STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHEN J. WILLIAMS, AS A
TRUSTEE FOR THE SPARKHILL TRUST,

Petitioner,

vs. Case No. 16-6127RU

FLORIDA DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,

Respondent.
_____/

FINAL ORDER

A final hearing in this case was conducted on December 12, 2016, pursuant to sections 120.56(4), 120.569, and 120.57(1), Florida Statutes.[1/] Administrative Law Judge ("ALJ") Cathy M. Sellers convened the hearing at the Division of Administrative Hearings ("DOAH") in Tallahassee, Florida. Respondent, Florida Department of Highway Safety and Motor Vehicles, appeared at DOAH. Petitioner, Stephen J. Williams, as Trustee for the Sparkhill Trust, appeared by telephone.[2/]

APPEARANCES

For Petitioner: Stephen J. Williams
1019 Southeast 4th Place
Cape Coral, Florida 33990-1521

For Respondent: Yale H. Olenick, Esquire
Department of Highway Safety
and Motor Vehicles
2900 Apalachee Parkway, Room A-432
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STATEMENT OF THE ISSUE

Whether two policy statements issued by Respondent, TL-10 and RS/TL 14-18, are unadopted rules, as defined in section 120.52(20), Florida Statutes, that violate section 120.54(1)(a), Florida Statutes.[3/]

PRELIMINARY STATEMENT

On October 17, 2016, Petitioner filed a Petition for Hearing challenging a portion of the Florida Department of Highway Safety and Motor Vehicles' Procedure Manual TL-10, dated April 30, 2014 ("TL-10"),[4/] and Technical Advisory RS/TL 14-18 ("RS/TL 14-18"), dated October 20, 2014, as unadopted and invalid rules.[5/] On October 27, 2016, the undersigned issued an Order Memorializing Agreed Schedule for Filing Motions and Responses, which, among other things, limited the issue in this proceeding to whether the Challenged Statements were unadopted rules. On November 18, 2016, Petitioner filed an amended Petition for Hearing ("Amended Petition"), which was accepted as the operative rule challenge petition in this proceeding.

The final hearing initially was scheduled for November 14, 2016, but was rescheduled to December 12, 2016. During the pendency of the proceeding, Petitioner filed multiple requests for summary final order and moved for a default judgment; all were denied.[6/] Respondent filed multiple requests to dismiss the proceeding; all were denied.

The final hearing was held on December 12, 2016. Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 3, 5 through 11, and 14 through 18 were admitted into evidence without objection, and Petitioner's Exhibits 4, 12, and 13 were admitted into evidence over objection. Respondent did not present any witnesses or offer any exhibits for admission into evidence.

The one-volume Transcript was filed on December 27, 2016. The deadline for filing proposed final orders was extended to January 13, 2017. On January 13, 2017, Respondent timely filed its Proposed Final Order, which was duly considered in preparing this Final Order. Petitioner did not file a proposed final order.[7/]

FINDINGS OF FACT

I. The Parties

1. Petitioner is a co-trustee of the Sparkhill Trust (the "Trust"), which was created in July 2009.

2. Opinicus Sentinel, LLC ("Opinicus Sentinel") currently is a co-trustee of the Trust, and has been a trustee of the Trust since its creation. Barbara Williams is the manager of Opinicus Sentinel, and has served in that capacity since its creation.[8/]

3. Petitioner was appointed as a trustee of the Trust on October 11, 2016.[9/]

4. The Trust owns a 2001 Porsche 996/911 Turbo motor vehicle (hereinafter, "Vehicle"). Solely for purposes of this proceeding,[10/] the Vehicle Identification Number ("VIN") of the Vehicle is WP0ZZZ99Z1S682830, as alleged in the Amended Petition. As of the final hearing, the Vehicle was located in Germany. During all times relevant to this proceeding, the Vehicle was located in a foreign country.

5. Respondent is the state agency responsible for, among other things, implementing and administering chapter 319, Florida Statutes, governing the issuance of certificates of title for motor vehicles. See § 319.17, Fla. Stat.

II. Background and Events Giving Rise to This Proceeding

6. On or about September 30, 2014, Opinicus Sentinel——at that time, the sole trustee of the Trust——submitted an application consisting of completed Form 82040[11/] and supporting documentation to the Lee County Tax Collector ("Tax Collector")[12/] on behalf of the Trust, requesting issuance of a certificate of title for the Vehicle in the name of the Trust. The application included a letter from a motor vehicle dealer in London, Ontario, Canada, stating that the dealer had inspected the Vehicle and that the Vehicle's VIN is WP0ZZZ99Z1S682830.

7. On or about October 22, 2014, the Tax Collector sent a letter to Ms. Williams, as manager of Opinicus Sentinel, stating that the application for certificate of title could not be

processed "because all used vehicles coming into Florida from a foreign country must have the Vehicle Identification Number verified by a Division of Motorist Services Compliance Examiner."

8. When asked for further explanation, the Tax Collector responded by electronic mail ("email"):

> The Lee County Tax Collector is a Constitutional Office that provides the services of the Department of Highway Safety and Motor Vehicles (DHSMV). As such, we are bound by both statutory and department procedural guidance. Procedures often are entitled Technical Advisories. The technical advisory relied upon by this office indicates that all used vehicles coming into Florida from a foreign country must have the VIN verified by a Division of Motorist Services Compliance Examiner as referenced in TL-10 in effect on the date the correspondence was drafted.

Email from Tax Collector to Barbara Williams, dated October 27, 2014 (emphasis added).

This email directed Ms. Williams to contact Respondent if the trustee wished to challenge the denial of the application for certificate of title for the Vehicle.

9. On November 3, 2014, Ms. Williams contacted Respondent, asserting that the Tax Collector's denial of the application for a certificate of title violated section 319.23(3)(a)2, Florida Statutes.

10. Also on that date, Ms. Williams filed a Petition for Administrative Hearing with Respondent on behalf of Opinicus

Sentinel, challenging TL-10 as an invalid and unadopted rule pursuant to section 120.56(4).[13/]

11. On November 24, 2014, Respondent sent a letter to Ms. Williams, refusing to issue the requested certificate of title. The letter stated:

> After researching the issue identified in your letter, the Department stands by the decision made by . . . [the Lee County Tax Collector]. Section 319.23(a)(2), Florida Statutes, states that, '[a]n appropriate departmental form evidencing that a physical examination has been made of the motor vehicle by the owner and by a duly constituted law enforcement officer in any state, a licensed motor vehicle dealer, a license inspector as provided by s. 320.58, or a notary public commissioned by this state and that the vehicle identification number shown on such form is identical to the vehicle identification number shown on the motor vehicle.

Letter from Respondent to Barbara Williams, dated November 24, 2014 (emphasis added).

12. The letter further stated:

> However, section 319.23(11), Florida Statutes, states that, '[t]he Department shall use security procedures, processes, and materials in the preparation and issuance of each certificate of title to prohibit to the extent possible a person's ability to alter, counterfeit, duplicate, or modify the certificate of title.'
>
> In the case at bar, the Department is choosing to implement the language found in 319.23(11) to ensure that the certificate of title is issued correctly. The Department has the authority to require VIN verifications on vehicles entering the state of Florida from a foreign country before a title can be issued.

13. In subsequent correspondence to Ms. Williams, dated December 18, 2014, Respondent stated:

> I can only again point you to s. 319.23(11). Since April of 2000 the Department's policy is to require all used vehicles coming into Florida from a foreign country to have the VIN verified by a Motor Vehicle Field Office Compliance Examiner prior to being titled.
>
> * * *
>
> I have included a copy of the Department's Technical Advisory, TL 14-18, which explains the Department's policy in depth.[14/]

14. On December 18, 2014, Respondent referred Opinicus Sentinel's Petition for Administrative Hearing to DOAH. The case was assigned DOAH Case No. 14-6005. On March 3, 2015, Opinicus Sentinel withdrew the petition, and the DOAH case file for Case No. 14-6005 was closed.

15. Notwithstanding that Case No. 14-6005 was pending at DOAH, on February 25, 2015, Respondent sent Ms. Williams a letter dismissing the previously-filed petition for administrative hearing with leave to file an amended petition. The letter also asserted an additional basis[15/] for Respondent's denial of the certificate of title for the Vehicle, specifically:

> Because the vehicle to be titled is not currently in Florida, clearly the vehicle will not be operated on the roads of Florida. Accordingly, the vehicle cannot be registered in Florida and the titling provisions of Chapter 319, Fla. Stat., do not apply. Therefore, the application for title you submitted to the Lee County Tax Collector

> pursuant to section 319.23, Fla. Stat. will not be approved.

16. While DOAH Case No. 14-6005 was pending, Stephen J. Williams, as beneficiary of the Trust, filed a Petition for Administrative Hearing challenging both TL-10 and RS/TL 14-18 as unadopted and invalid rules pursuant to section 120.56(4). That case was assigned DOAH Case No. 15-0484 and ultimately was dismissed by Final Order dated March 25, 2015.[16/]

17. As previously noted, on October 11, 2016, Petitioner was appointed as a co-trustee of the Trust.

18. On October 17, 2016, Petitioner, as a trustee of the Trust, initiated this proceeding by filing a Petition for Administrative Hearing, again challenging both TL-10 and RS/TL 14-18 as unadopted and invalid rules. As noted above, the scope of this proceeding subsequently was narrowed to eliminate the challenge to the substantive invalidity of TL-10 and RS/TL 14-18, so that the sole issue in this proceeding is whether TL-10 and RS/TL 14-18 are unadopted rules that violate section 120.54(1)(a).

The Challenged Statements: TL-10 and RS/TL 14-18

19. TL-10, identified by the Tax Collector as the original basis for denial of issuance of the certification of title for the Vehicle, went into effect on April 30, 2014. The portion of TL-10 pertinent to this proceeding states:

IV. MISCELLANEOUS INFORMATION

* * *

B. Vehicle identification number (VIN) verifications are to be completed by the applicant.

* * *

2. VIN verification may be done by one of the following:

* * *

c. Florida Division of Motorist Services (DMS) Compliance Examiner, DMS or tax collector employees.

* * *

NOTE: All USED vehicles coming into Florida from a foreign country, including dealer transactions, MUST have the VIN verified by a DMS Compliance Examiner.

20. Technical Advisory RS/TL 14-18 is titled "Motor Vehicles Coming Into Florida from a Foreign Country." It states in pertinent part:

All used vehicles coming into Florida from a foreign country (including dealer transactions) must have the vehicle identification number verified by a Motor Vehicle Field Office Compliance Examiner prior to being titled.

* * *

The Regional Motor Vehicle Field Office staff will perform an inspection of the vehicle that includes verification of the public VIN, confidential VIN or secondary VIN, manufacturer’s label or letterhead letter that states compliance with US vehicle standards,

> computer checks of NMVTIS/NICB data-bases, and a review of documentation showing vehicle clearance through US Customs (if applicable). Copies of these documents, including a copy of the completed form HSMV 84044, will be maintained in the regional office.
>
> The VIN verification will be completed by the compliance examiner on a form HSMV 84044, in lieu of a form HSMV 82040 or HSMV 82042.
>
> The compliance examiner will give the customer the original required documentation (including the original complete form HSMV 84044). The customer must submit all documentation to a tax collector's office or license plate agency in order for him/her to apply for a Florida Certificate of Title.

21. The undisputed evidence establishes that neither TL-10 nor RS/TL 14-18 have been adopted as rules pursuant to the procedures prescribed in section 120.54.

22. Respondent did not present any evidence showing that rulemaking was not practicable or feasible.

Respondent's Position

23. Respondent admitted, in its Amended Responses to Requests to Admissions served on Petitioner on November 21, 2016, that TL-10 and RS/TL 14-18 are intended to be, and are, of general application; that TL-10 and RS/TL 14-18 implement, interpret, or prescribe law or policy and/or describe the procedure or practice requirements of Respondent; and that TL-10 and RS/TL 14-18 have not been, and are not published in the Florida Administrative

Code. Additionally, Respondent acknowledges that neither TL-10 nor RS/TL 14-18 have been adopted as rules.

24. Respondent takes the position that Petitioner lacks standing to challenge TL-10 and RS/TL 14-18 as unadopted rules.

25. Specifically, Respondent asserts that Petitioner has not suffered a "real or immediate injury in fact" for purposes of having standing because although the Tax Collector and Respondent referred the Trust to TL-10 and RS/TL 14-18 as grounds for denial of the certificate of title, they were not the "ultimate grounds" on which the Trust was denied a certificate of title. On this basis, Respondent asserts that it did not apply TL-10 or RS/TL 14-18 to Petitioner, so Petitioner did not suffer injury as a result of application of these statements.

26. Respondent further asserts that because Petitioner cannot meet the requirements in section 319.23 to be entitled to issuance of a certificate of title for the Vehicle, Petitioner's claimed injury in this proceeding is speculative and hypothetical.

27. To this point, Respondent argues that Petitioner's alleged injury in this proceeding is speculative because the Trust has not satisfied the requirements of section 319.23 for purposes of being entitled to issuance of a certificate of title. Specifically, Respondent argues that because the Vehicle is not physically present in the state of Florida, it is not being operated on the roads of Florida, and because it is not being

operated on the roads of Florida, it is not required to be registered or to obtain a certificate of title——and, indeed, cannot be registered and a certificate of title issued until it is physically present in Florida. Accordingly, Respondent reasons, until the Vehicle is physically present in Florida and thus subject to registration and licensure requirements, TL-10 and RS/TL 14-18 were not, and cannot be, applied to determine whether the certificate of title for the Vehicle should be issued.

28. Also on this point, Respondent argues that Petitioner's alleged injury is speculative because Petitioner did not meet the requirement in section 319.23 that a physical examination of the Vehicle be made by the owner and a motor vehicle dealer licensed in the state of Florida.

29. Respondent further asserts that Petitioner's alleged interest does not fall within the zone of interest of this proceeding. Specifically, Respondent argues that because the Vehicle is located in a foreign country, Petitioner is unable to establish that the Vehicle must be registered and a certificate of title issued in Florida. Respondent concludes:

> Because Petitioner cannot meet the burden of establishing that the motor vehicle in question is required to be licensed and registered in Florida, and because he failed to satisfy the application requirements of section 319.23(3)(a)(2), he cannot meet the burden of establishing that any interest in obtaining a certificate of title for the

> vehicle in question is within the 'zone of interests' to be protected and regulated.

CONCLUSIONS OF LAW

30. Subject to a determination that Petitioner has standing, discussed below, DOAH has jurisdiction over this proceeding pursuant to sections 120.56(4), 120.569, and 120.57(1).

31. Section 120.56(4)(a) provides in pertinent part:

> (a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes an unadopted rule.
>
> * * *
>
> (d) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order.
>
> (e) If an administrative law judge enters a final order that all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

32. Petitioner bears the burden in this proceeding to prove, by a preponderance of the evidence, that the challenged statements are unadopted rules that violate section 120.54(1)(a). See S.W. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908

(Fla. 2d DCA 2001); see also Ag. for Pers. with Disab. v. C.B., 130 So. 3d 713, 717 (Fla. 1st DCA 2013).

TL-10 and RS/TL 14-18 Are Unadopted Rules

33. The term "rule" is defined in section 120.52(16)[17/] as:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or an existing rule. The term also includes amendment or repeal of a rule.

34. A statement of general applicability is a statement that purports to affect not just a single person or singular situations, but to a category or class of similarly-situated persons or activities. See McCarthy v. Dep't of Ins., 479 So. 2d 135 (Fla. 2d DCA 1985). Thus, the statement need not apply universally to every person or activity within the agency's jurisdiction; rather, it is sufficient that the statement apply uniformly to a class of persons or activities over which an agency exercises authority. See Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 83 (Fla. 1st DCA 1997).

35. Florida case law has expanded on the definition of rule to include "those statements which are intended by their effect to create rights, or to require compliance, or otherwise have the direct and consistent effect of law." State Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977). See also Jenkins

v. State, 855 So.2d 1219 (Fla. 1st DCA 2003); Amos v. Dep't of HRS, 444 So. 2d 43, 46 (Fla. 1st DCA 1983).

36. Thus, if the agency statement treats all those with like cases equally or requires affected persons to conform their behavior to a common standard, and creates or extinguishes rights, privileges, or entitlements, then the statement is a rule. See Fla. Quarter Horse Racing Ass'n v. Dep't of Bus. and Prof'l Reg., Case No. 11-5796RU (Fla. DOAH Final Order May 6, 2013), aff'd sub nom. Fla. Quarter Horse Track Ass'n v. State, 133 So. 3d 1118 (Fla. 1st DCA 2014).

37. As the Court of Appeal, First District, has explained:

> [T]he breadth of the definition in section 120.52(1[6]) indicates that the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them. Any agency statement is a rule if it "purports in and of itself to create certain rights and adversely affect others," [State, Dep't of Admin. v.] Stevens, 344 So. 2d [290,] 296 [(Fla. 1st DCA 1977)], or serves "by [its] own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law."
>
> McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

Harvey, 356 So. 2d at 325.

38. Applying these statutory and case law standards to this proceeding, there is no question that TL-10 and RS/TL 14-18 are rules.[18/]

39. TL-10 expressly applies to "[a]ll USED vehicles coming into Florida from a foreign country, including dealer transactions," and imposes the mandatory requirement that in order to obtain an original certificate of title, the vehicle "MUST have the VIN verified by a DMS Compliance Examiner."

40. RS/TL 14-18 expressly applies to "all used vehicles coming into Florida from a foreign country" and requires that the VIN be verified by an examiner with Respondent's Motor Vehicle Field Office Compliance as a condition precedent to applying for and obtaining a certificate of title for the vehicle.

41. Thus, by their plain terms, TL-10 and RS/TL 14-18 apply uniformly to a class of persons or activities over which Respondent exercises authority——here, all used motor vehicles coming into Florida from a foreign country for which certificates of title are sought. Further, both of these challenged statements impose the requirement——to which all persons seeking to obtain a certificate of title for a used vehicle being brought from a foreign country into the state of Florida must conform——that the VIN on the vehicle be verified by an examiner with Respondent's Motor Vehicle Field Office. Thus, both TL-10 and RS/TL 14-18 treat all those with like cases equally and require the affected persons or activities to conform to a common standard.

42. It is also noted that nowhere in chapter 319, or in any other statute, are the specific terms, provisions, and

requirements of either TL-10 or RS/TL 14-18 expressly codified. Thus, TL-10 and RS/TL 14-18 impose requirements that are not expressly contained in the statutes' plain language or readily apparent from the statutes' literal reading. As such, these agency statements interpret those statutes. See State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); Beverly Enterprises-Fla., Inc. v. Dep't of HRS, 573 So. 2d 19, 22 (Fla. 1st DCA 1990); St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989). See also Fla. Quarter Horse Racing Ass'n.

43. On these bases, it is determined that both TL-10 and RS/TL 14-18 are agency statements of general applicability that implement, interpret, and prescribe law or policy, and that they impose conditions, require compliance, and have the effect of law. Accordingly, it is concluded that TL-10 and RS/TL 14-18 are rules, as that term is defined in section 120.52(16).[19/]

44. Section 120.54(1)(a) declares that "[r]ulemaking is not a matter of agency discretion" and directs that "[e]ach agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." As noted above, there is no dispute that Respondent has not adopted either TL-10 or RS/TL 14-18 as rules pursuant to section 120.54. Also as noted above, Respondent did

not present any evidence to show that it was not practicable or feasible to adopt the challenged statements as rules.[20/]

45. On these bases, it is concluded that TL-10 and RS/TL 14-18 are unadopted rules that violate the mandate in section 120.54(1)(a) that each agency statement defined as a rule be adopted by the rulemaking procedure set forth in section 120.54 as soon as practicable and feasible.

Petitioner's Standing

46. As noted above, in administrative proceedings, standing is a matter of subject matter jurisdiction. Abbott Labs, 15 So. 3d at 657 n.2.

47. To have standing to challenge an agency statement defined as a rule in a proceeding before an administrative law judge, the challenger must be "substantially affected" by the statement in question. § 120.56(4)(a), Fla. Stat. ("Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)."). Jacoby v. Fla. Bd. of Med., 917 So. 2d 358 (Fla. 1st DCA 2005).

48. To satisfy the "substantially affected" standard in the unadopted rule context, a petitioner[21/] must show that he or she will suffer an immediate "injury in fact" within the "zone of interest" protected by the statute, or related statutes, that the

unadopted rule implements. See Fla. Med. Ass'n, Inc. v. Dep't of Prof'l Reg., 426 So. 2d 1112, 1114 (Fla. 1st DCA 1983).

49. It is well-established in Florida law that a person is "substantially affected" for purposes of having standing to challenge a rule——whether adopted or unadopted——if the rule is or will be applied to that person as a basis for agency action. Jacoby, 917 So. 2d at 360; Coalition of Mental Health Professions, 546 So. 2d 27 (Fla. 1st DCA 1989); Prof'l Firefighters of Fla., Inc. v. Dep't of HRS, 396 So. 2d 1194 (Fla. 2d DCA 1981); State v. Harvey, 356 So. 2d 323 (Fla. 1st DCA 1977). See Abbott Labs, 15 So. 3d at 651 n.2. See also Televisual Comm'n v. Dep't of Labor and Emp't Sec., 667 So. 2d 372 (Fla. 1st DCA 1995)(health care providers had standing to challenge proposed rule that purported to regulate the industry that provided the medium for the education of those providers); Ward v. Bd. of Trs., 651 So. 2d 1236 (Fla. 4th DCA 1995)(professional engineer would be subject to regulation by proposed rules imposing new dock construction standards, that, if complied with, would subject him to professional licensure discipline).[22/]

50. In Jacoby, the Board of Medicine denied a physician's application for a temporary medical practice certificate on the basis of existing rules and "non-rule" policies that had not been formally adopted as rules,[23/] and the physician challenged the rules and policies in a proceeding brought under section 120.56.

In his Final Order, the ALJ found that Jacoby did not demonstrate facts sufficient to show that, as a result of denial of his license, he had standing to challenge the rules and policies. In reversing the final order and determining that Jacoby had standing to challenge the rules and policies, the court rejected the agency's argument that Jacoby's injury alleged was speculative and conjectural. The court stated: "[h]ere, Appellant has been adversely affected by the rule, as his license was denied. . . . Thus, Appellant is subject to the licensing rules and policies . . . and he has already suffered an immediate impact because of those rules and policies." Id. at 360 (emphasis added).

51. In Professional Firefighters, an older case addressing rule challenge standing, a professional association[24/] and licensed members challenged proposed rules that, when applied, effectively would impose new exam requirements on the members. In rejecting the agency's argument that the injury to the licensed members was hypothetical and speculative, the court held that where a person is subject to regulation under rules, he or she suffers an injury in fact of sufficient immediacy for purposes of having standing to challenge those rules. Id. at 1196.

52. Similarly, in Coalition of Mental Health Professions, the court again affirmed that being subject to——i.e., regulated by——a rule is sufficient to establish an immediate injury in fact for purposes of having standing to challenge the rule. In that

case, a professional association challenged proposed rules that would regulate the professional licensed practice of members of the association. In reversing the final order dismissing the rule challenge for lack of standing, the court stated: "[t]he fact that appellant's members will be regulated by the proposed rules is alone sufficient to establish that their substantial interests will be affected and there is no need for further factual elaboration of how each member will be personally affected." Id. at 28 (emphasis added).

53. Here, Respondent asserts that Petitioner has not shown that it has suffered an injury in fact of sufficient immediacy to have standing in this proceeding because TL-10 and RS/TL 14-18 have not been applied to deny the certificate of title for the Vehicle. As support for this position, Respondent argues that TL-10 and RS/TL 14-18 were not the "ultimate grounds" for its decision to deny the certificate of title for the Vehicle, so Respondent did not apply TL-10 and RS/TL 14-18 to deny the application for the certificate of title for the Vehicle.

54. This argument is rejected. The evidence clearly establishes that Respondent did, in fact, apply TL-10 and RS/TL 14-18 to deny the application for certificate of title. The undisputed evidence establishes that the Tax Collector, acting as Respondent's statutorily-designated agent for purposes of issuing or denying certificate of title applications, cited

TL-10 as the basis for its refusal to issue the requested certificate of title. Furthermore, in the November 24, 2014, correspondence from Respondent to the trustee, Respondent specifically stated that it "stands by the decision made by . . . [the Lee County Tax Collector]." This statement evidences that Respondent effectively adopted the Tax Collector's rationale applying TL-10 as a basis for denying the certificate.

55. As an additional basis for the denial of the certificate of title, the letter also cited section 319.23(11) as authorizing Respondent to use security procedures, processes, and materials in the preparation and issuance of each certificate of title to prohibit to the extent possible a person's ability to alter, counterfeit, duplicate, or modify the certificate of title. Thus, per the letter, Respondent was "implementing" section 319.23(11) by requiring that the Vehicle's VIN be verified as previously specified (i.e., by a Motor Vehicle Field Office Compliance Examiner) before the certificate of title could be issued. In subsequent correspondence, Respondent further explained its reliance on section 319.23(11), stating that since April 2000, its "policy" was to "require all used vehicles coming into Florida from a foreign country to have the VIN verified by a Motor Vehicle Field Office Compliance Examiner prior to being titled." The correspondence specifically referred to——and even included a copy of——RS/TL 14-18, which explained Respondent's policy. Clearly,

then, Respondent did, in fact, apply both TL-10 and RS/TL 14-18 to deny the application for the certificate of title for the Vehicle.

56. Respondent's attempt to rely on the separate ground in its February 25, 2015, letter as a basis for asserting that TL-10 and RS/TL 14-18 were not the "ultimate grounds" for denial of the certificate of title also is misplaced. As previously explained,[25/] jurisdiction over the proceeding was vested in DOAH when Respondent sent the letter on February 25, 2015. Thus, Respondent lacked jurisdiction to take agency action to assert yet another basis for denying the certificate of title. Furthermore, under any circumstances, Respondent did not ever inform Respondent that it was ceasing to rely on TL-10 and RS/TL 14-18 as a basis for denying the certificate of title. Instead, with each piece of additional correspondence, Respondent set forth yet another ground for its decision to deny the certificate of title. As discussed above, to have standing to challenge a rule, it is sufficient for the challenger to show that the rule was a basis for agency action——not that it was sole basis for that action. See Coalition of Mental Health Professions, 546 So. 2d at 28; Prof'l Firefighters, 396 So. 2d at 1196.

57. Respondent's position, couched in various arguments (discussed in detail above) that Petitioner lacks standing because Petitioner did not, and cannot, meet the requirements for issuance of the certificate of title for the Vehicle, also is rejected.

Standing to challenge a rule is not predicated on showing that the challenger would prevail on the merits of a proceeding brought under sections 120.569 and 120.57(1) to challenge the denial of a license on the basis of that rule. See Harvey, 356 So. 2d at 325 (challenger not required to pursue and prevail in all potential avenues of relief to demonstrate he or she is substantially affected by rule). As extensively discussed above, in rule challenge proceedings brought under section 120.56, it is sufficient, for standing purposes, to show that the challenger was subjected to the rule as a basis for the agency's action.

58. Based on the foregoing, it is concluded that Petitioner has demonstrated an injury in fact of sufficient immediacy to meet the first requirement of the "substantially affected" standing standard applicable to this proceeding.

59. Respondent also asserts that Petitioner has not shown that his interest falls within the "zone of interests" protected by this proceeding, which challenges TL-10 and RS/TL 14-18 as unadopted rules. Respondent argues that the zone of interest in this proceeding is limited exclusively to motor vehicles required to be registered and licensed in Florida, and since the Vehicle is not currently physically present in Florida, it is not required to be registered and licensed in Florida, so that Petitioner's interest in challenging the agency statements is not protected under this proceeding.

60. This argument also is rejected. Petitioner, as trustee of the Trust that owns the Vehicle, clearly has an interest in obtaining a certificate of title, which is an interest under chapter 319 that clearly is protected in this proceeding. Here, the effect of TL-10 and RS/TL 14-18 is to impose additional obstacles to obtaining a certificate of title for the Vehicle beyond the requirements set forth in chapter 319, governing motor vehicle titling in Florida. Therefore, Petitioner is asserting an injury——i.e., that the certificate of title for the Vehicle has been denied——that is specifically protected by chapter 319.[26/]

61. The circumstances in this case are analogous to those in NAACP v. Board of Regents, 822 So. 2d 1 (Fla. 2003), which involved a challenge to proposed rules that effectively imposed more stringent state university admission requirements on minority students than those to which they previously were subject. In reversing the lower court's holding that the challengers lacked standing, the Florida Supreme Court concluded that the rules had the effect of imposing additional obstacles to the students' interest in being admitted to a state university, and that that interest clearly was protected under the statutes establishing requirements and standards for admission to a state university.

62. Based on the foregoing, it is determined that Petitioner's interest in obtaining a certificate of title for the

Vehicle falls within the zone of interest protected under this proceeding.

Conclusion

63. For the reasons set forth herein, it is concluded that Petitioner, as a trustee of the Trust that owns the Vehicle, is substantially affected by TL-10 and RS/TL 14-18, and, thus, has standing to challenge these agency statements as unadopted rules in this proceeding brought under section 120.56(4).

64. For the reasons set forth herein, it is concluded that TL-10 and RS/TL 14-18 are unadopted rules that violate section 120.54(1)(a).

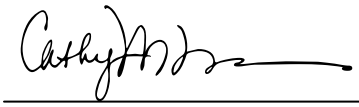
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the portion of the Florida Department of Highway Safety and Motor Vehicles' Procedure Manual TL-10, dated April 30, 2014, specifically addressed herein, and Technical Advisory RS/TL 14-18, dated October 20, 2014, are unadopted rules that violate section 120.54(1)(a), Florida Statutes.[27/]

Jurisdiction is retained to conduct further proceedings as necessary to award attorney's fees and costs, as applicable, pursuant to section 120.595(4), Florida Statutes. Therefore, it is further ORDERED that Petitioner shall have 30 days from the date of this Final Order within which to file a motion for attorney's fees and costs, to which motion (if filed) Petitioner

shall attach appropriate affidavits (for example, attesting to the reasonableness of any fees and costs) and other documentation (such as time sheets, receipts, bills, and the notice addressed in section 120.56(4)(b) as a condition precedent to the award of attorney's fees and costs) essential to support a claim (if any) for attorney's fees and costs pursuant to section 120.595(4).

DONE AND ORDERED this 3rd day of March, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of March, 2017.

ENDNOTES

[1/] All references are to the 2016 version of Florida Statutes unless otherwise stated.

[2/] As required by Florida Administrative Code Rule 28-106.213(5)(b), a notary public was physically present with Petitioner, administered the oath, and filed written certification in this proceeding, confirming Petitioner's identity and that he took the oath or affirmation.

[3/] As addressed in greater detail below, Respondent disputes Petitioner's standing to challenge Respondent's agency statements

as unadopted rules. For DOAH to have jurisdiction to conduct this proceeding and issue a final order determining whether Respondent's agency statements are unadopted rules, Petitioner must have standing. Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 657 n.2 (Fla. 1st DCA 2009)("standing in the administrative context is a matter of subject matter jurisdiction").

[4/] Here, Petitioner challenges only a portion of TL-10—— specifically, section IV., item B., the Note on page TL-10-12, which states: "NOTE: All USED vehicles coming into Florida from a foreign country, including dealer transactions, MUST have the VIN verified by a DMS Compliance Examiner." For shorthand purposes, this Final Order refers to "TL-10" as the challenged statement, but this proceeding does not challenge TL-10 in its entirety, only the provision specifically identified in this endnote.

[5/] Petitioner also challenged TL-10 and RS/TL 14-18 as invalid exercises of delegated legislative authority. Because these statements were neither proposed nor adopted as rules, their substantive validity could not be challenged in a proceeding brought under section 120.56(4). Accordingly, by Order issued on October 27, 2016, the undersigned limited the scope of this proceeding to determining whether the challenged statements were unadopted rules that violated the rulemaking mandate in section 120.54(1)(a).

[6/] The motions for summary final order were denied on the basis of the existence of disputed issues of material fact that required demonstration through evidence tendered and admitted in an evidentiary hearing. The motion for default judgment was denied on the basis that such relief is not available under chapter 120.

[7/] On January 17, 2017, Petitioner filed a document titled "Re: Proposed Final Order," explaining why he did not file a proposed final order and offering to do so if the tribunal thought it would be helpful for him to submit one. The undersigned did not respond or accept Petitioner's offer because the deadline for filing proposed final orders had passed.

[8/] At all times pertinent to this proceeding, Ms. Williams acted in her capacity as the manager of Opinicus Sentinel, trustee of the Trust.

[9/] To establish that he is a co-trustee of the Trust and that the Trust owns the Vehicle, Petitioner testified to that effect at the final hearing and provided a Certification of Trust pursuant to section 736.1017, Florida Statutes, which was admitted into evidence. Pursuant to section 736.1017, the provision of a certification of trust that contains all the information required under that statute obviates the need to furnish a copy of the trust instrument itself to anyone other than a beneficiary. Pursuant to this statute, the Certification of Trust is accepted, along with Petitioner's credible testimony, as adequate to establish that Petitioner is a co-trustee of the Trust.

[10/] Without belaboring the parties' underlying substantive dispute as to whether Respondent correctly denied the application for certificate of title for the Vehicle (which is not at issue in this proceeding) the evidence indicates that Respondent has not accepted the sufficiency of the proof that Petitioner provided in an effort to establish the VIN of the 2001 Porsche 996/911 Turbo vehicle owned by the Trust for purposes of issuance of a certificate of title pursuant to section 319.23, Florida Statutes. Although the Vehicle's VIN number remains a point of contention that may be addressed in an adjudicatory hearing under sections 120.569 and 120.57(1), the VIN alleged in the Amended Petition is accepted in this proceeding solely for the purpose of identifying the specific vehicle at issue.

[11/] This form has been adopted by reference in Florida Administrative Code Rule 15C-21.001.

[12/] Pursuant to section 320.03(1), Florida Statutes, the Lee County Tax Collector serves as an agent for Respondent in the processing of motor vehicle title transactions and associated registrations.

[13/] Although styled as a "Petition for Administrative Hearing," the pleading did not request a hearing under sections 120.569 and 120.57(1) to address the correctness of the agency's as-applied action under the applicable statutes governing issuance or denial of the certificate of title, but instead challenged TL-10 and RS/TL 14-18 under section 120.56(4) on the basis that these statements were substantively invalid and had not been adopted pursuant to the rulemaking process in section 120.54.

[14/] RS/TL 14-18, issued on October 20, 2014, replaced Respondent's Advisory Number T00-004, dated April 10, 2000.

[15/] As noted above, although Opinicus Sentinel styled its pleading as a "Petition for Hearing," it did not constitute a request for an as-applied adjudicatory proceeding under sections 120.569 and 120.57(1), but instead was an unadopted rule challenge brought under section 120.56(4). Respondent incorrectly treated that unadopted rule challenge as a request for an administrative hearing under sections 120.569 and 120.57(1) instead of immediately referring it to DOAH, which is vested with exclusive jurisdiction over rule challenges. Alternatively, Respondent could have dismissed the challenge with the explanation that the rule challenge needed to be filed with DOAH rather than with Respondent. Even assuming arguendo that the challenge filed by Opinicus Sentinel was properly treated as a proceeding under sections 120.569 and 120.57(1), section 120.569(2)(a) provides that once a matter has been referred to DOAH, the referring agency is not to take any further action with respect to the matter except as a party litigant. In any event, because jurisdiction over the proceeding was vested in DOAH on February 25, 2015, Respondent was not authorized to grant leave to amend the petition for hearing or to otherwise take any further agency action asserting an additional basis for denial of the certificate of title for the Vehicle. To this last point, it is further noted that even if the February 25, 2015, letter were intended to constitute separate agency action, it did not so inform Opinicus Sentinel by providing a clear point of entry, as required by section 120.569(1), notifying Opinicus Sentinel of its right to request a hearing under sections 120.569 and 120.57(1) to challenge that agency action.

[16/] Case No. 15-0484 was dismissed on the basis that Stephen J. Williams, as the beneficiary of the Trust, was not a real party in interest for purposes of having standing as a substantially affected person in the proceeding.

[17/] The definition of "rule" in section 120.52(16) expressly excludes:

> (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
>
> (b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

[18/] Respondent did not argue, or present any evidence to show, that TL-10 or RS/TL 14-18 fell within any of the exclusions from the definition of "rule" in section 120.52(16)(a) through (c). A review of these exclusions confirms they are not applicable to this case.

[19/] Although Respondent effectively admitted, in its Amended Responses to Requests for Admissions, Responses to Request Nos. 4, 5, and 6, that TL-10 and RS/TL 14-18 are rules, that admission is not legally sufficient, in and of itself, to render the challenged statements rules. As discussed herein, the competent substantial evidence in the record establishes that TL-10 and RS/TL 14-18 are rules.

[20/] Section 120.54(1)(a)1. provides that rulemaking is presumed feasible unless the agency proves that it has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking. Section 120.54(1)(a)2. provides that rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances, or the particular questions addressed are of such a narrow scope that resolution of the matter is impracticable outside of an

adjudication to determine the substantial interests of a party based on individual circumstances.

[21/] Here, Petitioner is a trustee of the Trust that owns the Vehicle. Petitioner is authorized to act on behalf of the Trust in this proceeding. See §§ 736.0816, 736.0801, and 736.0809, Fla. Stat.

[22/] In Ward and Televisual Communications, the injuries found sufficient to satisfy the "injury in fact of sufficient immediacy" requirement were less direct and immediate than the injury Petitioner has suffered in this proceeding. In those cases, the rules being challenged did not directly regulate the challengers, but had the collateral effect of regulating their conduct. By contrast, here, the unadopted rules have been directly applied to deny the certificate of title for the Vehicle owned by the Trust for which Petitioner is a trustee. Ward and Televisual Communications stand as examples in which courts have found "injury in fact" sufficient to establish rule challenge where the impacts of the rules on the challengers were attenuated and were less direct than the impacts on Petitioner in this case.

[23/] The court in Jacoby referred to these policies as "non-rule" policy. "Non-rule policy" is a moniker——confusing and now outdated——used to describe policies that constitute "rules" as defined in section 120.52(16) but that have not been adopted pursuant to the rulemaking procedures in section 120.54. More recently, the Legislature enacted the term "unadopted rule," codified at section 120.52(20), to describe agency statements that fall within the definition of "rule" but that have not been adopted pursuant to the rulemaking procedures in section 120.54.

[24/] Although both Professional Firefighters and Coalition of Mental Health Professions were professional associations challenging rules of behalf of their members, that fact does not affect the applicability of those holdings to this case. For an association to have standing to challenge rules on behalf of its members, the association is required to allege and prove that, among other things, a substantial number of its members are "substantially affected" by the rule. Fla. Home Builders Ass'n v. Dep't of Labor and Emp't Sec., 412 So. 2d 351 (Fla. 1982). Both Professional Firefighters and Coalition of Mental Health Professions address this "prong" of the Florida Home Builders standing test, and both hold that being subject to regulation by a rule is sufficient to establish injury in fact for purposes of being "substantially affected" by the rule.

[25/] See note 15, supra.

[26/] Again, it is important to note the scope of this proceeding. This proceeding solely addresses whether the challenged statements are unadopted rules that violate section 120.54(1). If Petitioner is successful in this proceeding, the result is that Respondent no longer can apply TL-10 and RS/TL 14-18 as a basis for denying a certificate of title for a motor vehicle. Of course, this does not mean that Respondent could not deny a certificate of title on other pertinent grounds. As previously noted, whether Petitioner is entitled to issuance of the certificate of title for the Vehicle under chapter 319 is not at issue in this proceeding. Thus, if Respondent were to deny a certificate of title on grounds other than the challenged statements——such on the basis of statutes or adopted rules——and Petitioner disputed the substantive (as opposed to procedural) correctness of that decision, a petitioner could challenge that decision in a proceeding brought under sections 120.569 and 120.57(1).

[27/] Section 120.56(4)(e) states: "[i]f an administrative law judge enters a final order that all or part of an unadopted rule violates section 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action."

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.