STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN COUNCIL OF LIFE INSURANCE,	)	
Petitioner,	)	
vs.	)	Case No. 09-4909RP
DEPARTMENT OF FINANCIAL SERVICES,	)	
Respondent.	)	

AMENDED FINAL ORDER ON MOTION TO DISMISS

This case began when Petitioner, American Council of Life Insurance (ACLI) filed a Petition for Administrative Determination of Invalidity of Proposed Rule (Petition), seeking an administrative determination that proposed rule 69B-162.011 is invalid. The case was assigned to the undersigned and a Notice of Hearing was entered scheduling the hearing for October 12, 2009.

Paragraph (8) of the Petition alleges that proposed rule 69B-162.011 is an invalid exercise of delegated legislative authority because the Department of Financial Services (Department) failed to follow the applicable rulemaking procedures or requirements, exceeded its grant of rule making authority, and that the rule enlarges, modifies, or contravenes the specific provisions of the law implemented, vests unbridled discretion in the Department, and is arbitrary or capricious.

The Department filed a Motion to Dismiss (Motion) seeking dismissal of the Petition filed by ACLI. The primary basis for the Motion is that the Petition was filed untimely. ACLI filed a response in opposition. Thereafter, the Department filed a reply to ACLI's response and ACLI filed a response to the Department's reply.[1/]

The proposed rule was published May 22, 2009, in Volume 35, No. 20, of the Florida Administrative Weekly (FAW). A Notice of Change was published August 14, 2009, in Volume 35, No. 32 of

the FAW. A second Notice of Change was published August 21, 2009, in Volume 35, No. 33 of the FAW. The Petition was filed September 9, 2009.

The Motion alleges that the Petition seeks to attack provisions of the proposed rule as initially published, and that ACLI did not initiate a challenge to the proposed rule as initially published or to the first notice of change. Regarding the second notice of change, the Motion further alleges:

> 5. In the instant cause, the purported means through which the instant Petitioner seeks to challenge the entire proposed rule is the second notice of change. More particularly, Petitioner complains that the second notice of change lacks a specific effective date. . . . Through that pretextual challenge to the second notice of change, Petitioner seeks to attack provisions of the rule long ago published without challenge.. . . If Petitioner is substantially affected by those provisions of the proposed rule now, it was substantially affected by those same provisions on publication, but it initiated no challenge to the proposed rule. The time for such a challenge has expired.
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> 6. The reason that the second notice of change provides for no specific effective date is that no effective date can be assigned until the proposed rule has been adopted, which can occur only after all challenges, such as this one, have been disposed of. Thus, Petitioner has created the very impasse to assignment of an effective date of which it complains and attempts to use to challenge the entire proposed rule. If this argument is allowed, the statutory delimitation of rule challenges to 21 days after publication will be rendered meaningless and of no force or effect.

Section 120.56(2)(a), Florida Statutes (2009), reads in pertinent part as follows:

> 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 within 21 days after the date of publication of the notice required by s.120.54(3)(a). . . 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. (emphasis added)

ACLI responded to the Department's Motion by asserting that the Motion is insufficient based upon the "private negotiations between DFS and ACLI, which negotiation began at the hearing held on the challenged [sic] on June 16, 2009, and continued thereafter, regarding the substantive terms and provisions of the challenged rule, which led ACLI to believe that certain changes in the challenged rule would be made by DFS. DFS failed to make such changes in either of the two Notices of Change filed by DFS." ACLI then cites as authority Department of Health and Rehabilitative Services v. Florida Medical Center, 578 So. 2d 351 (Fla. 1st DCA 1991).

Further, ACLI asserts that DFS's argument that no specific effective date is required is insufficient, citing Section 12 of Senate Bill 2082 (2008), which addresses the effective date of the implementing rules of the statutory amendment contained in the bill: . . . and such implementing rules shall take effect 60 days after the date on which the final rule is adopted or January 1, 2009, whichever is later."

The Department's reply to ACLI's response asserts that Florida Medical Center is distinguishable from the instant case, and that the legislatively prescribed effective date of the proposed rule is either January 1, 2009, or sixty days after adoption, "which ever is later." Thus, the Department argues that the time for assignment of an effective date has not yet arrived.

Finally, ACLI's reply to the Department's response asserts that the Department misconstrues Florida Medical Center, and that the proposed rule as initially noticed stated the effective date as January 1, 2009, and did not "eliminate" that obviously incorrect date until the second notice of change.

In Department of Health and Rehabilitative Services v. Florida Medical Center, supra, the hearing officer in the underlying challenge to a proposed rule found that material changes to a proposed rule based on off-the-record private negotiations constituted changes that were in excess of delegated legislative authority. The First District affirmed, finding that the appellees' challenge filed within 21 days following the agency's publication of notice of change to a proposed rule, but more than 21 days following the original notice of the proposed rule was timely, when the "material modifications to the rule were predicated upon neither public hearings nor the record of the proceedings." 578 So. 2d 351, 354. In contrast, ACLI argues that it was substantially affected by changes not made to the proposed rule based upon private negotiations.

The undersigned is not persuaded that the Florida Medical Center case opens the door to Petitioner herein. ACLI did not file a challenge to the proposed rule as initially noticed. Further, the only allegation in the Petition regarding the second notice of change relates to the deletion of the effective date of January 1, 2009, relating to the incorporation by reference of forms, a date that had long passed. The undersigned is not persuaded that this constitutes a change that enables Petitioner to then challenge the substance of the rule as initially noticed, as contemplated by Section 120.56(2)(a), Florida Statutes.

Finally, any amendment to the Petition would not allow Petitioner to state a cause of action in this rule challenge proceeding. See Undereducated Foster Children of Florida v. Florida Senate et al., 700 So. 2d 66 (Fla. 1st DCA 1997).

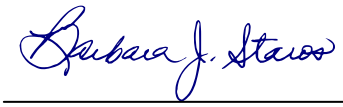
Accordingly, it is

ORDERED:

1. Respondent's Motion to Dismiss is granted.

2. The hearing scheduled for October 12, 2009, is hereby canceled.

DONE AND ORDERED this 9th day of October, 2009, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of October, 2009.

ENDNOTE

1/ Florida Administrative Code Rule 106.204(1) only authorizes a response in opposition to a motion and does not contemplate further pleadings regarding a motion. Notwithstanding, the reply and response to the reply have been considered.

COPIES FURNISHED:

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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.