

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COVENTRY FIRST, LLC,)
)
 Petitioner,)
)
 vs.) Case No. 09-3944RU
)
 OFFICE OF INSURANCE REGULATION)
 and FINANCIAL SERVICES)
 COMMISSION,)
)
 Respondents.)
 _____)

FINAL ORDER

A final hearing was conducted in this case on September 28, 2009, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William E. Williams, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the guidelines set forth in the Specialty Product Administration Field Examination Policy Procedures (SPA Field Exam Policy), Viatical Settlement Provider Examination Manual (VSP Manual), Viatical Settlement Provider Examination Procedures (VSP Exam Procedures), and notice-of-examination letters constitute agency statements defined as rules but not adopted as such, in violation of Section 120.54, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner Coventry First, LLC (Petitioner) filed its Petition Seeking Administrative Determination of the Invalidity of Agency Statements Defined as Rules ("Petition") on July 22, 2009. The Petition alleged that Respondents Office of Insurance Regulation (OIR) and Financial Services Commission (Commission) (herein after referred to collectively as Respondents) have developed and apply certain documents in conducting examinations of viatical settlement providers (VSPs). According to the Petition, Respondents' use of the documents includes the requirement that VSPs, licensed but not domiciled in Florida, provide information and documentation regarding viatical settlement contracts that are neither effectuated in Florida nor involve Florida residents. Petitioner asserts that the use of the documents amounts to a rule under Section 120.52(16), Florida

Statutes, which must be adopted pursuant to Section 120.54, Florida Statutes.

A Notice of Hearing and Order of Pre-hearing Instructions dated July 24, 2009, scheduled this matter for hearing on August 21, 2009.

On July 28, 2009, Petitioner filed an Agreed Motion for Rescheduling of Final Hearing. An Order dated July 28, 2009, granted the motion and rescheduled the hearing for August 24, 2009.

On August 12, 2009, Petitioner filed another Agreed Motion for Rescheduling of Final Hearing. An Order dated August 12, 2009, granted the motion and rescheduled the hearing for September 28, 2009.

On September 22, 2009, Petitioner filed an unopposed motion to amend the Petition. An Order dated September 23, 2009, granted the motion.

On September 23, 2009, Respondents filed a Unilateral Pre-hearing Stipulation. On September 24, 2009, Petitioner filed a Unilateral Pre-hearing Stipulation.

On September 24, 2009, Respondents filed a Motion for Summary Final Order and Amended Unilateral Pre-hearing Stipulation. When the hearing commenced, the undersigned reserved ruling on the motion, directing the parties to address the issues raised therein in post-hearing proposed orders. The

motion is hereby denied for reasons set forth in the Conclusions of Law below.

Petitioner presented the testimony of one witness. Petitioner's Exhibits P1-P8, P10-P33, and P35-38 were accepted as evidence.

Respondents presented the testimony of two witnesses. Respondents' Exhibits R1-R11 were accepted as evidence.

The Court Reporter filed the transcript of the proceedings with the Division of Administrative Hearings on October 2, 2009. The parties filed Proposed Final Orders on October 19, 2009. Unless otherwise indicated, all references are to the 2009 Florida Statutes.

FINDINGS OF FACT

1. OIR has the statutory duty to enforce the provisions of the Florida Insurance Code, to investigate any violation of the Florida Insurance Code, and to regulate insurance activity in Florida, including the licensure, examination, and monitoring of insurers and other risk-bearing entities such as VSPs. See § 624.307, Fla. Stat.

2. Petitioner is a foreign corporation, licensed to do business in Florida as a VSP. See § 626.9911(12), Fla. Stat. Therefore, it is subject to OIR's regulation.

3. Section 626.9911(10), Florida Statutes, defines a viatical settlement contract as follows in pertinent part:

(10) "Viatical settlement contract" means a written agreement entered into between a

viatical settlement provider, or its related provider trust, and a viator. The viatical settlement contract includes an agreement to transfer ownership or change the beneficiary designation of a life insurance policy at a later date, regardless of the date that compensation is paid to the viator. The agreement must establish the terms under which the viatical settlement provider will pay compensation or anything of value, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of all or a portion of the insurance policy or certificate of insurance to the viatical settlement provider.

4. Section 626.9922, Florida Statutes, provides OIR explicit authority to examine any books and records, without limitation to Florida-only files, of Florida-licensed VSPs. Section 626.9922, Florida Statutes, states as follows in pertinent part:

(1) The office or department may examine the business and affairs of any of its respective licensees or applicants for a license. The office or department may order any such licensee or applicant to produce any records, books, files, advertising and solicitation materials, or other information and may take statements under oath to determine whether the licensee or applicant is in violation of the law or is acting contrary to the public interest. The expenses incurred in conducting any examination or investigation must be paid by the licensee or applicant. Examination and investigations must be conducted as provided in chapter 624, and licensees are subject to all applicable provisions of the insurance code.

5. Section 626.9925, Florida Statutes, states as follows:

Rules.--The commission may adopt rules to administer this act, including rules establishing standards for evaluating advertising by licensees; rules providing for the collection of data, for disclosures to viators, for the registration of life expectancy providers; and rules defining terms used in this act and prescribing recordkeeping requirements relating to executed viatical settlement contracts.

6. Florida law specifically addresses viatical settlement contracts entered into between a VSP domiciled in Florida and a non-Florida resident in Section 626.99245, Florida Statutes, as follows:

(1) A viatical settlement provider who from this state enters into a viatical settlement contract with a viator who is a resident of another state that has enacted statutes or adopted regulations governing viatical settlement contracts shall be governed in the effectuation of the viatical settlement contract by the statutes and regulations of the viator's state of residence. If the state in which the viator is a resident has not enacted statutes or regulations governing viatical settlement agreements, the provider shall give the viator notice that neither Florida nor his or her state regulates the transaction upon which he or she is entering. For transactions in those states, however, the viatical settlement provider is to maintain all records required as if the transactions were executed in Florida. The forms used in those states need not be approved by the office.

There is no similar statute that specifically requires a non-domestic VSP, such as Petitioner, to produce records for OIR's review on transactions with viators who are not Florida residents.

7. Nevertheless, OIR reviews out-of-state transactions of licensed VSPs, domestic and non-domestic, to verify compliance with Section 626.99275(1)(d), Florida Statutes, which states as follows:

(1) It is unlawful for any person:

* * *

(d) To knowingly or intentionally facilitate the change of state of residency of a viator to avoid the provisions of this chapter.

Except as provided in Section 626.99275(1)(d), Florida Statutes, OIR does not apply Florida law to a foreign VSP's non-Florida transactions.

8. OIR's examiners spend significantly less time reviewing non-Florida transactions, than Florida transactions. The examiners only review non-Florida transactions to determine whether the non-Florida transaction is actually a Florida transaction. Florida transactions, on the other hand, are put through a rigorous review process to ensure compliance with Florida law.

9. There have been instances during an examination of a VSP whereby OIR has discovered a file represented as a Florida file that was actually a non-Florida file. OIR also has discovered instances whereby a file represented to be from another state was later revealed to be a Florida transaction.

10. Alan Buerger, Petitioner's founder, Chief Executive Officer, and Treasurer, provided testimony during deposition and

final hearing. During deposition, Mr. Buerger testified there have been instances where Petitioner has misplaced or mislabeled a viator's state of residence.

11. Section 624.316(1)(c), Florida Statutes, governing examination of insurers, gives the Commission discretion to adopt a specified rule as follows:

(c) The office shall examine each insurer according to the accounting procedures designed to fulfill the requirements of generally accepted insurance accounting principles and practices and good internal control and in keeping with generally accepted accounting forms, accounts, records, methods, and practices relating to insurers. To facilitate uniformity in examination, the commission may adopt, by rule, the Market Conduct Examiners Handbook and the Financial Condition Examiners Handbook of the National Association of Insurance Commissioners, 2002, and may adopt subsequent amendments thereto, if the examination methodology remains substantially consistent.

The Commission has not exercised its discretion to adopt the NAIC Market Conduct Examiner's Handbook (currently known as the "Market Regulation Handbook") or any other rule relating to procedures or methodologies for market conduct examinations carried out pursuant to Chapter 624, Florida Statutes.

12. Petitioner alleges that the following documents contain statements that should be adopted by a rule: (1) SPA Field Exam Policy, (2) VSP Manual, and (3) VSP Exam Procedures. OIR's examiners receive these documents from their supervisors as guidelines to use in the examination of VSPs.

13. The SPA Field Exam Policy is an internal management memorandum that is a flexible guide used to train examiners. The document does not directly or indirectly require a VSP to comply with any statement contained therein or take any action, and it is not a procedure that is important to the public. It is only directed to OIR's field examiners.

14. The SPA Field Exam Policy includes the following policy statement: "Statement of Policy: Field examination shall be conducted in a professional manner in accordance with statutes governing Specialty Insurers."

15. The SPA Field Exam Policy also states as follows: "Purpose or Objective: To establish policies and procedures governing the travel and conduct of the examinations and the review, issuance and distribution of reports of examinations." Its overall objective "is to verify compliance with the specific statutory requirements governing the type of entity under examination."

16. OIR gives the SPA Field Exam Policy to new and existing examiners to tell them how to conduct an examination. The SPA Field Exam Policy includes the following procedures:

(a) scheduling of examination; (b) scope and objective of examination; (c) conduct of examination; (d) working paper standards; (e) draft reports of examination; (f) exit conferences; (g) review and issuance of reports of examination;

(h) corrective action plans; and (i) travel and administrative matters.

17. According to the SPA Field Exam Policy, an examiner is required to perform an examination using the standard audit program in effect at the start of the examination unless instructed otherwise. The policy states that the scope of the examination is to correspond to that contained in the engagement letter.

18. The VSP Manual is an internal management memorandum that is directed to OIR's examiners. It is a training tool and guideline for examiners that are conducting examinations of VSPs. The manual includes an outline of items to look for during the examinations. The outline tracks the language in the statute.

19. One purpose of the VSP Manual is to ensure that examiners go through all sections of the statute that relate to VSPs and to make sure they test OIR's issues of concern. The VSP Manual states that "[i]n conducting examinations of VSPs, the examiner will use the current audit program (see Attachment A) and follow the guidance offered in this manual."

20. According to the VSP Manual, examiners should review a list of all in-force policies and select a sample of completed settlement contracts. The sample of in-force contract includes Florida and non-Florida contracts.

21. The VSP Manual directs examiners to review the selected policies to verify compliance with twelve bullet points. The

twelve bullet points apply only to Florida policies. Out-of-state policies are reviewed only to determine whether there is a violation of Section 626.99275, Florida Statutes.

22. The examiner may deviate from the guidelines in the VSP Manual without receiving approval from management. The VSP Manual does not confer any requirements upon a VSP. It does not establish a procedure that could be used to impose a penalty on a licensed VSP.

23. The VSP Exam Procedures is an internal management memoranda used as a flexible guide to the examiners on how to conduct an examination in accordance with the statutes. It assists the examiners in determining what steps to perform while doing an examination. However, the examiners are allowed to deviate from the document. The information in the document tracks the language of the statutes.

24. OIR's VSP Exam Procedures is the "current audit program" referenced in the SPA Field Exam Policy and the VSP Manual. The first page of the VSP Exam Procedures sets forth the following objectives:

- Ensure examinations are conducted in accordance with established policies and procedures (examination procedure step 1),
- Gain an understanding of the company's operations (steps 2,3 and 5),
- Verify the viatical settlement provider ("VSP") is complying with the provisions of Chapter 626, Part X, Florida Statutes, and in accordance with the

terms of its viatical settlement agreements (steps 4 and 6 through 12),

- Ensure the company is keeping the Office informed of developments that are of interest to it (steps 4 and 6), and
- Prepare a Report of Examination available to the public (step 15).

25. In step 8, examiners are instructed to select and review a sample of in-force policies for compliance with twelve bullet points. The twelve-point review would apply only to Florida policies.

26. The VSP Exam Procedures does not direct Petitioner or any other VSP to take any sort of action. It is directed exclusively to OIR's examiners. It does not establish a procedure that could be used to impose a penalty on a VSP.

27. During deposition and final hearing, Mr. Buerger was asked how Petitioner was substantially affected by the OIR's internal management memoranda. Mr. Buerger testified that the requirement to prepare documents and data on a nationwide—rather than Florida-only basis—had a substantial affect on Petitioner. However, Mr. Buerger could not identify any of Petitioner's private interests that are affected by the SPA Field Exam Policy, the VSP Manual, and the VSP Exam Procedures. Mr. Buerger had not read any of the three documents that Petitioner claims constitute unpromulgated rules.

28. OIR provides courtesy letters to VSPs prior to examinations. OIR uses the engagement letters to advise VSPs about upcoming triennial or market conduct/target examinations

and to notify them that an examiner will expect to review all of the company's books and records.

29. Notification of upcoming examinations is not required by statute. The engagement letters do not place any requirements upon VSPs.

30. As early as March 15, 2004, engagement letters have contained requests for certain records. However, requests for information in letters may vary on a case-by-case basis depending on a VSP's licensure history and business practices.

31. Currently, OIR's financial examiner/analyst supervisor, Janice Davis, drafts the letters. Ms. Davis has prepared the letters using the same format since 2007, but an insurance examiner could draft a letter without supervisory approval. The drafter of the courtesy letters can change the letters at any time without approval from upper management and without internal ramifications from the Office.

32. Ms. Davis's letters request VSPs to have the following records available:

- Copy of latest audited financial statement, if any.
- Copy of most recent unaudited financial statements.
- Chart of accounts.
- Bank statements along with receipt and disbursement journals for all bank accounts for the past 24 months.
- Documentation supporting ownership interest in the company, together with the complete corporate record book, minutes, corporate resolutions or

similar documentation of organizational meeting and resolutions.

- Copies of all licenses obtained by the company and status of any pending applications for licensure.
- Copies of all approved forms, disclosures, and contracts, as well as advertising, sales and investment literature.
- Copies of all contracts or agreement between the company and all persons (including other entities and investors) related to the conduct of business.
- Listing of all broker and agent commissions paid during exam scope.
- All contracts with viators, in which the company participated, in primary or secondary market, whether as provider, broker, originator, agent or purchaser.
- Database of all policies reviewed or considered for purchase.
- Insured tracking records and files.
- Premium payment records and files.
- All viator files, including but not limited to: applications, offers, contracts or agreements, insurance policies, medical records, etc.
- All complaint and litigation files (and any resolutions thereto).

Because VSPs must pay all expenses associated with examinations, advance listing of the specific records that need to be available facilitates examinations.

33. The letters do not require VSPs to provide documentation in a database or spreadsheet in Excel format. It is an option provided to the company. Ms. Davis' letter to Petitioner dated August 14, 2008, states as follows in relevant part:

Additionally, to facilitate an expeditious review of the files, please

provide the examiner with a database or spreadsheet file in Excel format including, but not limited to, the following documentation

1) Please provide the following information on **all** policies purchased, **to date:**

- a. contract identifier
- b. viator name
- c. viator State of residence
- d. insured name
- e. insured State of residence
- f. settlement amount
- g. original viatical settlement provider
- h. broker(s)
- i. broker commission(s)
- j. date of contract
- k. date of closing
- l. insurer name
- m. policy number
- n. policy issue date
- o. type of coverage (individual, group, term, whole life, etc.)
- p. death benefit
- q. life expectancy
- r. projected maturity date
- s. original premium escrow and current escrow balance
- t. current status (active vs. matured, sole vs. available)
- u. date of death (if applicable)
- v. date death claim filed (if applicable (Emphasis in original)).

2) If the licensee is responsible for the payment of premiums, please provide a listing (include: unique viator identifier, insurer, policy number, policy face value, frequency of payment, next payment due date and amount due) for all policies purchased since inception for which premiums are due during the next 12 months.

34. The engagement letters make it clear that OIR expects VSPs to provide information as required by Section 626.9922,

Florida Statutes. In giving OIR authority to examine all books and records, the statute does not differentiate between in-state and out-of-state records.

35. If a VSP does not produce documents as requested in the courtesy letters, OIR could take disciplinary action against its license. To date, OIR has not taken any such action against a company for not providing the requested documentation. If the company does not provide a database or Excel spreadsheet, OIR will create a database for the documentation by going through paper files at the VSP's expense.

36. During deposition, Mr. Buerger, Petitioner's corporate representative, was asked if Petitioner preferred not to have a letter that provided notice of an upcoming examination and whether Petitioner would prefer an examiner show up to conduct an examination without prior notice. Mr. Buerger responded: "If we are going to have an exam, we'd like to know when somebody's coming."

37. OIR has a pending examination of Petitioner's books and records. OIR expects Petitioner to produce documentation and information listed in the engagement letter, including information relating to out-of-state settlement transactions. In the course of an examination that took place in 2005, OIR advised Petitioner that its license would be suspended summarily under an emergency order if it failed to provide out-of-state information.

38. The requirement to produce in-state and out-of-state records creates a financial burden for Petitioner because the majority of Petitioner's records involve out-of-state transactions. For example, in 2005, Petitioner had approximately 1,760 policies nationwide in the three-year period covered by the examination. Only 13 percent of these policies involved Florida residents. OIR billed Petitioner approximately \$33,000 for the examination.

39. Petitioner incurred other expenses associated with the 2005 examination such as the following: (a) legal expenses; (b) internal costs for software engineering, accounting and contract services to prepare the database; and (c) substantial time for staff to coordinate information from various departments to prepare the nationwide information. Petitioner's staff spent six to seven hours of time for each of the approximately 517 hours that OIR billed for the 2005 examination. Finally, the request for out-of-state documents required Petitioner to spend a substantial amount of time and resources to ensure the security of personal financial and health information of viators.

40. OIR currently has issued a second notice of triennial examination to Petitioner. The August 14, 2008, engagement letter requires Petitioner to provide documents and information for its policies on a nationwide basis. For the period covered by the second triennial examination, Petitioner has approximately 4,500 to 4,600 policies. Thus, Petitioner expects a substantial

increase in the cost of complying with OIR's document review and data requests from the costs it incurred in 2005.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. See §§ 120.569 and 120.57(1), Fla. Stat.

42. Section 120.56(4)(a), Florida Statutes, states in pertinent part, that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)." A person or entity demonstrates it is "substantially affected" by demonstrating that: (a) it will suffer an injury in fact of sufficient immediacy to entitle it to a formal administrative proceeding; and (b) the substantial injury is of a type or nature that the proceeding is designed to protect. See Ameristeel v. Clark, 691 So. 2d 473 (Fla. 1997).

43. In this case, Petitioner has standing to challenge the documents at issue as unpromulgated rules because it is subject to examinations that: (a) include a review of documents and information listed in the engagement letters; and (b) are conducted pursuant to guidelines set forth in the manuals. OIR's examination of out-of state viatical settlement contracts, in addition to Florida transactions, requires Petitioner to expend a substantial amount of time and other resources.

44. Petitioner has the burden of establishing by a preponderance of the evidence that the challenged agency statements constitute unpromulgated rules. See Bravo Basic Material Co., Inc. v. Dep't of Transp., 602 So. 2d 632 (Fla. 2nd DCA 1992); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

45. Petitioner alleges that the following agency statements are rules, as defined by Section 120.52(16), Florida Statutes: (1) SPA Field Exam Policy, (2) VSP Manual, (3) VSP Exam Procedures, and (4) courtesy letters provided to the VSPs prior to an examination.

46. Section 120.52(16), Florida Statutes, defines a rule as follows in pertinent part:

(16) "Rule" means 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. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

47. An agency statement is invalid only if it falls within the definition of a rule. See Dep't of Revenue v. Novoa, 745 So. 2d 378 (Fla. 1st DCA 1999).

48. Statements of general applicability, as referred to in Section 120.52(16), Florida Statutes, are statements that are intended by their own effect to create rights or require compliance, or otherwise have the direct and consistent effect of law. McDonald v. Dep't of Banking and Finance, 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

49. In Dep't of Revenue v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996), the court held that the Department of Revenue's training manual used for the tax assessment procedure was a statement of general applicability because it was the sole guide for the auditors and was not applied on a case-by-case basis. In Vanjaria, the auditors had no discretion to act outside of the procedure.

50. Unlike Vanjaria, OIR's SPA Field Exam Policy, VSP Manual, VSP Exam Procedures, and courtesy letters are not mandatory guides for examiners to use in conducting examinations. The examiners have discretion to deviate from the documents. OIR's examiners rely solely on the statutes in requesting and requiring a licensed VSP to provide all books and records without limiting it to Florida transactions.

51. The manuals are applied on a case-by-case basis, depending on the licensed VSP being examined. The examiners are free to adjust the audit program guidelines based on the circumstances of the VSP. There may be companies that do not

engage in business outside of Florida, so there would be no need to request that non-Florida files be available for review.

52. In determining whether an agency statement is an unpromulgated rule, the effect of the statement must be taken into consideration. See Vanjaria, 675 So. 2d at 255. An agency statement that requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law, is a rule. Id.

53. In Dep't of Highway Safety and Motor Vehicles v. Schluter, 705 So.2d 81, 82 (Fla. 1st DCA 1997), the court held that certain policies concerning officer discipline were not agency statements of general applicability because each was to apply only under certain circumstances and did not have the consistent effect of law.

54. In Agency for Health Care Administration v. Custom Mobility, Inc., 995 So. 2d 984 (Fla. 1st DCA 2008), the court held that a formula used to calculate overpayment to Medicaid providers was not a statement of general applicability because it only applied to some of the service providers being audited, and thus, did not have the consistent effect of law. The court found that the formula did not create any rights or adversely affect others because it did not itself establish that the service provider owed money. Id. at 987. Additionally, the court held that the formula was not a rule because it did not set forth a

categoric requirement of specific criteria with which to comply.
Id.

55. Like Schluter and Custom Mobility, Inc., OIR's manuals and letters are not statements of general applicability and do not have the consistent effect of law. They do not create or adversely affect any rights. A VSP is not afforded any additional rights or burdened by any further obligations as a direct or immediate consequence of the documents.

56. The manuals do not have a direct or external effect on any VSP. They are simply internal documents given to examiners to teach them what the statutes require in conducting an examination of a licensed VSP. The courtesy letters are given to the licensed VSPs to notify them of the examinations and to advise them about records that OIR may want to review in regard to that specific company.

57. In Gary M. Piccirillo and Douglas L. Adams v. Dep't of Corrections, Case No. 83-1652 (DOAH April 17, 1984), the Division of Administrative Hearings considered whether portions of the Union Correctional Institution Operating Procedures 82-69 constituted unpromulgated rules. The document contained operating procedures relating to the confinement of inmates. Id. In finding that portions of the statements were not rules, the Administrative Law Judge held that, "where agency statements that have not been adopted as rules simply track the language of either a statute or a validly adopted rule, it is unnecessary

that they be adopted pursuant to the requirements of Section 120.54, Florida Statutes." Id.

58. Here as in the Piccirillo case, OIR's manuals and letters track the language in Section 626.9922, Florida Statutes, which provides OIR with authority to order licensed VSPs to "produce any records, books, files, advertising and solicitation materials or other information"

59. OIR's SPA Field Exam Policy, VSP Manual, and VSP Exam Procedures do not constitute statements of "general applicability," but rather fall under the classification of "internal management memoranda," an exception to the definition of a rule. See § 120.52(16)(a), Fla. Stat. They are intended solely for the training of the OIR's examiners on how to conduct an examination of VSPs. The documents do not affect the private interest of VSPs.

60. In Dep't of Revenue v. Novoa, 745 So.2d 378, 381 (Fla. 1st DCA 1999), the court held that a policy prohibiting employees from preparing tax returns for private parties during non-working hours fell within the internal management memorandum exception to the definition of a rule. Id. at 379. According to the Novoa court, the policy only applied to employees and did not impair any private interests established by law. Id. at 391. Moreover, the court found that members of the general public have no arguable interest in the restrictions an administrative agency imposes on its own employees. Id. Since the policy only applied

to the employees, no person or firm outside the agency could possible be affected by it. Id. Therefore, the policy did not have an affect outside the agency. Id.

61. Similar to the appellees in Novoa, Petitioner has failed to show what its private interests are and how those private interests are affected by OIR's internal management memoranda. During deposition and final hearing, Mr. Buerger was unable to articulate how the memoranda affected Petitioner other than increasing the cost of the examination. An increase in examination costs is not a legal right protected by Section 120.52(16)(a), Florida Statutes. Hence, Petitioner has not established that the internal management memoranda affect a protected legal right.

62. In Cirrinzione v. Dep't of Agriculture and Consumer Services, Case No. 05-0145RU (DOAH January 3, 2006), the Administrative Law Judge rejected claims that the practices and procedures that the agency utilized in investigating possible statutory violations are agency statements. The Administrative Law Judge held that the practices and procedures used by the agency during an investigation fell under the internal management memoranda exception to the definition of a rule. Id. The opinion states as follows in relevant part:

22. The procedure that the Department utilizes in investigating possible violations, reviewing the investigation files, drafting administrative complaints, and reviewing draft administrative complaints are followed for all disciplinary actions.

This procedure falls under the internal memoranda exception to the definition of a rule. The procedure has no application outside the Department. It does not affect the private interests of persons who are subject to disciplinary action. At first blush, it would appear that because the investigatory process could end in a penalty being imposed upon the person being investigated that the procedure would affect the private interests of a person. However, a person who is subject to discipline by the Department has no statutory right in having the disciplinary case investigated in a certain manner, in having certain persons review the file before the final determination is made to take disciplinary action, or in having the administrative complaint drafted or reviewed in a certain manner. The ultimate decision to take the disciplinary action is made by the Division Director or Assistant Division Director and not by lower echelon staff.

23. The investigatory process is not a procedure that is important to the public. Section 482.061, Florida Statutes, provides that the Department shall appoint inspectors to do inspections and perform investigative work. If the inspectors find a violation, they are required to report it to the Department. The process that the Department utilizes in reviewing the report and subsequent investigative file, preparing an administrative complaint based on the investigative file, and reviewing the administrative complaint for quality control prior to the actual determination to take disciplinary action is of no more importance to the public than what steps an agency uses in preparing and reviewing other types of documents that are sent out by the agency.
Id.

63. OIR's internal management memoranda are utilized during the examination of VSPs. Following the opinion in Cirrinzione, OIR's internal management memoranda fall under the internal

management memoranda exception to the definition of a rule. Further, Petitioner does not have a statutory right in having an examination conducted in a certain manner.

64. OIR's internal management memoranda and courtesy letters are not rules within the definition of Section 120.52(16), Florida Statutes. They are not subject to the requirements set forth in Section 120.54(1), Florida Statutes.

65. By motion, Respondents seek reasonable costs and attorneys' fees pursuant to Section 120.595(4)(d), Florida Statutes, which states as follows:

(d) If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and attorney's fees against a party if the appellate court or administrative law judge determines that the party participated in the proceedings for an improper purpose as defined in paragraph (1)(e) or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts.

Under the circumstances of this case, Respondent's motion is denied.

ORDER

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

ORDERED that the Petition, as amended, is dismissed, and it is further

ORDERED that Respondents are not entitled to recover costs and attorneys' fees.

DONE AND ORDERED this 13th day of November, 2009, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of November, 2009

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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 one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second 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.