STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, Petitioner, vs. YURAY RODRIGUEZ, Respondent.	)	Case No. 11-714PL

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on July 22, 2011, by video teleconference at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Jacek P. Stramski, Esquire
Douglas D. Dolan, Esquire
Florida Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Frank L. Hollander, Esquire
Hollander and Associates, LLC
Two South Biscayne Boulevard
One Biscayne Tower, Suite 1650
Miami, Florida 33131

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the allegations contained in the Second Amended Administrative Complaint, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On November 18, 2010, Petitioner, Department of Financial Services, filed an Administrative Complaint against Respondent, Yuray Rodriguez. Respondent timely requested a formal hearing to contest the allegations, and, on February 10, 2011, the matter was referred to the Division of Administrative Hearings ("DOAH").

On March 3, 2011, Petitioner filed a Motion for Leave to File Amended Administrative Complaint, which was granted on March 28, 2011. Subsequently, on May 18, 2011, Petitioner requested permission to file a Second Amended Administrative Complaint, which was likewise granted.

As noted above, the final hearing in this matter was held before the undersigned on July 22, 2011. During the final hearing, Petitioner presented the testimony of Gabriel San Quintin, Digna Blanzaco, Rafael Alpizar, and Respondent. Petitioner introduced twelve exhibits into evidence, numbered 1, 4, 5, 6, 7, 8, 9, 12, 16, 17, 18, and 19. Respondent presented the testimony Jorge Ferrer, Lidia Azcue, and Salma Zacur.

Respondent also introduced five exhibits, identified as F, J, L, M, and N.

The final hearing transcript was filed with DOAH on August 17, 2011. Both parties timely filed proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged misconduct.

FINDINGS OF FACT

A. The Parties

1. Since 1999, Respondent has been licensed in the State of Florida as a health insurance agent.

2. Pursuant to chapter 626, Florida Statutes, Petitioner Department of Financial Services has regulatory jurisdiction over licensed health insurance agents.

B. The Events

3. On or about December 12, 2006, Respondent was appointed as an agent with SunCoast Physicians Health Plan, Inc. ("SunCoast"), an insurer that offered Medicare Advantage HMO plans. Although Respondent was one of its appointed agents, he did not receive a salary from SunCoast, nor was he provided an office.[1]

4. In or around January 2007, Respondent was contacted by telephone by an individual——previously unknown to Respondent and whose name Respondent no longer recalls——who claimed that a local physician was interested in converting a number of consumers from other coverage to SunCoast.

5. As the conversation progressed, it appeared to Respondent that the individual was presenting a legitimate business opportunity, as he mentioned the names of several of Respondent's acquaintances. At the conclusion of the call, Respondent agreed to meet the individual (and the individual's associate, whose name Respondent likewise does not remember) later that day at an office building at the intersection of Flagler Street and Fontainbleau Boulevard in Miami.

6. Respondent proceeded to the agreed upon location and met with the two individuals, both of whom demonstrated substantial knowledge regarding SunCoast and its benefits. During the meeting, the two individuals advised that Dr. Abreau, a physician familiar to Respondent, desired to perform a membership conversion. As the discussion progressed, the individuals presented Respondent with approximately 30 enrollment applications for the SunCoast plan, all of which were blank with the exception of the pre-printed material.

7. As a purported sign of "good faith,"[2] the two individuals insisted that Respondent sign each of the forms on

the signature line reserved for persons (e.g., agents or brokers) who assisted consumers in completing the application. Respondent ultimately agreed to do so——and to allow the unknown individuals, at their insistence, to temporarily retain the blank applications bearing his signature——with the understanding that he would return to the office the next morning, at which point Respondent would speak personally with Dr. Abreau and make arrangements to meet with the potential enrollees.[3]

8. On the following day, Respondent returned to the office building to continue with the transaction. Unable to find any trace of the two individuals, Respondent eventually located a custodian within the building, who advised that the office had been vacant for "a while."

9. After repeated attempts over the next several days, Respondent was able to reach one of the unknown individuals by telephone, at which time Respondent was informed that the "deal was off" and that the enrollment forms would be mailed to him.

10. Although Respondent never received the enrollment application as promised, he believed——based upon his prior experience in the industry that enrollment forms could only be submitted to an insurance company by the agent, i.e., Respondent——that the forms could not be misused and therefore no further action on his part was necessary. As such, Respondent

never notified SunCoast that third parties were in possession of blank enrollment forms that bore his signature.

11. Later during the month of January 2007, one or more unknown persons submitted approximately 30 enrollment forms (the same applications signed by Respondent) to SunCoast for processing. There is no record of who delivered the applications or by what means.

12. Although SunCoast should have utilized the Centers for Medicare and Medicaid Services (CMS) computer database to confirm the accuracy of the personal information of each applicant that appeared on the forms, SunCoast did not do so. Had SunCoast performed such a verification, it would have discovered that the residential addresses for all of the applicants were incorrect——a clear sign that the applications were fraudulent.

13. SunCoast processed the applications shortly thereafter, which resulted in unauthorized changes in health coverage for approximately 30 persons.

14. In February 2007, Gabrial San Quintin was hired by SunCoast as its Director of Enrollment and Member Administration. Shortly thereafter, Mr. San Quintin discovered that an unusual number of SunCoast's mailings to its enrollees were being returned due to incorrect address information.

15. Mr. San Quintin investigated the matter and ultimately determined that the January 2007 enrollment forms bearing Respondent's signature had not been authorized by the persons whose names appeared on the applications. However, neither Mr. San Quintin nor any other SunCoast employee notified Respondent of this information.[4] In fact, Respondent credibly testified that he did not learn of the improperly submitted applications until approximately one year after his meeting with the unknown individuals.

16. Although the approximately 30 applications processed by SunCoast in January 2007 had not been authorized by the enrollees, SunCoast continued to provide full insurance coverage until such time that the enrollees were switched back to their original coverage.

17. During the final hearing, Petitioner presented the testimony of two of the individuals whose insurance coverage was improperly switched to SunCoast pursuant to applications bearing Respondent's signature: Digna Blanzaco and Rafael Alpizar. From the testimony of Ms. Blanzaco, it is apparent that she suffered no financial harm due to the unauthorized switch, nor was she denied any medical services. Likewise, there is no evidence that Mr. Alpizar suffered any physical harm or financial loss as a result of the improper change in coverage.[5]

18. In August 2007, SunCoast became insolvent and was subsequently liquidated.

19. The undersigned credits Respondent's testimony that: he was not the person who submitted the applications to SunCoast in January 2007 and has no knowledge of who did so; he had no knowledge that the applications bearing his signature were going to be misused in any manner whatsoever, nor did he intend or desire for the applications to be misused; the reason he signed the forms and left them with the unknown individuals was because he believed it was necessary to do so in order to preserve what reasonably appeared to be a legitimate business opportunity; the January 2007 incident was the only occasion in which he left blank applications bearing his signature with third parties; and he received no remuneration as a result of the fraudulently submitted applications. The undersigned also finds, based upon the evidence adduced during the final hearing, that Respondent acted in good faith at all times in connection with the SunCoast applications.

C. Ultimate Findings of Fact

20. Petitioner has failed to prove by clear and convincing evidence that Respondent has demonstrated a lack of fitness or trustworthiness to engage in the business of insurance.

21. Petitioner has failed to adduce clear and convincing evidence that Respondent has demonstrated the lack of reasonably

adequate knowledge and technical competence to engage in insurance transactions.

22. Petitioner failed to present clear and convincing evidence that Respondent engaged in unfair or deceptive acts or practices, as defined and prohibited by Part IX of Chapter 626, Florida Statutes, or has otherwise shown himself to be a source of injury or loss to the public.

CONCLUSIONS OF LAW

A. Jurisdiction

23. DOAH has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. The Burden and Standard of Proof

24. This is a disciplinary proceeding in which Petitioner seeks to suspend Respondent's license. Accordingly, Petitioner must prove the allegations in the Second Amended Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); § 458.331(3), Fla. Stat.

25. Clear and convincing evidence:

> [R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in

> issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. The Charges Against Respondent

26. In the Second Amended Administrative Complaint, Petitioner alleges that Respondent violated two provisions of section 626.611, Florida Statutes: section 626.611(7), which requires the suspension or revocation of an agent's license where the agent has demonstrated a lack of fitness or trustworthiness; and section 626.611(8), which mandates suspension or revocation where the agent has demonstrated a lack of adequate knowledge and technical competence to engage in insurance transactions.

27. It is further alleged that Respondent violated section 626.621(6), Florida Statutes, which provides that Petitioner, in its discretion, can take disciplinary action where a licensee engaged in unfair or deceptive acts or practices.

28. As sections 626.611 and 626.621 are penal in nature, they must be strictly construed in favor of Respondent. Bowling v. Dep't of Ins., 394 So. 2d 165, 172 (Fla. 1st DCA 1981).

29. Whether Respondent violated these statutes, each of which is addressed below, is a question of ultimate fact to be

decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995).

D. Section 626.611(7) & (8)

30. In Counts I, II, and III of the Second Amended Administrative Complaint, which relate, respectively, to Rafael Alpizar, Digna Blanzaco, and the remaining enrollees, Petitioner alleges that Respondent violated section 626.611(7) and section 626.611(8), which provide:

> The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:
>
> * * *
>
> (7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.
>
> (8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment.

31. At the outset, it is critical to recognize that during the final hearing in this matter, counsel for Petitioner stipulated, correctly in the undersigned's view, that Respondent's mere act of signing the blank forms——on the line

reserved for agents or other persons who helped the potential enrollee fill out the form——was not improper in and of itself.[6]

32. With that stipulation in mind, that undersigned will begin with the allegation that Respondent lacks the fitness or trustworthiness necessary to engage in the business of insurance, contrary to section 626.611(7).

33. To establish a violation of section 626.611(7), it is insufficient for Petitioner to demonstrate an act of mere negligence on the part of a licensee. Dep't of Fin. Servs. v. Brown, Case No. 04-765, 2004 Fla. Div. Adm. Hear. LEXIS 1913 (Fla. DOAH Sept 30, 2004), adopted in toto Dec. 17, 2004. Rather, as discussed in Brown, Petitioner must adduce clear and convincing evidence of bad intent, willfulness or fraudulent conduct:

> In order to establish a lack of fitness or trustworthiness to engage in the business of insurance, the Petitioner would have to adduce evidence of bad intent, willfulness or fraudulent conduct. That evidence was not established in this case. It could be argued that Respondent was negligent and used poor financial judgment by selling the referenced unregistered securities without inquiring sufficiently into their value, the level of risk or the accurate status of the company issuing the securities. However . . . the establishment of mere negligence on his part does not establish a lack of fitness or trustworthiness because it does

> not establish the element of wrongful intent, willfulness, or fraudulence.

Id. at *23. (Internal citation omitted); see also Hartnett v. Dep't of Ins., 406 So. 2d 1180, 1184 (Fla. 1st DCA 1981)("We would venture to suggest . . . [that] the element of 'willfulness' found to be necessary in proof of Section 626.611(10) and other violations . . . would be no less essential in a prosecution relying upon the general, all-purpose language of Section 616.611(7)").

34. Pursuant to the foregoing authority and the findings of fact contained herein, Petitioner has failed to prove a violation of section 626.611(7) by clear and convincing evidence. While Respondent acted imprudently, and perhaps negligently, by allowing the applications bearing his signature to remain in the possession of the unknown individuals and by choosing not to follow up with SunCoast when the forms were not returned to him by mail, Respondent's conduct does not evince bad intent, willfulness, or fraudulent conduct. On the contrary, Respondent signed the blank forms (at the insistence of the unidentified individuals) for the sole purpose of preserving what he reasonably perceived as a legitimate business opportunity. Further, as found above, Respondent acted in good faith and neither intended nor knew that the blank applications bearing his signature would ultimately be misused by other

parties or improperly processed by SunCoast. For these reasons, Respondent is not guilty of violating section 626.611(7), as charged in Counts I, II, and III.

35. Next, Petitioner alleges that Respondent is in violation of section 626.611(8), which requires an agent to possess "reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment." In its Proposed Recommended Order, Petitioner argues, in part, that Respondent violated this statutory provision because he "falsely certified that he assisted a consumer in completing the application." The undersigned rejects this contention, as it runs afoul of Petitioner's stipulation during the final hearing that Respondent's mere act of signing the blank forms was not unlawful or improper.

36. Petitioner further asserts that a violation of section 626.611(8) is demonstrated by Respondent's decision to permit the applications bearing his signature to remain in the possession of the unknown individuals and by his failure to contact SunCoast when the applications were not ultimately returned.

37. The undersigned does not agree that an agent's inability to clairvoyantly predict criminal misdeeds by others, standing alone, is sufficient to demonstrate a violation of section 626.611(8). Rather, the statute contemplates that

Petitioner present clear and convincing evidence that Respondent lacked sufficient knowledge and technical competence to explain insurance products to customers, help them make informed decisions, and/or enroll them in the plans. In other words, and stated simply, it was necessary for Petitioner to prove that Respondent lacked the knowledge and competence to engage in the business of insurance. The facts adduced by Petitioner fail to make such a showing, and therefore, Respondent is not guilty of violating this particular provision. See Dep't of Fin. Servs. v. Sibble-McLeod, Case No. 04-3423PL, 2005 Fla. Div. Adm. Hear. LEXIS 855, *5-6 (Fla. DOAH Feb. 23, 2005)("The Department offered no evidence, however, to prove that Respondent lacked knowledge of the insurance business and lacked technical competence, in violation of Subsection 626.611(8); rather, the evidence demonstrates that Respondent understood what was required of her but did not do it").

E. Section 626.621(6)

38. Petitioner further alleges, in Counts I, II, and III of the Second Amended Administrative Complaint, that Respondent is in violation of section 626.621(6), which provides:

> 626.621 Grounds for discretionary refusal, suspension, or revocation of agent's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment. The department may, in its discretion, deny an application for, suspend, revoke, or refuse

> to renew or continue the license or appointment of any applicant, agent, adjuster, customer representative, service representative, or managing general agent, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:
>
> * * *
>
> (6) In the conduct of business under the license or appointment, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part IX of this chapter [section 626.9541, Florida Statutes], or having otherwise shown himself or herself to be a source of injury or loss to the public.

(Emphasis added).

39. Pursuant to the foregoing language, a violation of section 626.621(6) can be established by proving that the licensee's behavior constituted an unfair method of competition or unfair or deceptive practice or act, as defined in section 626.9541, or, in the alternative, by demonstrating that the licensee has shown himself or herself to be a source of injury or loss to the public.

40. As to the first method of proving a violation of section 626.621(6), Petitioner alleges that Respondent's conduct was inconsistent with the following provisions of section 626.9541(1)(e)1.e. and (1)(k)1., which read:

> 626.9541 Unfair methods of competition and unfair or deceptive acts or practices defined.
>
> (1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS. The following are defined as unfair methods of competition and unfair or deceptive acts or practices:
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> * * *
>
> (e) False statements and entries.—
>
> 1. Knowingly:
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> * * *
>
> e. Causing, directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement.
>
> * * *
>
> (k) Misrepresentation in insurance applications.
>
> 1. Knowingly making a false or fraudulent written or oral statement or representation on, or relative to, an application or negotiation for an insurance policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual.

41. The undersigned will begin with section 626.9541(1)(e)1.e., which, pursuant to the language quoted above, requires proof that Respondent: (1) knowingly; (2) caused, either directly or indirectly; (3) any false material statement; (4) to be made, published, disseminated, circulated, delivered to any person, or placed before the public.

42. In its Proposed Recommended Order, Petitioner argues that Respondent is guilty of violating this statutory provision because he "falsely certified that he assisted" consumers in completing the applications, left the false certifications in the possession of third parties, and "failed to explain" when he was notified that the applications were "before the SunCoast HMO." (Pet. PRO at 13-14; 16).

43. The undersigned disagrees, as Respondent's act of signing the blank forms did not create materially false statements. This is because none of the applications contained any consumer information whatsoever at the time Respondent affixed his signature, and as such, it would have been obvious to any reasonable person looking at the forms (in the condition Respondent last saw them——blank) that no consumers had been assisted. Further, assuming arguendo that materially false statements were created, Respondent did not do so knowingly, as required by the statute, because it was his intention to meet with each potential enrollee prior to submitting the forms to SunCoast. Finally, to the extent that Petitioner's theory of guilt relies upon a finding that Respondent failed to respond to SunCoast's (after the fact) inquiries regarding discrepancies in the applications, the undersigned has credited Respondent's testimony that he was never contacted by SunCoast. For these

reasons, Petitioner failed to prove a violation of section 626.9541(1)(e)1.e.

44. Turning to section 626.9541(1)(k)1.——which requires proof that Respondent, for the purpose of obtaining a fee or commission, knowingly made a false or fraudulent written or oral statement on (or relative to) an application for an insurance policy——Petitioner contends that Respondent has violated this provision based upon his signing of the blank applications. In particular, Petitioner asserts that "Respondent knowingly made a false certification that he had assisted an individual in completing the application used to enroll [the victims] for the purpose of obtaining a commission." (Pet. PRO at 13; 16).

45. In light of Petitioner's stipulation during the final hearing that Respondent did nothing improper by merely affixing his signature to the blank forms, the undersigned fails to understand how it can now be argued that Respondent's act of signing resulted in the creation of a false certification. In any event, the evidence adduced during the final hearing did not establish that Respondent knowingly made false statements, as he intended to meet with each of the enrollees prior to the submission of the applications to SunCoast. Accordingly, Respondent is not guilty of violating section 626.9541(1)(k)1.

46. Finally, the undersigned shall address, in light of the conclusions regarding section 626.9541, whether Respondent

violated section 626.621(6) pursuant to the alternative theory that he has shown himself to be a source of loss or injury to the public. As noted above, section 626.621(6) authorizes discipline where an agent:

> In the conduct of business under the license or appointment, engage[es] in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part IX of this chapter [section 626.9541, Florida Statutes], or ha[s] otherwise shown himself or herself to be a source of injury or loss to the public.

(Emphasis added).

47. It might be tempting to conclude, based upon the foregoing language, that any behavior by a licensee——even conduct that is in no manner unfair or deceptive——is punishable if it served as a source of injury or loss to the public. It appears that Petitioner has taken this position, as it argues:

> The record evidence clearly and convincingly establishes that Respondent violated Section 626.621(6), Fla. Stat. Respondent violated Section 626.9541(1)(e)1.e., and Section 626.9541(1)(k)l., Fla. Stat., and indirectly caused the unwillful enrollment of thirty-four consumers into the SunCoast HMO, exposing Respondent's appointing insurer to potential liability for the provision of healthcare coverage for individuals that were not in fact SunCoast HMO customers.

(Pet. PRO at 16)(emphasis added).

48. The undersigned concludes, however, applying the cannon of statutory construction ejusdem generis, see State v.

Hearns, 961 So. 2d 211, 219 (Fla. 2007)("[W]hen a general phrase follows a list of specifics, the general phrase will be interpreted to include only items of the same type as those listed"), that the conduct which led to the public's injury or loss is only punishable if it was unfair or deceptive in some fashion. This construction of the statute avoids the evisceration of the phrases "unfair methods of competition" and "unfair or deceptive acts or practices," and prevents the elevation of innocuous or innocent behavior to the same plane of unfair or deceptive acts.

49. Returning to the facts at hand, while Respondent no doubt failed to exercise his best judgment in allowing the unknown individuals to retain possession of the forms and not notifying SunCoast when the applications were not returned to him, his behavior in that regard was neither unfair nor deceptive. As detailed previously, Respondent, who at all times acted in good faith, signed the forms and acceded to the requests of the two individuals only because he thought it was necessary to further a seemingly legitimate business transaction. In addition, Respondent fully intended to meet with each potential enrollee and had no desire to cause unauthorized changes in insurance coverage for any individual. For these reasons, Respondent's actions did not rise to the level of improper behavior contemplated by section 626.621(6).[7]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter an order dismissing the Second Amended Administrative Complaint.

DONE AND ENTERED this 2nd day of September, 2011, in Tallahassee, Leon County, Florida.

EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of September, 2011.

ENDNOTES

[1] Health insurance agents such as Respondent commonly hold appointments with multiple insurers.

[2] The unknown individuals apparently expressed some concern that Respondent could "go behind their backs" (i.e., go directly to the physician and cut them out of the transaction), and that such a possibility would somehow be foreclosed if Respondent temporarily left the applications bearing his signature in their possession.

[3] The pre-printed applications read, immediately above Respondent's signature, "If anyone helped you fill out this form, s/he must sign the following line."

[4] Although the evidence is in conflict on this point, the undersigned credits the testimony of Respondent over that of Mr. San Quintin.

[5] Mr. Alpizar was, however, inconvenienced when a test had to be delayed for approximately 15 days until such time that the coverage issue was resolved. There is no evidence that the brief delay placed Mr. Alpizar's health in jeopardy.

[6] See Final Hearing Transcript, pages 241-242.

[7] As Respondent did not engage in unfair or deceptive behavior, it is not necessary to resolve whether the unauthorized changes in insurance coverage constitute "injury" within the meaning of section 626.621(6). Nevertheless, the undersigned is inclined to believe, contrary to Respondent's argument, that an unwanted change in coverage represents a cognizable injury even in the absence of financial loss or physical harm.

COPIES FURNISHED:

Jacek P. Stramski, Esquire
Douglas D. Dolan, Esquire
Florida Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399

Frank L. Hollander, Esquire
Hollander and Associates, LLC
Two South Biscayne Boulevard
One Biscayne Tower, Suite 1650
Miami, Florida 33131

Julie Jones, Agency Clerk
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.