location in violation of Section 320.27(5), Florida Statutes, and Rule 15C-7.005, F.A.C. Furthermore, a motor vehicle dealer which supplies vehicles in this manner shall be deemed to have conducted business within the State of Florida and acted as a "licensee," "importer" and "distributor" as contemplated by Section 320.60, Florida Statutes, and thus such activity shall constitute a violation of Sections 320.61 and 320.642, Florida Statutes. . . .

44. Under the express terms of the rule, a Florida Chevrolet dealership in Tallahassee that supplies Chevrolet motor vehicles to a Nissan dealership in Jacksonville that sells the Chevrolets at the Jacksonville location would be deemed to be an "importer" under the rule, despite the fact that the Chevrolet dealer at no time brought vehicles from a foreign country into the United States or from another state into Florida for the purpose of sale or lease. Clearly, Rule 17C-7.005(4) expands the definition of "importer" from that provided by Section 320.60(7), and violates Section 120.52(8)(c), Florida Statutes.

45. The Department and Intervenors assert a different reading of the rule, stating, "Whether the 'supplier' is a Florida licensed franchised motor vehicle dealer or is out-of-state, by regularly supplying motor vehicles to another for resale, the supplier is functioning as a distributor (in the case of in-state dealers) or an importer (in the case of out-of-state dealers) and so is in violation of section 320.61, which requires distributors and importers to be licensed." This interpretation, however, is inconsistent with the express language of Rule 15C-7.005(4), which states "shall be deemed to have conducted business in the State of Florida and acted as a 'licensee,' 'importer,' and distributor."

46. Similarly, Section 320.27(5) requires that a supplemental license is required only for "each permanent additional place or places of business not contiguous to the premises for which the original license is issued." By contrast, Rule 15C-7.005 simply requires motor vehicles to be "regularly and repeatedly sold at a specific location in the State of Florida" under certain specified circumstances. It requires neither that the location be permanent nor that it not be contiguous to the premises for which the original license is issued. For this reason Rule 17C-7.005(1) enlarges the specific provisions of law implemented, in violation of Section 120.52(8)(c), Florida Statutes.

Whether Rule 15C-7.005 Impermissibly Creates a Private Right of Action

47. Finally, Petitioners assert that Rule 15C-7.005 impermissibly creates a private right of action for its violation. Petitioner asserts several theories for invalidating Rule 15C-7.005 on this basis, but only one requires discussion. There is no question that Chapter 320, Florida Statutes, creates several instances in which competitors have a private right of action against entities that violate various licensure requirements. See, e.g., §§ 320.64, 320.695 and 320.697, Fla. Stat. However, there is simply no statutory authority for the Department to create any private right of action or to create enforcement authority for itself by rule. Smith v. Department of Corrections, 920 So. 2d 638 (Fla. 1st DCA 2005); Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001); St. Petersburg Kennel Club v. Department of Business and Professional Regulation, 719 So. 2d 1210 (Fla. 2d DCA 1998). To the extent that it does so, Rule 17C-7.005(4), (5) & (6) exceed the Department's statutory authority in violation of Section 120.52(8)(b), Florida Statutes.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

Florida Administrative Code Rule 15C-7.001 is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 20th day of April, 2007, in Tallahassee, Leon County, Florida.

S

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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.