

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAPITAL CITY CHECK CASHING,

Petitioner,

vs.

Case No. 13-4739RX

OFFICE OF FINANCIAL REGULATION,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a formal hearing in this case was held on January 14, 2014, before Suzanne Van Wyk, duly-appointed Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John O. Williams, Esquire
Williams and Holz, P.A.
211 East Virginia Street
Tallahassee, Florida 32301

For Respondent: Susan Leigh Matchett, Esquire
Office of Financial Regulation
200 East Gaines Street
Fletcher Building, Suite 550
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether part of Florida Administrative Code Rule 69V-560.704, particularly subsections (4)(d) and (5)(a), exceed Respondent's rulemaking authority; enlarge, modify or contravene the specific provisions of law implemented; or are arbitrary or capricious, and thus, constitute an invalid exercise of delegated legislative authority pursuant to section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

On December 12, 2013, Capital City Check Cashing filed a Petition for Determination of Invalidity of Two Rules challenging the validity of Florida Administrative Code Rules 69V-560.704(4)(d) and (5)(a).

This matter was set for hearing on January 14, 2014. On January 3, 2014, Respondent, Office of Financial Regulation, filed a Motion to Dismiss, which was denied.

The final hearing commenced as scheduled on January 14, 2014, in Tallahassee, Florida. At hearing, Petitioner presented the testimony of Kane Fuhrman, Petitioner's sole employee, and Gregory Oaks, Director of Respondent's Consumer Finance Division. Petitioner's Exhibits P1 through P12 were admitted into evidence.

Respondent offered the testimony of Mr. Oaks in its case-in-chief. Respondent's Motion for Official Recognition of

applicable provisions of the Florida Statutes and Florida Administrative Code, as well as documents from the Joint Administrative Procedures Committee, was granted. The record was held open through close of business, January 20, 2014, for Respondent's submission of specified sections of Florida Statutes and the United States Code. Respondent timely filed the specified documents.

The one-volume final hearing Transcript was filed with the Division of Administrative Hearings on January 30, 2014. Both parties timely filed Proposed Final Orders^{1/} which have been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Respondent is the state agency charged with the regulation and enforcement of chapter 560, Florida Statutes,^{2/} relating to money services businesses and their authorized vendors. Chapter 560, Part I, governs money services business generally, which includes check cashers. Chapter 560, Part III, governs check cashers.

2. Petitioner is a licensed check casher pursuant to section 560.303. As a licensee, Petitioner is required to comply with Respondent's duly-adopted administrative rules governing check cashers.

3. Petitioner challenges parts of Florida Administrative Code Rule 69V-560.704, "Records to Be Maintained by Check Cashers," as an invalid exercise of delegated legislative authority.

4. Respondent cites section 560.105 as the specific authority to adopt the rule.

5. Section 560.105 provides as follows:

560.105 Supervisory powers; rulemaking.—

(1) The office shall:

(a) Supervise all money services businesses and their authorized vendors.

(b) Have access to the books and records of persons the office supervises as necessary to carry out the duties and functions of the office under this chapter.

(c) Issue orders and declaratory statements, disseminate information, and otherwise administer and enforce this chapter and all related rules in order to effectuate the purposes, policies, and provisions of this chapter.

(2) The commission may adopt rules pursuant to ss. 120.536(1) and 120.54 to administer this chapter.

(a) The commission may adopt rules requiring electronic submission of any forms, documents, or fees required by this chapter, which must reasonably accommodate technological or financial hardship and provide procedures for obtaining an exemption due to a technological or financial hardship.

(b) Rules adopted to regulate money services businesses, including deferred presentment providers, must be responsive to changes in economic conditions, technology, and industry practices.

6. Respondent cites section 560.310, as the law implemented by the challenged rule.

7. Section 560.310 provides as follows:

560.310 Records of check cashers and foreign currency exchangers.—

(1) A licensee engaged in check cashing must maintain for the period specified in s. 560.1105 a copy of each payment instrument cashed.

(2) If the payment instrument exceeds \$1,000, the following additional information must be maintained or submitted:

(a) Customer files, as prescribed by rule, on all customers who cash corporate payment instruments that exceed \$1,000.

(b) A copy of the personal identification that bears a photograph of the customer used as identification and presented by the customer. Acceptable personal identification is limited to a valid driver license; a state identification card issued by any state of the United States or its territories or the District of Columbia, and showing a photograph and signature; a United States Government Resident Alien Identification Card; a passport; or a United States Military identification card.

(c) A thumbprint of the customer taken by the licensee when the payment instrument is presented for negotiation or payment.

(d) The office shall, at a minimum, require licensees to submit the following

information to the check cashing database or electronic log, before entering into each check cashing transaction for each payment instrument being cashed, in such format as required by rule:

1. Transaction date.
2. Payor name as displayed on the payment instrument.
3. Payee name as displayed on the payment instrument.
4. Conductor name, if different from the payee name.
5. Amount of the payment instrument.
6. Amount of currency provided.
7. Type of payment instrument, which may include personal, payroll, government, corporate, third-party, or another type of instrument.
8. Amount of the fee charged for cashing of the payment instrument.
9. Branch or location where the payment instrument was accepted.
10. The type of identification and identification number presented by the payee or conductor.
11. Payee's workers' compensation insurance policy number or exemption certificate number, if the payee is a business.
12. Such additional information as required by rule.

For purposes of this subsection, multiple payment instruments accepted from any one person on any given day which total \$1,000

or more must be aggregated and reported in the check cashing database or on the log.

(3) A licensee under this part may engage the services of a third party that is not a depository institution for the maintenance and storage of records required by this section if all the requirements of this section are met.

(4) The office shall issue a competitive solicitation as provided in s. 287.057 for a statewide, real time, online check cashing database to combat fraudulent check cashing activity. After completing the competitive solicitation process, but before executing a contract, the office may request funds in its 2014-2015 fiscal year legislative budget request and submit necessary draft conforming legislation, if needed, to implement this act.

(5) The office shall ensure that the check cashing database:

(a) Provides an interface with the Secretary of State's database for purposes of verifying corporate registration and articles of incorporation pursuant to this section.

(b) Provides an interface with the Department of Financial Services' database for purposes of determining proof of coverage for workers' compensation.

(6) The commission may adopt rules to administer this section, require that additional information be submitted to the check cashing database, and ensure that the database is used by the licensee in accordance with this section. (emphasis added).

Florida Control of Money Laundering in Money Transmitters Act

8. Section 560.310 was created by the 1994 Legislature as part of the omnibus "Money Transmitters Code" (the Code), providing for initial regulation of payment instrument sellers, foreign currency exchangers, check-cashers, and funds transmitters.

9. The Code was enacted following publication of a report of Florida's Eleventh Statewide Grand Jury titled "Check Cashing Stores: A Call for Regulation." See Interim Report Number One of the Eleventh Statewide Grand Jury, "Check Cashing Stores: A Call For Regulation," (Feb. 9, 1994) ("1994 Grand Jury Report" or "1994 Report").

10. The 1994 Report recognized the important role of check-cashing services for a significant number of people who are economically disadvantaged and cannot, or do not, maintain traditional bank accounts.

11. However, the 1994 Report also documented abuse of unregulated check-cashing services by con artists, money launderers, and other criminals. The report found that the unregulated industry attracted criminals because the industry was under no obligation to keep records of the identity of those for whom they move money. Specifically, the report found that check-cashers did not have to: (1) verify that their business customers were legally registered; (2) verify

that the person presenting the payment instrument is authorized to cash the instrument; or (3) keep records of the identity of the person who cashed the payment instrument. Id.

12. The 1994 Report found check-cashing services were “not legally obligated to maintain transaction records of any kind that would be useful to law enforcement in the exercise of their investigatory duties.” Id.

13. The 1994 Report recommended statewide regulation of check-cashing services to include the following relevant requirements:

- Maintain for a period of five years all records of transmittals, currency exchanges, checks cashed, payment instruments issued, and other related financial records.
- Obtain identification from customers when cashing checks or money orders.
- Obtain, and maintain for five years, documentation regarding the identity of the payees of checks and money orders.

Id.

14. Part I of the Code applied generally to all money transmitters, which was specifically defined to include check cashers. See ch. 94-354, § 1, Laws of Fla. (1994).

15. The Code created section 560.123 “Florida Control of Money Laundering in Money Transmitters Act” requiring money transmitters to comply with the money laundering, enforcement,

and reporting provisions of section 655.50, Florida Statutes.
Id.

16. Section 655.50, Florida Statutes (1993),^{3/} provided in pertinent part, "[e]ach financial institution shall maintain for a minimum of 5 calendar years full and complete records of all financial transactions, including all records required by 31 C.F.R. parts 103.33 and 103.34."
§ 655.50(8)(b), Fla. Stat. (1993).

17. Part III of the Code created sections 560.301, et seq., titled the "Check Cashing and Foreign Currency Exchange Act" (the Act). See ch. 94-354, § 3, Laws of Fla. (1994).

18. Section 560.310, titled "Records of check cashers and foreign currency exchangers," contained no requirements for particular types of records to be kept, but provided for the length of time check cashers must maintain "books, accounts, records and documents," and provided for the location and destruction of said records. See § 560.310, Fla. Stat. (Supp. 1994).

19. The Act did not directly require personal identification of persons presenting payment instruments for cash, but rather incentivized the presentation of personal identification by correlating the amount of fees charged with presentation of personal identification. Check cashers could

charge a higher transaction fee when the customer did not present identification.^{4/}

20. In 2008, the Attorney General's Office published a Report of the Eighteenth Statewide Grand Jury titled, "Check Cashers: A Call for Enforcement" (2008 Report). See Second Interim Report of the Eighteenth Statewide Grand Jury, "Check Cashers: A Call for Enforcement" (March 2008). The 2008 Report was highly critical of the Money Transmitter Regulatory Unit (MTRU), the arm of Respondent with regulatory authority over check cashers and other money transmitters.

21. The 2008 Report documented systematic fraud involving the check-cashing industry perpetrated particularly by construction contractors, in the arena of workers' compensation, and the health care sector, in the arena of Medicaid and Medicaid prescription drug fraud. Id. at 7.

22. According to the 2008 Report, both issues involved the establishment of shell corporations to launder money obtained by fraudulent means. Id. at 9, 11.

23. The 2008 Report described the following elaborate scheme of workers' compensation fraud: A contractor, who is required to purchase workers' compensation insurance based on the amount of his or her payroll, hides the payroll by establishing a shell corporation in the name of a nominee owner, often a temporary resident of the United States. The

shell company buys a bare minimum workers' compensation policy, and the contractor makes payments to this shell "subcontractor," who cashes the checks and returns the money to the contractor to pay his or her employees under the table. Id. at 10-12.

24. Further, according to the 2008 Report, some check cashers actively participated in this scheme by setting up shell companies themselves, securing the certificate of insurance, and seeking out contractors with which to do business. Id. at 13.

25. The 2008 Report documented an investigation by the Division of Insurance Fraud which revealed ten construction companies had funneled one billion dollars through check-cashing businesses in the prior three years. Id. at 13.

26. The 2008 Report documented lack of enforcement by the MTRU, understaffing, and underutilized resources. Id. at 19-24.

27. Further, the Report placed blame on the MTRU for failing to exercise rulemaking authority granted by the 1994 Legislature, especially with respect to collecting information related to corporate customers. Id. at 38.

28. The 2008 Report also found the MTRU needed legislative authority to require check cashers to gather and report information in electronic format, which would make the

investigation process more efficient and allow check-cashing businesses to detect structuring of transactions by customers to defraud workers' compensation and other statutory requirements. Id. at 19.

29. The 2008 Legislature incorporated many of the recommendations from the 2008 Report and significantly overhauled regulation of all money services businesses (formerly, "money transmitters") including check cashers.

30. The 2008 Legislation made the following changes-of-note to Part I of chapter 560:

- Prohibited licensees from accepting anything of value from a customer with intent to deceive or defraud. See ch. 08-177, § 8, Laws of Fla. (2008)
- Prohibited the delivery to MTRU of any file known by it to be fraudulent or false. See Id.
- Increased the enforcement authority of MTRU. See ch. 08-177, § 9, Laws of Fla.
- Authorized immediate suspension of a license for failure to provide required records. See ch. 08-177, § 10, Laws of Fla.
- Required licensees to retain all required records for a minimum of five years. See ch. 08-177, § 1, Laws of Fla.

31. The 2008 Legislature made the following changes to chapter 560, Part III:

- Prohibited a check casher from transacting business in any name other than the legal name under which it is licensed;
- Required disclosure of any fictitious name as part of initial licensing;
- Required a check casher to endorse all payment instruments received in the check-casher's legal name under which it is licensed; and
- Prohibited check cashers from accepting multiple payment instruments from a person who is not the original payee, unless the person is a licensed check casher and the payment instruments are endorsed with the check casher's legal name.

32. Further, the 2008 Legislation required check cashers to maintain a customer file on all customers who cash "corporate or third-party payment instruments exceeding \$1,000." Ch. 08-177, § 42, Laws of Fla. The 2008 Legislature also added the requirement that, for any payment instrument accepted having a face value of \$1,000 or more, the check casher must maintain personal identification from customers, a thumbprint of the customer, and a payment instrument log in an electronic format. See Id.

33. Subsections 560.310(4), (5), and (6), relating to creation and maintenance of a statewide, real-time, online check-cashing database, were created by the 2013 Florida Legislature. See ch. 13-139, § 1, Laws of Fla.

34. Prior to the 2013 amendments, section 560.310 required check cashers to maintain an electronic payment instrument log "as prescribed by rule." § 560.310(1)(d), Fla. Stat. (2012). The 2013 amendment required check cashers to "submit the following information to the check-cashing database or electronic log, before entering into each check cashing transaction for each payment instrument being cashed, in such format as required by rule" Id.

The Rule

35. Florida Administrative Code Rule 69V-560.704(5)(a), reads as follows:

(5)(a) In addition to the records required in subsections (1) and (2) for payment instruments \$1,000.00 or more, the check casher shall create and maintain an electronic log of payment instruments accepted which includes, at a minimum, the following information:

1. Transaction date;
2. Payor name;
3. Payee name;
4. Conductor name, if other than the payee;
5. Amount of payment instrument;
6. Amount of currency provided;
7. Type of payment instrument;
 - a. Personal check;
 - b. Payroll check;
 - c. Government check;

- d. Corporate check;
 - e. Third party check; or
 - f. Other payment instrument;
8. Fee charged for the cashing of the payment instrument;
9. Branch/Location where instrument was accepted;
10. Identification type presented by conductor; and
11. Identification number presented by conductor.

(b) Electronic logs shall be maintained in an electronic format that is readily retrievable and capable of being exported to most widely available software applications including Microsoft EXCEL.

36. The 2013 Legislature incorporated into section 560.310, almost verbatim, the information required by the rule to be collected and maintained by check cashers in an electronic log.^{5/}

37. The only significant difference between the statute and the rule is that the statute additionally requires check cashers to maintain, as part of the electronic log, the "payee's workers' compensation insurance policy number or exemption certificate number, if the payee is a business." § 560.310(2)(d)11., Fla. Stat.^{6/}

38. Respondent has not amended the rule subsequent to the 2013 amendments to section 560.310 requiring development

and maintenance of a statewide, real-time, online check-cashing database.

39. Respondent has not activated a statewide, real-time, online check-cashing database, but anticipates doing so in Fiscal Year 2015-2016.

Referrals to Law Enforcement

40. Pursuant to section 560.109(9), Respondent is required to annually report to the legislature the total number of examinations and investigations of its licensees that resulted in a referral to law enforcement, and the disposition of those referrals by agency.

41. Respondent refers to the Florida Department of Law Enforcement (FDLE) results of its licensee investigations which may reveal criminal activity within the purview of the FDLE. For Fiscal Year 2012-2013, Respondent's Bureau of Enforcement referred 78 examinations to FDLE.

42. Respondent refers to the Division of Insurance Fraud (DIF) results of its licensee examinations which may reveal criminal activity related to workers' compensation insurance. For Fiscal Year 2012-2013, Respondent referred 33 examinations to DIF.

43. At the time of Respondent's 2012-2013 annual report to the Legislature, FDLE had not opened any cases based on the

78 examinations referred. During that same time frame, DIF had opened 4 cases based on 33 referrals from Respondent.

Threshold Amount for Recordkeeping

44. Petitioner first challenges the rule as exceeding the scope of Respondent's delegated legislative authority because it requires a log be kept "for payment instruments \$1,000.00 or more" while the statute requires a log be kept on payment instruments "that exceed \$1,000." § 560.310(2)(a), Fla. Stat.

45. Section 560.310(2) further reads, as follows:

For purposes of this subsection, multiple payment instruments accepted from any one person on any given day which total \$1,000 or more must be aggregated and reported in the check cashing database or on the log. (emphasis added).

46. On the one hand, the statute requires a log be created and maintained on each payment instrument that exceeds \$1,000, while on the other hand, acknowledges that payment instruments of lesser amounts, when presented by the same person, are "log worthy" when, together, they reach a threshold of \$1,000.

47. Petitioner argues that the 2012 Legislature repealed Respondent's authority to require a log be kept on payment instrument amounts of \$1,000.

48. Section 560.310, Florida Statutes (2011), reads, in pertinent part, as follows:

560.310 Records of check cashers and foreign currency exchangers.—

(1) In addition to the record retention requirements specified in s. 560.1105, a licensee engaged in check cashing must maintain the following:

(a) Customer files, as prescribed by rule, on all customers who cash corporate or third-party payment instruments exceeding \$1,000.

(b) For any payment instrument accepted having a face value of \$1,000 or more:

1. A copy of the personal identification that bears a photograph of the customer used as identification and presented by the customer. Acceptable personal identification is limited to a valid driver's license; a state identification card issued by any state of the United States or its territories or the District of Columbia, and showing a photograph and signature; a United States Government Resident Alien Identification Card; a passport; or a United States Military identification card.

2. A thumbprint of the customer taken by the licensee.

(c) A payment instrument log that must be maintained electronically as prescribed by rule. For purposes of this paragraph, multiple payment instruments accepted from any one person on any given day which total \$1,000 or more must be aggregated and reported on the log. (emphasis added).

49. The statute contained distinct recordkeeping requirements for payment instruments exceeding two different

threshold amounts: (1) A customer file on all customers who cash corporate or third-party payment instruments exceeding \$1,000, and (2) personal identification information of customers presenting payment instruments of \$1,000 or more.

50. The payment instrument log requirement was not associated with any minimum threshold amount. However, the language of subparagraph (c) did require aggregation of multiple payment instruments accepted from any one person on any given day which total \$1,000 or more. As such, the log appeared to be required for all payment instruments of \$1,000 or more.

51. The 2012 Legislation struck the separate threshold of \$1,000 or more which triggered the requirement to keep customer's personal identification information. See ch. 12-85, § 7, Laws of Fla. (2012). Further, the 2012 changes collapsed the separate requirements of customer identification information, customer thumbprint, and a payment instrument log into one list of records required to be kept on customers who cash payment instruments exceeding \$1,000. See Id. However, the law retained the requirement that multiple payment instruments totaling \$1,000 or more accepted from any one person on any given day be aggregated and reported on the log.

Electronic Log Requirement

52. Next, Petitioner challenges the rule as an invalid exercise of Respondent's delegated legislative authority because the governing statute was amended in 2013 to eliminate the requirement for check cashers to keep an electronic log of payment instruments.

53. In 2013, the Legislature created the following new subsections of section 560.310:

(4) The office shall issue a competitive solicitation as provided in s. 287.057 for a statewide, real time, online check cashing database to combat fraudulent check cashing activity. After completing the competitive solicitation process, but before executing a contract, the office may request funds in its 2014-2015 fiscal year legislative budget request and submit necessary draft conforming legislation, if needed, to implement this act.

(5) The office shall ensure that the check cashing database:

(a) Provides an interface with the Secretary of State's database for purposes of verifying corporate registration and articles of incorporation pursuant to this section.

(b) Provides an interface with the Department of Financial Services' database for purposes of determining proof of coverage for workers' compensation.

(6) The commission may adopt rules to administer this section, require that additional information be submitted to the check cashing database, and ensure that the

database is used by the licensee in accordance with this section.

Ch. 13-139, § 1, Laws of Fla.

54. With regard to the payment instrument log, the statute was amended as follows:^{7/}

(d) The office shall, at a minimum require licensees to submit the following information to the check cashing database or electronic log, before entering into each check cashing transaction for each A payment instrument being cashed, in such format as required ~~log that must be maintained electronically as prescribed by rule:~~

Id.

55. The law also made the following conforming changes to existing text of section 560.310:

(2) If the payment instrument exceeds \$1,000, the following additional information must be maintained or submitted:

* * *

For purposes of this subsection ~~paragraph~~, multiple payment instruments accepted from any one person on any given day which total \$1,000 or more must be aggregated and reported in on the check cashing database or on the log.

Id.

56. The statute authorizes Respondent to make a 2014-2015 legislative budget request prior to executing the contract for a vendor to run the database. See § 560.310(4), Fla. Stat. Thus, the statute specifically anticipates lag

time between enactment of the legislation requiring the statewide database and the rollout of the database.

57. Contrary to Petitioner's assertion, the statute does not eliminate licensed check cashers' responsibility to maintain records in an electronic log. The statute recognizes the licensee's duty to both maintain information on an electronic log and submit that information to the statewide real time database.

Corporate Customer

58. Next, Petitioner challenges Respondent's authority to require check cashers to maintain records of corporate customers in addition to natural persons.

59. The section of the rule at issue is 69V-560.704(4), which reads, in pertinent part, as follows:

(4) In addition to the records required in subsections (1) and (2), for payment instruments exceeding \$1,000.00, the check casher shall:

* * *

(d) Create and maintain a customer file for each entity listed as the payee on corporate payment instruments and third party payment instruments accepted by the licensee. Each customer file must include, at a minimum, the following information[.] (emphasis added).

60. Florida Administrative Code Rule 69V-560.704 further defines the following relevant terms:

(1) For purposes of this rule the term:

(a) 'Corporate payment instrument', as referenced in Section 560.310(1), F.S., means a payment instrument on which the payee named on the face of the payment instrument is not a natural person.

(b) 'Conductor' means a natural person who presents a payment instrument to a check casher for the purpose of receiving currency.

(c) 'Customer file' in regard to a 'corporate payment instrument' means the corporate entity shown as payee. In regard to 'third-party payment instruments', the term 'customer file' means the individual negotiating the payment instrument.

61. Petitioner complains that Respondent is without authority to construe the term "customer" as the payee on a corporate payment instrument rather than a natural person appearing before the licensee presenting a check to be cashed. Petitioner argues that section 560.310 defines customer as the person presenting a check for payment, while the rule impermissibly requires the licensee to maintain customer files of corporate entities.

62. Section 560.310 does not define the term "customer."

63. The sections of the statute which predate the 2013 Legislation used the term customer as if it applied only to a natural person. For example, the statute required the check casher to maintain "[a] copy of the personal identification that bears the photograph of the customer used as identification and presented by the customer."

§ 560.310(2)(b), Fla. Stat. (2012). Further, the statute required the licensee to maintain “[a] thumbprint of the customer taken by the licensee when the payment instrument is presented for negotiation or payment.” § 560.301(2)(c), Fla. Stat. (2012).

64. However, the 2013 amendments to chapter 560, specifying the items to be documented in the check casher’s electronic log of payment instruments, employ the terms “payor name” and “payee name” as displayed on the payment instrument, and “conductor” if different from the name on the payment instrument.

65. The list of items required by statute to be logged include “[t]he type of identification and identification number presented by the payee or conductor,” and “[p]ayee’s workers’ compensation insurance policy number or exemption certification number, if the payee is a business.”

§ 560.310(2)(d)10. and 11., Fla. Stat. (2013).

66. Additionally, the legislation requires Respondent to ensure that the anticipated statewide check-cashing database will interface with the Secretary of State’s database for verifying corporate registration and articles of incorporation, as well as with the Department of Financial Services’ database for determining proof of coverage for workers’ compensation.

67. If the payee's corporate information is not maintained by check cashers, it cannot be reported to the statewide check-cashing database for verification.

68. Furthermore, the statute prohibits a licensee from accepting or cashing a corporate payment instrument from a person who is not an authorized officer of the corporate payee named on the instrument. See s. 560.309(4), Fla. Stat. Without obtaining records of the corporate payee, the check casher would be unable to comply with this requirement.

Corporate Documents

69. Next, Petitioner complains that some of the information required by rule to be kept on corporate customers is beyond the Respondent's statutory authority. Specifically, Petitioner objects to the obligation to maintain the following information on corporate customers, as required by rule 69V-560.704(4)(d):

1. Documentation from the Secretary of State verifying registration as a corporation or fictitious entity showing the listed officers and FEID registration number. If a sole proprietor uses a fictitious name or is a natural person, then the customer file shall include the social security number of the business owner and documentation of the fictitious name filing with the Secretary of State.
2. Articles of Incorporation or other such documentation which establishes a legal entity in whatever form authorized by law. For purposes of this rule a sole proprietor

operating under a fictitious name registered with the Secretary of State shall not have to present such documentation.

3. Documentation of the occupational license from the county where the entity is located.

4. A copy of the search results screen page from Compliance Proof of Coverage Query Page webpage from the Florida Department of Financial Services - Division of Workers' Compensation website (http://www.fldfs.com/WCAPPS/Compliance_POC/wPages/query.asp).

5. Documentation of individuals authorized to negotiate payment instruments on the corporation or fictitious entity's behalf including corporate resolutions or powers of attorney. Payment instruments for insurance claims where there are multiple payees shall be exempt from this provision provided that the maker of the check is an insurance company and the licensee has obtained and retained documentation as to the identity of the natural person listed as the payee on such payment instrument.

70. Section 560.310(2) provides for the following customer information to be kept on file:

(a) Customer files, as prescribed by rule, on all customers who cash corporate payment instruments that exceed \$1,000. (emphasis added).

71. Respondent clearly has statutory direction in determining which types of documentation should be kept in corporate customer files.

72. As noted previously, licensed check cashers are required by statute to enter into their electronic log each

corporate payees' workers' compensation insurance policy number or exemption certificate number before entering into each check-cashing transaction. See § 560.310(2)(d)11, Fla. Stat. Likewise, licensees are required to verify that the conductor presenting a corporate check is an authorized officer of the corporate payee. See § 560.309(4), Fla. Stat.

73. Petitioner seems to suggest that Respondent cannot require any document to be kept on corporate payees unless that document is specifically mentioned in the authorizing statute. That suggestion is contrary to controlling law, as discussed more fully below.

CONCLUSIONS OF LAW

Jurisdiction and Standing

74. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding. See §§ 120.56(1)(c), 120.569 and 120.57(1), Fla. Stat.

75. Section 120.56(1)(a) provides:

Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the Rule is an invalid exercise of delegated legislative authority.

76. Jurisdiction attaches when a person who is substantially affected by a rule claims that it is an invalid exercise of delegated legislative authority.

77. The party challenging the rule has the burden, when standing is resisted, to prove standing. Fla. Dep't of Health & Rehab. Servs. v. Alice P., 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979). In order to meet the substantially-affected test, Petitioner must establish: (1) a real and sufficiently immediate injury-in-fact; and (2) "that the alleged interest is arguably within the zone of interest to be protected or regulated." All Risk Corp. v. Fla. Dep't of Labor & Employment Sec., 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982) (citations omitted).

78. Here, Respondent concedes that Petitioner is within the zone of interest regulated by the subject rule. Respondent argues, however, that Petitioner has not established an injury-in-fact sufficient to meet the first prong of the standing test.

79. A real and sufficiently immediate injury-in-fact has been recognized where the challenged rule, or its promulgating statute, has a direct and immediate effect upon one's right to earn a living. Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995). The clearest example of this is where the challenged rule directly regulates the challenger's occupational field per se, by, for example, setting criteria to engage in that profession. See, e.g., Coal. of Mental Hlth. Profs. v. Dep't of Prof'l

Reg., 546 So. 2d 27 (Fla. 1st DCA 1989); Prof'l Firefighters of Fla., Inc. v. Dep't of HRS, 396 So. 2d 1194 (Fla. 1st DCA 1981).

80. As a licensed check casher, Petitioner must comply with the recordkeeping rules which are the subject of this challenge. Petitioner incurs costs associated with compiling and maintaining said records, including contracting with a Certified Public Accountant to advise the company on compliance with the recordkeeping requirements.

81. Petitioner has demonstrated standing as a licensed check casher subject to Florida Administrative Code Rule 69V-560.704.

Burden of Proof

82. The burden is on the challenger of an existing rule to demonstrate by a preponderance of the evidence that the rule is an invalid exercise of delegated legislative authority. See § 120.56(3)(a), Fla. Stat.

Invalid Exercise of Delegated Legislative Authority

83. Specifically, Petitioner challenges portions of the rule as an "invalid exercise of delegated legislative authority" pursuant to sections 120.52(8)(b), (8)(c), and (8)(e), which provide as follows:^{8/}

'Invalid exercise of delegated legislative authority' means action that 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:

* * *

(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 to which is required by section 120.54(3)(a)1.;

* * *

(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;

* * *

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 or 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 an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

84. Added in 2008, section 120.52(17) provides:

'Rulemaking authority' means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term 'rule'.

85. This definition does not add new restrictions to agency rulemaking authority, but it does emphasize the existing restrictions cited in the definition of an "invalid exercise of delegated legislative authority." See Fla. Elec. Comm'n v. Blair, 52 So. 3d 9 (Fla. 1st DCA 2010). The term "law implemented" is also defined by Florida Statutes as "the language of the enabling statute being carried out or interpreted by an agency through rulemaking." See § 120.52(9), Fla. Stat.

Exceeds Rulemaking Authority

86. First, Petitioner asserts that rule 69V-560.704(4)(d) exceeds Respondent's grant of rulemaking authority because it requires check cashers to obtain and maintain records regarding corporate payees. Petitioner argues that the statute limits a check-cashing business' obligation to keep records on customers who are natural persons only.

87. Petitioner's argument is not supported by the plain language of the operative statute. Section 560.310(2)(d)11. requires check cashers to obtain the payee's workers'

compensation policy number or exemption number. Section 560.309(4) requires check cashers to determine whether a conductor presenting a corporate payment instrument is an authorized officer of the corporate payee. Section 560.310(2)(a) specifically requires check cashers to maintain customer files as prescribed by rule.

88. Petitioner's interpretation of the statute relies upon a very narrow reading focused only on section 560.310(2)(a), (b), and (c). That interpretation ignores all other provisions of section 560.310, as well as the other sections of chapter 560, Part III, regulating check cashers. Further, that interpretation ignores the evolution of the state's regulation of check-cashing businesses.

89. Petitioner has not met its burden to establish by a preponderance of the evidence that the rule exceeds Respondent's grant of rulemaking authority by requiring customer files on corporate payees.

90. Next, Petitioner asserts that the rule exceeds Respondent's delegated rulemaking authority because the corporate documents listed in rule 69V-560.704(4)(d)1. through 4. are not named in the statute.^{9/}

91. The Administrative Procedures Act (Act) provides that "[a]n agency may adopt only rules that implement or interpret the specific powers and duties granted by the

enabling statute." § 120.52(8), Fla. Stat. However, as used in the Act, the term "specific" is not a synonym for "detailed." See SW Fla. Water Mgmt. Dist. v. Save the Manatee Club, 773 So. 2d 594, 599 (Fla. 1st DCA 2000). "The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." Smith v. Dep't of Corr., 920 So. 2d 638, 641 (Fla. 1st DCA 2005) (quoting SW Fla. Water Mgmt. Dist. v. Save the Manatee Club, 773 So. 2d 594 (Fla. 1st DCA 2000)).

92. "If the enabling statute had to be as detailed as the rules themselves, the point of rulemaking would be defeated entirely." Consolidated-Tomoka Land Co. v. Dep't of Bus. and Prof'l Reg., 717 So. 2d 72 (Fla. 1st DCA 1998), superseded on other grounds by statute as stated in SW Fla. Water Mgmt. Dist. v. Save the Manatee Club, 773 So. 2d 594, 597 (Fla. 1st DCA 2000).

93. Petitioner's argument that Respondent may not require check cashers to maintain documents regarding registration with the Secretary of State, corporate articles of incorporation, copies of occupational licenses, and workers' compensation insurance, because those items are not mentioned in the enabling statute, is rejected.

94. Petitioner has not proven by a preponderance of the evidence that rule 69V-560.704(4)(d) exceeds Respondent's statutory authority simply because the statute does not name those specific documents.

Contravention of Specific Law Implemented

95. Petitioner next argues that portions of the rule which require check cashers to maintain an electronic log of payment instruments cashed, and which establish recordkeeping requirements for checks of \$1,000 or more, contravene section 560.310.

96. At the outset, the undersigned notes that an agency's interpretation of an operable statute, which the agency is charged with administering, is entitled to deference. Kessler v. Dep't of Mgmt. Servs., 17 So. 3d 759, 762 (Fla. 1st DCA 2009). However, that deference is not absolute, and will not be afforded where the agency's view is contrary to the statute's plain meaning. See Id.

97. Petitioner argues that the Legislature repealed the requirement for check cashers to maintain an electronic log of payment instruments in 2013 when it adopted legislation requiring a statewide real-time database.

98. Petitioner's argument is not supported by the plain language of the law. The conforming changes in section 560.310 specifically recognize the duty of check cashers to maintain an

electronic log of information related to payment instruments.
See ch. 13-139, § 1, Laws of Fla.

99. Further, the statute plainly requires check cashers to submit payment instrument information into the statewide database, when developed. See § 560.310(2), Fla. Stat. (“[t]he following information must be [] submitted:”); and § 560.310(2)(d), Fla. Stat. (“The office shall, at a minimum, require licensees to submit the following information to the check-cashing database . . .”). Check cashers cannot submit information which they do not collect.

100. Under Petitioner’s interpretation of the statute, check cashers would have ceased collecting and maintaining information on payment instruments cashed in 2013, and resume when the database is activated. Petitioner’s interpretation would lead to an absurd result.

101. “Statutory provisions should not be construed in a manner that would lead to an absurd result.” State v. Presidential Women’s Ctr., 937 So. 2d 114, 119 (Fla. 2006). Petitioner’s interpretation is not persuasive.

102. Petitioner has not demonstrated by a preponderance of the evidence that rule 69V-560.704(5)(a) contravenes section 560.310 by requiring check cashers to maintain a payment instrument log.

103. Next, Petitioner posits that rule paragraph (5) (a) contravenes the statute by requiring an electronic log be kept on all payment instruments of \$1,000 or more, while section 560.310(2) (d) requires a log of payment instruments exceeding \$1,000.

104. Setting aside the obvious pedantry of Petitioner's argument, the undersigned does not find that the penny difference contravenes the statute.

105. The flush left language of section 560.310(2) (d) retains the direction that check cashers must aggregate checks accepted from any one person on any given day "which total \$1,000 or more." Thus, Respondent has authority to require check cashers maintain a log on payment instruments meeting a threshold of \$1,000.

106. Clearly Petitioner prefers an interpretation of the statute which would set the recordkeeping threshold at amounts greater than \$1,000.

107. An "agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations." Kessler v. Dep't of Mgmt. Servs., 17 So. 3d 759, 762 (Fla. 1st DCA 2009) (citing Fla. Dep't of Educ. v. Cooper, 858 So. 2d 394, 396 (Fla. 1st DCA 2003)).

108. In the case at hand, Respondent's interpretation is within the permissible range of interpretations, although not the most desirable to Petitioner.

109. Petitioner has not demonstrated by a preponderance of the evidence that rule 69V-560.704(5) (a) contravenes section 560.310 by requiring check cashers to maintain a log of payment instruments \$1,000 or greater, rather than those exceeding \$1,000.

Arbitrary and Capricious

110. Petitioner asserts that paragraph (4) (d) of the rule which requires check cashers to obtain and maintain certain corporate information on corporate customers, is arbitrary and capricious.

111. The Administrative Procedures Act defines arbitrary and capricious as follows:

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.

§ 120.52(8) (e), Fla. Stat.

112. The analysis for whether a rule is arbitrary and capricious is (1) whether the rule is supported by logic or the necessary facts; and (2) whether the rule was adopted without thought, or is irrational. See Las Mercedes Home Care Corp. v. Ag. for Hlth. Care Admin., Case No. 10-0860RX (Fla.

DOAH July 23, 2010); aff'd, 67 So. 3d 1262 (Fla. 1st DCA 2011).

113. As explained in Agrico Chemical Company v. Department of Environmental Protection, 365 So. 2d 759 (Fla. 1st DCA 1979):

A capricious action is one which is taken without thought or reason and irrationally. An arbitrary decision is one not supported by facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial evidence. Id. at 763.

114. Section 560.310, Florida Statutes, specifically authorizes Respondent to prescribe by rule requirements for the maintenance of customer files. See § 560.310(2)(a), Fla. Stat. ("Customer files, as prescribed by rule . . .").

115. Petitioner maintains the requirements are arbitrary and capricious because (1) the documents required are already in the possession of state and local government agencies; and (2) use of the information maintained pursuant to the rule has not proven useful to law enforcement.

Petitioner introduced no evidence to support a conclusion that Respondent's choice of documents to be maintained was done without thought or reason. Based on the extensive legislative history, the purpose of the recordkeeping requirements is to detect and deter fraudulent transactions and money laundering, overwhelmingly perpetrated by persons

establishing "shell" corporations in the name of nominal owners. These schemes are particularly prevalent in the area of workers' compensation and Medicare and Medicaid payments.

116. The documents selected by Respondent are useful to verify the legal status of a corporate entity, the persons authorized to conduct business on behalf of a corporate entity, whether a corporate entity has an occupational license to conduct business in the local jurisdiction, and proof of workers' compensation insurance. Rather than being selected on a whim or without reason, the documents all relate to the purpose of the recordkeeping requirement.

117. Finally, Petitioner complains that the records required to be kept are all documents in the possession of state and local agencies. Presumably, Petitioner believes this fact is evidence the rule is arbitrary and capricious.

118. To the contrary, the undersigned concludes that public availability of the documents increases efficiency of the recordkeeping process. Check cashers can print or download the documents with just a few keystrokes.

119. Additionally, the legislation mandates that the statewide real-time database, when launched, "interface with the Secretary of State's database for the purposes of verifying corporate registration and articles of incorporation," as well as "with the Department of Financial

Services' database for purposes of determining proof of coverage for workers' compensation." § 560.310(5)(a) and (b), Fla. Stat. These sections are further evidence that Respondent did not adopt the rule requirements on a whim, or without thought or reason.

120. Finally, Petitioner weaves in two remaining arguments which are creative, but not persuasive.

121. As further grounds for finding the rule arbitrary or capricious, Petitioner points to the fact that Respondent's referrals to law enforcement have resulted in few, if any, criminal investigations.

122. Petitioner asks the undersigned to find a causal link between the type of customer records check cashers are required to maintain and the percentage of Respondent's examinations which result in a criminal investigation by law enforcement. It is a stretch at best.

123. Finally, Petitioner argues that the rule is arbitrary and capricious because it has not been "responsive to changes in economic conditions, technology, and industry practices," as required by section 560.105(2)(b), Florida Statutes, Respondent's cited "specific authority" for the rule.

124. Petitioner introduced evidence of a decline in the number of licensed check-cashing businesses in the State of

Florida since 2008. Petitioner apparently places blame on the challenged recordkeeping requirements for the decline in the number of licensed check cashers. Without additional evidence, that leap cannot be made.^{10/}

125. Petitioner has not met its burden to demonstrate by a preponderance of the evidence that Florida Administrative Code Rule 69V-560.704(4) (d) is arbitrary or capricious.

Conclusion

126. Petitioner has failed to meet its burden to demonstrate that any portion of Florida Administrative Code Rule 69V-560.704 is an invalid exercise of delegated legislative authority. Based on a thorough review of the evidence, the undersigned concludes that the challenged portions of the rule do not exceed Respondent's grant of rulemaking authority, do not contravene the specific law implemented, and are neither arbitrary nor capricious.

ORDER

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

ORDERED that the Petition filed by Petitioner pursuant to section 120.56(3), Florida Statutes, seeking an administrative determination that Florida Administrative Code Rule 69V-560.704 constitutes an "invalid exercise of delegated

legislative authority," as defined in section 120.52(8)(b),
(c), and (e), is hereby DISMISSED.

DONE AND ORDERED this 6th day of May, 2014, in
Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of May, 2014.

ENDNOTES

^{1/} Petitioner filed a "Proposed Recommended Order" which was taken as a proposed final order in this matter.

^{2/} Except as otherwise noted herein, all references to the Florida Statutes are to the 2013 version.

^{3/} Section 655.50 was amended again by the 1994 Legislature only to correct a cross-reference to section 895.02, Florida Statutes, which was amended in the same bill. See ch. 94-209, § 80, Laws of Fla. (1994).

^{4/} Section 560.309, Florida Statutes (Supp. 1994) read, in pertinent part, as follows:

(4) Exclusive of the direct costs of verification which shall be established by department rule, no check casher shall:

(a) Charge fees, except as otherwise provided by this part, in excess of 5 percent of the face amount of the payment instrument, or 6 percent without the provision of identification, or \$5, whichever is greater;

(b) Charge fees in excess of 3 percent of the face amount of the payment instrument, or 4 percent without the provision of identification, or \$5, whichever is greater, if such payment instrument is the payment of any kind of state public assistance or federal social security benefit payable to the bearer of such payment instrument;

* * *

(d) As used in this subsection, 'identification' means, and is limited to, an unexpired and otherwise valid driver license, a state identification card issued by any state of the United States or its territories or the District of Columbia, and showing a photograph and signature, a U.S. Government Resident Alien Identification Card, a U.S. Passport, or a U.S. Military identification card.

^{5/} There are minor formatting differences between the rule and the statute.

^{6/} The statute also requires check cashers to collect and maintain "[s]uch additional information as required by rule." § 560.310(2)(d)12., Fla. Stat.

^{7/} In the Laws of Florida, words ~~stricken~~ are deletions; words underlined are additions.

^{8/} Petitioner originally alleged the rules were also invalid pursuant to 120.52(8)(f). However, Petitioner withdrew that allegation at the final hearing. T.18:17-24.

^{9/} In the original Petition, Petitioner included all documents listed in (4)(d)1. through 5. as exceeding Respondent's rulemaking authority. Petitioner appears to have abandoned any challenge to subparagraph 5. Florida Administrative Code Rule 69V-560.704(4)(d)5. requires check cashers to maintain

"[d]ocumentation of individuals authorized to negotiate payment instruments on the corporation or fictitious entity's behalf including corporate resolutions or powers of attorney." Presumably, Petitioner dropped this argument because the statute specifically requires check cashers to determine whether a conductor of a corporate payment instrument is "an authorized officer of the corporate payee named on the instrument's face." § 560.309(4), Fla. Stat. Challenging subparagraph 5. would fly in the face of Petitioner's argument that Respondent is not authorized to require documents not mentioned in the statute.

^{10/} The decline could just as easily be blamed on the nationwide economic downturn. More likely, the decline in the number of check cashers coincides with the overhaul of regulations to weed out illegitimate check-cashing businesses directly engaged in criminal activity.

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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.