STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GEORGINA BAXTER-ROBERTS,

Petitioner,

vs.

Case No. 19-4186RU

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

SUMMARY FINAL ORDER

This cause is being determined based upon Respondent's Second Motion for Summary Final Order; Petitioner's Response to the Division's Second Motion for Summary Final Order; and Petitioner's Cross Motion for Summary Final Order.

APPEARANCES

For Petitioner: David S. Romanik, Esquire
David S. Romanik, P.A.
2355 Southeast 5th Street
Ocala, Florida 34471

For Respondent: Megan S. Silver, Esquire
Johnny P. ElHachem, Esquire
Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues to be determined are whether certain alleged statements by Respondent, the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the Division or Respondent), constitute unadopted rules in violation of section 120.54(1), Florida Statutes (2019), and whether Florida Administrative Code Rule 61D-6.011, as effective September 5, 2018, is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(c), (d), and (e).

PRELIMINARY STATEMENT

On August 6, 2019, Petitioner, Georgina Baxter-Roberts (Petitioner or Ms. Baxter-Roberts), filed a Petition Challenging Agency Statement as an Unadopted Rule (Petition), asserting that certain agency statements concerning penalty guidelines applicable to "stacking" of non-steroid anti-infammatory drug (NSAID) violations were unadopted rules in violation of section 120.54(1). On August 9, 2019, the case was assigned to the undersigned, and on August 12, 2019, was set for hearing to commence on September 6, 2019.

On August 13, 2019, Respondent moved to dismiss the Petition, and on August 16, 2019, Petitioner responded to the Motion to Dismiss and requested leave to file an amended petition. On August 21, 2019, Respondent's Motion to Dismiss

was denied, Petitioner's request for leave to file an amended petition was granted, and Petitioner's First Amended Petition Seeking an Administrative Determination that an Agency Statement is an Unadopted Rule or, Alternatively, Seeking an Administrative Determination that Existing Rule 61D-6.011 Constitutes an Invalid Exercise of Delegated Legislative Authority (Amended Petition) was deemed as filed that day.

On August 22, 2019, a disciplinary proceeding against Petitioner was referred to the Division of Administrative Hearings (DOAH) and docketed as Case No. 19-4497. Respondent's motion to have the cases consolidated was denied, because to consolidate would not result in an efficient use of resources.

On August 29, 2019, Respondent filed a Motion for Summary Final Order and a Motion for Protective Order, followed the next day by a Motion to Continue Final Hearing. On September 3, 2019, an Order was issued granting the requested continuance, and deferring ruling on the Motion for Protective Order and the Motion for Summary Final Order until responses were received for both.

On September 17, 2019, Petitioner filed a Motion for Leave to File a Second Amended Petition, which Respondent opposed. After responses were filed to all pending motions, the Motion for Protective Order was denied, and a motion hearing was conducted by telephone on September 30, 2019. On October 1,

2019, an Order was issued which granted Petitioner's Motion for Leave to File a Second Amended Petition. Both the Department's Motion for Summary Final Order as to the Amended Petition and Petitioner's Cross Motion for Summary Final Order were withdrawn by the parties. They were directed to provide mutually acceptable dates for rescheduling the hearing, and after receiving those dates, the hearing was rescheduled for November 12 and 13, 2019, in Tallahassee. However, because of the expense Petitioner would incur to bring one of the witnesses to Tallahassee, the hearing was rescheduled for November 20 and 21, 2019, via video teleconference, with sites in Tallahassee and Lauderdale Lakes.

On October 9, 2019, the Department filed Respondent's Second Motion for Summary Final Order, to which Petitioner responded and filed a Cross Motion for Summary Final Order and Request for Oral Argument.

The parties presented oral argument on the Second Motion for Summary Final Order and Cross Motion for Summary Final Order during a live motion hearing on November 13, 2019, in Tallahassee. During the hearing on the motions, the parties agreed that no material fact remained in dispute and that the case could be decided on the merits, based on the papers and exhibits submitted. The parties were given until November 22, 2019, to file any supplemental exhibits related to matters

discussed during the motion hearing, and both parties did so. All of the documents attached to the Second Amended Petition, the Second Motion for Summary Final Order, and the Response to the Motion for Summary Final Order have been considered in the preparation of this Summary Final Order, in addition to the Supplemental Exhibits filed by both parties.

All references to Florida Statutes are to the 2019 codification, unless otherwise specified. Rule 61D-6.011 has been amended since the filing of the Amended Petition in this case. For clarity, the version of rule 61D-6.011 being challenged will be identified as the Challenged Rule.

FINDINGS OF FACT

1. Petitioner is a horse trainer licensed by the Division, holding a Professional Individual Occupational License, number 10047930-1021. As a licensed horse trainer, Petitioner is subject to the regulatory authority of the Division, including its enforcement of the statutes and properly adopted administrative rules that regulate the medication of thoroughbred horses that race at the licensed thoroughbred racetracks in Florida.

2. Respondent is a state agency charged with the implementation and enforcement of Florida's pari-mutuel laws pursuant to section 20.165 and chapter 550, Florida Statutes,

including the licensing and regulation of all pari-mutuel activities in the state.

3. As part of its regulatory responsibilities, the Division regulates the medication of horses that participate in races conducted at licensed pari-mutuel facilities in Florida.

Amendments to Rule 61D-6.011

4. In 2015, the legislature amended section 550.2415 with respect to drug classification schedules and disciplinary guidelines to be used in connection with the impermissible use of drugs and naturally occurring substances for racehorses. Section 550.2415(7) was amended to provide:

> (7)(a) In order to protect the safety and welfare of racing animals and the integrity of the races in which the animals participate, the division shall adopt rules establishing the conditions of use and maximum concentrations of medications, drugs, and naturally occurring substances identified in the Controlled Therapeutic Medication Schedule, Version 2.1, revised April 17, 2014, adopted by the Association of Racing Commissioners International, Inc. Controlled therapeutic medications include only the specific medications and concentrations allowed in biological samples which have been approved by the Association of Racing Commissioners International, Inc., as controlled therapeutic medications.
>
> (b) The division rules must designate the appropriate biological specimens by which the administration of medications, drugs, and naturally occurring substances is monitored and must determine the testing methodologies, including measurement uncertainties, for screening such specimens

> to confirm the presence of medications, drugs, and naturally occurring substances.
>
> (c) The division rules must include a classification system for drugs and substances and a corresponding penalty schedule for violations which incorporates the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the Association of Racing Commissioners International, Inc. The division shall adopt laboratory screening limits approved by the Association of Racing Commissioners International, Inc., for drugs and medications that are not included as controlled therapeutic medications, the presence of which in a sample may result in a violation of this section.
>
> (d) The division rules must include conditions for the use of furosemide to treat exercise-induced pulmonary hemorrhage.
>
> (e) The division may solicit input from the Department of Agriculture and Consumer Services in adopting the rules required under this subsection. Such rules must be adopted before January 1, 2016.
>
> (f) This section does not prohibit the use of vitamins, minerals, or naturally occurring substances so long as none exceeds the normal physiological concentration in a race-day specimen. (emphasis added).

5. In response, the Division amended rules 61D-6.008 and 61D-6.011, and both amendments became effective January 10, 2016. Rule 61D-6.008 addresses permitted medications allowed for horses, and rule 61D-6.011 addresses the penalties to be imposed for drug violations.

6. Rule 61D-6.011 adopted the drug classifications identified in the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the Association of Racing Commissioners International, Inc. (the ARCI Document). It did not, however, incorporate the ARCI recommended penalty schedule contained in the ARCI Document.

7. The Florida Horsemen's Benevolent and Protective Association, Inc. (the FHBPA), a trade association representing the interests of thoroughbred racehorse owners and trainers in Florida, challenged the validity of the 2016 amendment to rule 61D-6.011, as an invalid exercise of delegated legislative authority, in Florida Horsemen's Benevolent and Protective Association v. Department of Business and Professional Regulation, DOAH Case No. 17-5882RX. In a Partial Final Order issued March 13, 2018, the rule was invalidated because it failed to incorporate the penalty guidelines as well as the classification system for drugs and substances, as required by section 550.2415(7)(c). The Partial Final Order was affirmed by the First District Court of Appeal on March 7, 2019. Dep't of Bus. & Prof'l Reg. v. Fla. Horsemen's Benevolent & Protective Ass'n, 264 So. 3d 1191 (Fla. 1st DCA 2019).

8. While the appeal of the Partial Final Order was pending before the First District, the Division amended rule 61D-6.011 (the Challenged Rule). The relevant portion of the Challenged

Rule, which became effective on September 5, 2018, states as follows:

> (1) The purpose of this rule is to designate and classify prohibited substances and the corresponding penalties that the Division shall impose upon a finding that a horse participated in a race while impermissibly medicated or with a prohibited substance present in their body. Nothing hereunder modifies the provisions of rule 61D-6.008, 61D-3.002, F.A.C., or rules promulgated under section 550.2415, F.S. The State of Florida has not established a Racing Commission. Any reference to a Commission within the incorporated document in subsection (2) of this rule is not applicable.
>
> (2) In accordance with section 550.2415, F.S., the Uniform Classification Guidelines for Foreign Substances, version 8.0, revised December 2014, by the Association of Racing Commissioners International, Inc., is hereby incorporated by reference. An electronic copy is available at https://www.flrules.org/Gateway/reference.asp?No=Ref-06400.
>
> (3) The penalties corresponding to the classification of a substance, provided by the incorporated document in subsection (2) of this rule, shall be imposed when the presence or a specific amount of a substance is identified in a urine or blood specimen in violation of Division rule or Florida Statutes. Penalties shall be imposed against racing horse trainers, pursuant to subsection 61D-6.002(1), F.A.C., and against the purse, sweepstakes, and trophy received by racing horse owners or trainers, pursuant to section 550.2415(3)(a), F.S.

9. It is this version of rule 61D-6.011 that is at issue in this case.

10. The ARCI Document incorporated into the Challenged Rule is a Model Rule of the Association of Racing Commissioners International. No evidence was presented to demonstrate that Florida has adopted any of the other Model Rules of the ARCI, and the parties indicated during the motion hearing that Florida has not done so at this time.

11. One type of medication violation that the Division penalizes is when permitted NSAIDs are found in a horse's sample in amounts that exceed permitted levels. When two NSAIDs are present at the same time, the amount permitted for each is lower than what is permitted for one, standing alone. When two NSAIDs are present in amounts over the permitted levels, the violation is referred to as a "stacking" violation. Rule 61D-6.008(3) provides that samples may contain one of the three NSAIDs listed, up to the primary threshold, and may contain two NSAIDs with concentrations up to the secondary threshold. The rule identifies the primary and secondary concentrations for Flunixin, Ketoprofen, and Phenylbutasone.

12. The Challenged Rule, via the ARCI Document which it incorporates, identifies these NSAIDs as Class 4 drugs. The ARCI Document, and thus the Challenged Rule, also lists these drugs as Penalty Class C drugs, with an asterisk denoting a footnote which states, "See Recommended Penalty Section of Document."

13. Page 28 of the ARCI Document, which is part of the Recommended Penalty portion of the document, addresses the penalties applicable for stacking violations. It states:

> The following are recommended penalties for violations due to the presence of a drug carrying a Category "B" penalty, for the presence of more than one NSAID in a plasma/serum sample, subject to the provisions set forth in ARCI-011-020(E) and ARCI-025-020(E) and for violations of the established levels for total carbon dioxide:

LICENSED TRAINER		
1st offense	2nd offense (365-day period) in any jurisdiction	3rd offense (365-day period) in any jurisdiction
• Minimum 15-day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a 60-day suspension AND • Minimum fine of $500 absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum fine of $1,000.	• Minimum 30-day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a 180-day suspension AND • Minimum fine of $1,000 absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum fine of $2,500.	• Minimum 60-day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a one-year suspension AND • Minimum fine of $2,500 absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of $5,000 or 5% purse (greater of the two) AND • May be referred to the Commission for any further

		action deemed necessary by the Commission.
LICENSED OWNER		
1st offense	2nd offense (365-day period) in owner's stable in any jurisdiction	3rd offense (365-day period) in owner's stable in any jurisdiction
• Disqualification and loss of purse [in the absence of mitigating circumstances]* AND • Horse must pass a commission-approved examination before becoming eligible to be entered.	• Disqualification and loss of purse [in the absence of mitigating circumstances]* AND • Horse must pass a commission-approved examination before becoming eligible to be entered.	• Disqualification, loss of purse, and in the absence of mitigating circumstances, a $5,000 fine AND Horse shall be placed on Veterinarian's List for 45 days and must pass a commission-approved examination before becoming eligible to be entered.

(emphasis added).

14. ARCI-011-020(E) and ARCI-025-020(E)(the Model Stacking Rules), referenced in the "subject to" clause at the top of page 28 of the ARCI Document, are part of the Model Rules of Racing published by the ARCI. The text for these rules is not included in the ARCI Document. The text of the ARCI Document does not state that it incorporates these Model Stacking Rules by reference, and there is no hyperlink to the Model Stacking Rules or a statement describing how affected persons may obtain a copy of them in the Challenged Rule. These Model Stacking

Rules provide for lesser penalties for stacking violations than those in the ARCI Document.

15. The ARCI Document also does not provide an effective date for the Model Stacking Rules it references. The copy of the Model Stacking Rules attached to the Second Amended Petition is dated April 2018, a date well after the version of the ARCI Document specified in section 550.4215. Moreover, Version 5.8 of the Model Rules of Racing (Exhibit F to Respondent's Second Motion for Summary Final Order), which is 448 pages long, states that "[t]he Model Rules are seen as a living document that is amended as the need arises."

Charges Against Petitioner

16. On February 20, Respondent issued an Administrative Complaint against Ms. Baxter-Roberts, alleging a stacking violation involving two NSAID. She was also served with a proposed stipulation and consent order, which provided for a $1,000 fine and 30-day suspension. The violation charged in the Administrative Complaint was Petitioner's second stacking offense in a 365-day period.

17. The proposed penalty was consistent with the disciplinary provisions in the ARCI Document, without reference to the Model Stacking Rules identified in the "subject to" clause. As noted above, if the cited Model Stacking Rules are consulted, a lesser penalty is suggested.

18. Respondent's Disciplinary Guidelines are available for review on the Department's website, and by following the link to the ARCI Document provided in the Division's rules. Respondent did not provide a copy of the Disciplinary Guidelines to Petitioner with the Administrative Complaint and proposed stipulation and consent order. There is no obligation to do so.

19. Petitioner executed an Election of Rights form which was received by the Division on March 11, 2019, choosing option three, which states: "**I do not dispute the allegations** of material fact in the Administrative Complaint and **waive my right** to any form of hearing. I request that a Final Order imposing a penalty and fines be entered in this case." She also executed the Stipulation and Consent Order, by which she agreed to a $1,000 fine and 30-day suspension.

20. Petitioner was not represented by counsel when she signed these documents. The Stipulation and Consent Order that she signed states,

> Respondent is aware that she/he is entitled to the advice of counsel, and has either sought the advice of counsel or by execution of this Stipulation and Consent Order, is knowingly waiving the opportunity to seek advice of counsel. Respondent acknowledges that Petitioner has not made any promise, nor has it in any other way encouraged Respondent to enter into this Stipulation and Consent Order without the advice of counsel.

21. The Stipulation and Consent Order was approved for legal sufficiency on March 12, 2019, and filed with the agency clerk on March 15, 2019.

22. More than two months later, on May 31, 2019, Petitioner, through counsel, petitioned to set aside the Stipulation and Consent Order, petitioned to have a formal administrative hearing involving disputed issues of material fact, and requested that the doctrine of equitable tolling be applied in order to allow for the filing of an untimely petition. The petition also requested an immediate stay of the license suspension pending final resolution of the proceeding. While the Division agreed to grant a stay of the remaining 25 days of suspension on June 5, 2019, it entered an Order on July 25, 2019, denying Ms. Baxter-Roberts' other requests for relief. Ms. Baxter-Roberts appealed this Order to the First District Court of Appeal, and that appeal remains pending.

23. There are other trainers who received Administrative Complaints charging stacking violations and proposed stipulations and consent orders where the penalties proposed were, like that presented to Ms. Baxter-Roberts, consistent with the penalty outlined in the ARCI Document adopted by the Challenged Rule.

Yet Another Amendment

24. On June 20, 2019, the Division filed a Notice of Proposed Rule Development, indicating that it intended to amend

the Challenged Rule. The proposed amendment does not incorporate by reference the terms of the Model Rules referenced in the ARCI Document, but engrafts the text from those rules into rule 61D-6.011. This amendment to rule 61D-6.011 was filed for adoption on August 9, 2019, and became effective August 29, 2019. The Amended Petition in this case, where the challenge to rule 61D-6.011 was first alleged, was filed August 16, 2019.[1/]

25. Bradford Beilly is an attorney who represents licensees before the Division. He was also counsel for the FHBPA in the challenge to the prior version of rule 61D-6.011, that resulted in the incorporation of the ARCI Document into the rule.

26. Between April 2019 and August 29, 2019, at least four trainers represented by Mr. Beilly also had stacking violations involving NSAIDs for which Administrative Complaints were issued.

27. On May 7, 2019, Mr. Beilly emailed Louis Trombetta and other employees of the Division, providing a copy of a Model Stacking Rule referenced in the ARCI Document and voicing his opinion that Respondent was over-penalizing stacking violations.

28. With respect to these four trainers, the Consent Orders entered after negotiation with counsel resulted in penalties consistent with the most recent amendment to the rule.

CONCLUSIONS OF LAW

29. DOAH has jurisdiction over the subject matter and the parties to this proceeding pursuant to sections 120.56(4), 120.569, and 120.57(1).

30. Petitioner seeks a determination that there are agency statements that meet the definition of a rule, but have not been adopted by the process outlined in section 120.54. In the alternative, she asserts that the Challenged Rule, as amended September 5, 2018, is an invalid exercise of delegated legislative authority.

31. The Division is an "agency" as that term is defined in section 120.52(1), and its statutory powers include rulemaking pursuant to section 550.0251(3).

32. Section 120.52(16) provides in part:

> (16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

33. Section 120.52(2) defines an "unadopted rule" as "an agency statement that meets the definition of the term 'rule' but that has not been adopted pursuant to the requirements of s. 120.54."

34. The Legislature has established a strong policy in favor of rulemaking for agencies in the State of Florida. Rulemaking is not a matter of agency discretion, and each agency statement defined as a rule by section 120.52 shall be adopted by the rulemaking procedure provided in section 120.54 as soon as feasible and practicable. § 120.54(1), Fla. Stat.

35. While agencies are encouraged to adopt rules where they have the statutory authority to do so, they may only go as far as the statutory grant received. Section 120.52(8) defines the term "invalid exercise of delegated legislative authority." After listing the ways in which a rule can constitute an invalid exercise, the "flush left" portion of the definition provides:

> 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 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 the specific powers and duties conferred by the enabling statute.

36. Those who are substantially affected by an unadopted rule have a remedy pursuant to section 120.56(4), which authorizes them to seek an administrative determination that the statement violates section 120.54(1)(a). A petition seeking such a determination must contain a description of the statement alleged to be an unadopted rule, and shall state facts sufficient to show that it is in fact an unadopted rule. Section 120.56(4)(e) provides that if an administrative law judge enters a final order finding that all or part of an unadopted rule violates section 120.54(1)(a), then the agency must immediately discontinue all reliance upon the unadopted rule, or any substantially similar statement, as a basis for agency action. Stated another way, the relief available under section 120.56(4) is prospective in nature.

37. Petitioner has standing to bring the challenge in this proceeding. As a licensed horse trainer, she is subject to the rules adopted by the Division for the licensing and regulation of horse racing, and is substantially affected by any unadopted rules used by the Division in carrying out its regulatory responsibilities. Respondent does not dispute Petitioner’s standing to seek an administrative determination as to whether the purported agency statements she identifies are unadopted rules.

38. There are four agency statements that Petitioner alleges are unadopted rules, and these statements are identified on pages 17 and 18 of the Second Amended Petition. Petitioner describes these statements as follows:

> (a) Notwithstanding that a Class 3 NSAID stacking violation per ARCI-025-020(E) carries a Category "C" penalty consisting of only a minimal fine with no license suspension, the Division has adopted an agency policy of treating Class 3 NSAID stacking violations as carrying a Category "B" penalty that include higher fines than are authorized for a penalty under Category "C" and for licensure suspension.
>
> (b) Notwithstanding the decision in Fernandez v. Florida Department of Health, [82 So. 3d 1202 (Fla. 4th DCA 2012)], and general principles of administrative law, the Division has adopted an agency policy of imposing upon its licensees disciplinary penalties in excess of the maximum penalty that the Division can lawfully impose for a Class 3 stacking violation.
>
> (c) Notwithstanding the decision in Fernandez v. Florida Department of Health, supra, and general principles of administrative law, the Division has adopted an agency policy of including in proposed settlement agreements with [its] licensees for Class 3 NSAID stacking violations disciplinary penalties in excess of the maximum penalty that the Division can lawfully impose for a Class 3 NSAID stacking violation.
>
> (d) Notwithstanding the decision in Fernandez v. Florida Department of Health, supra, and general principles of administrative law, the Division has adopted an agency policy of including in proposed settlement agreements with [its] licensees

> for Class 3 NSAID stacking violations disciplinary penalties in excess of the maximum penalty that the Division can lawfully impose while concealing from the licensee that the disciplinary penalties required under the settlement agreement are in excess of the maximum penalty that the Division can lawfully impose for a Class 3 NSAID stacking violation.

39. At the crux of Petitioner's argument with respect to all four statements is the premise that the Model Stacking Rules referenced in the "subject to" clause of the ARCI Document are included in the Challenged Rule, because they are referenced in the ARCI Document incorporated into the rule. They are not part of the Challenged Rule.

40. As noted in the Findings of Fact, the text of the Model Stacking Rules is not included in the ARCI Document, and the ARCI Document does not expressly incorporate those rules by reference. For the ARCI Document to be interpreted as incorporating the Model Stacking Rules runs afoul of the rulemaking requirements of chapter 120.

41. Florida has specific requirements for incorporating information by reference. Section 120.54(1)(i) provides:

> (i)1. A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes.

* * *

> 3. In rules adopted after December 31, 2010, material may not be incorporated by reference unless:
> a. The material has been submitted in the prescribed electronic format to the Department of State and the full text of the material can be made available by free public access through an electronic hyperlink from the rule making the reference in the Florida Administrative Code; or
> b. The agency has determined that posting the material on the internet for purposes of public examination and inspection would constitute a violation of federal copyright law, in which case a statement to that effect, along with the address of locations at the Department of State and the agency at which the material is available for public inspection, must be included in the notice required by subparagraph (3)(a)1.

42. Section 120.54(1)(i)6. authorizes the Department of State to adopt by rule requirements for incorporating materials pursuant to this paragraph. As a result, the Department of State has adopted Florida Administrative Code Rule 1-1.013, which provides in pertinent part:

> (1) Any ordinance, standard, specification, guideline, manual, handbook, map, chart, graph, report, form or instructions to forms, or other similar material that meets the definition of rule provided in section 120.52(16), F.S., and is generally available to affected persons may be incorporated by reference in a rule adopted pursuant to section 120.54, F.S., and Rule 1-1.010, F.A.C.
>
> (2) A reference to material incorporated in a rule must include:
>
> (a) Specific identification of the incorporated material, along with an

effective date. Forms and their instructions should be identified by title, the form number, and effective date. In addition, incorporated forms and instructions should clearly display the form title, form number, effective date, and the number of the rule in which it is incorporated.

(b) A statement that the material is incorporated by reference.

(c) A statement describing how an affected person may obtain a copy of the incorporated material. (Notice: agencies or units of government not within the Department of State may not indicate the Department of State or the Administrative Code and Register Section as the agency responsible for providing copies of incorporated materials.).

(3) A rule may incorporate material by reference, but only in the form that the material exists on the date that the rule is adopted. Any substantive amendments to material incorporated by reference must be promulgated under the rulemaking provisions of section 120.54, F.S., in order for the amended portions to be valid. Technical changes, those not changing the substance of the material incorporated by reference, may be made in accordance with subsection 1-1.010(10), F.A.C.

* * *

(6) When incorporated materials are filed electronically through the Department of State's e-rulemaking Internet website, the Department shall make the full text of incorporated materials available free for public access through an electronic hyperlink from the rule that references the material, directly to the material incorporated. Hyperlinks from rules in the Florida Administrative Code to any material

> other than incorporated materials are prohibited. (emphasis added).

43. While the ARCI Model Rules are mentioned in the ARCI Document, the indices for incorporating those rules by reference are not present. Respondent's assertion that the Model Stacking Rules are not part of the Challenged Rule is correct.

44. Petitioner asserts that the decision in Department of Business & Professional Regulation v. Florida Horsemen's Benevolent & Protective Association requires inclusion of the Model Stacking Rules, because when adopting a rule incorporating the ARCI Document, section 550.2415 required the Division to incorporate "the entire document." The reality is that the Division did in fact incorporate the entire document. Nothing in section 550.2415 required Respondent to adopt the ARCI Document and any other documents to which it refers, and the text of the Model Stacking Rules is simply not within the ARCI Document that the Division was mandated to adopt. To give life to Petitioner's argument would require section 550.2415(7)(c) to specify that the Division's rule "must include a classification system for drugs and substances and a corresponding penalty schedule for violations which incorporates the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the Association of Racing Commissioners International, Inc., and all documents to which it

refers." Section 550.2415 does not include this language, and the undersigned is not authorized to add it. Kasischke v. State, 991 So. 2d 803, 810 (Fla. 2008).

45. The Legislature is presumed to know existing law when it enacts a statute. Dep't of Ins. v. First Floridian Auto & Home Ins. Co., 803 So. 2d 771, 775 (Fla. 1st DCA 2001). Therefore, when it amended section 550.2415, specifically directing that the ARCI Document be incorporated by reference, it must be presumed that the legislature knew the constraints that section 120.54 contains with respect to incorporating documents. It cannot be presumed that the legislature intended for the Division to act in a manner inconsistent with existing law.

46. Moreover, paragraph (3) of the Challenged Rule provided that "the penalties corresponding to the classification of a substance, provided by the incorporated document in subsection (2) of this rule, shall be imposed when the presence or a specific amount of a substance is identified in a urine or blood specimen . . . ." (emphasis added). The ARCI Document provides a specific penalty for stacking violations, as identified in the chart replicated at paragraph 12. With respect to the first "statement," Respondent has not adopted a policy of treating stacking violations as carrying a higher

penalty than that authorized by the Challenged Rule. It was simply following the rule in effect at the time.

47. The second identified statement also alleges that Respondent is imposing disciplinary penalties in excess of the maximum penalty that the Division can lawfully impose for an NSAIDs stacking violation. The second statement also alleges that this policy has been adopted "notwithstanding the decision in Fernandez v. Florida Department of Health."

48. Petitioner cites the Fernandez decision as standing for the premise that an agency is generally without authority to impose discipline in excess of the maximum penalty authorized by the applicable penalty guideline. In the undersigned's view, Petitioner stretches the holding of Fernandez beyond its terms.

49. Fernandez was a nurse who was charged with statutory violations as a result of administering Heparin to a friend in a hospital where he was not employed. Fernandez did not dispute the facts and appeared at a hearing pursuant to section 120.57(2), where the Board of Nursing revoked Fernandez's license. The Fourth District Court of Appeal found that there was no disciplinary guideline established by rule for one of the counts charged, and for that count, no penalty could be imposed. With respect to the remaining count, the maximum guideline penalty fell short of revocation.

50. With respect to this count, the court stated:

> We acknowledge that section 456.079(3), Florida Statutes (2008), gives the Board discretion to depart from the guidelines and impose a harsher penalty when there are aggravating circumstances. The final order on review does not articulate those "[c]ircumstances which may be considered for the purposes of mitigation or aggravation of [a] penalty." Accordingly, we reverse the penalty imposed on Count I and remand for a penalty consistent with the guideline. Our holding is without prejudice to the Board imposing a harsher penalty, provided it complies with section 456.079(3) and its own guideline.

82 So. 3d at 1204 (citations omitted; emphasis added); see also, Fernandez v. Dep't of Health, 120 So. 3d 117, 119 (Fla. 4th DCA 2013)(statute gives the Board discretion to depart from the penalty guidelines set forth in rule and to impose a harsher penalty when there are aggravating circumstances).

51. Clearly, Fernandez does not stand for the premise that an agency cannot exceed the guideline penalty. Instead, it stands for the premise that an agency cannot exceed the guideline penalty without evidence of aggravating circumstances. Here, the penalty provided and accepted in Petitioner's case was part of a settlement offer. Petitioner was free to reject the offer and attempt to negotiate for a lower penalty, as some other trainers did. She did not do so in a timely manner. Moreover, not only is the penalty contained in the settlement offer presented to Petitioner consistent with the penalty outlined on page 28 of the

ARCI Document incorporated into the Challenged Rule, it is part of an offer that Petitioner could accept or reject. As such, it does not require compliance, create rights while adversely affecting others, or otherwise have the direct and consistent effect of law. State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); Beverly Enter.-Fla., Inc. v. Dep't of HRS, 573 So. 2d 19, 22 (Fla. 1st DCA 1990). The second identified statement does not constitute an unadopted rule.

52. The third asserted statement is not an unadopted rule for the same reasons as the second statement. The Division was following the Challenged Rule as written, as opposed to increasing the penalty to be imposed.

53. The fourth alleged agency statement is much the same as the third, with the added allegation that the Division is concealing from licensees that the disciplinary penalties required under a settlement agreement are in excess of the maximum penalty the Division may impose for an NSAIDs stacking violation. As with the other alleged statements, the penalty included in the stipulation was not in excess of the penalty outlined in the ARCI Document and incorporated into the Challenged Rule. Further, Petitioner's statement that the Division "concealed" information is based upon her allegation that the Division did not expressly tell Petitioner that the proposed penalty exceeded the guideline penalty identified in the

Model Stacking Rules for the violation, and that this concealment "essentially tricked" her into executing the settlement stipulation.

54. As previously found, the settlement stipulation did not include a penalty in excess of the version of the Challenged Rule. Further, while the Division freely admits that it did not provide a copy of the rule to Petitioner, her characterization of this omission as concealment is simply inconsistent with the facts developed through the exhibits submitted, and the law applicable to licensed trainers in Florida.

55. First, Kate Marshman testified that the rules for pari-mutuel wagering are all posted on the agency's website, including rule 61D-6.011. It cannot be said that the Division concealed the rule from Petitioner, or any other licensee, when they are readily available to the public. Rule 61D-6.002(1) expressly provides that "[t]rainers, kennel owners and operators are presumed to know the rules of the Division." Moreover, "we are all charged with knowledge of existing laws." Morey's Lounge v. Dep't of Bus. & Prof'l Reg., 673 So. 2d 538, 540 (Fla. 4th DCA 1996). Petitioner insinuates that the Division was under a duty to provide a paper copy of the rules to her, but cites to no statute, rule, or case that imposes such an obligation. Even assuming that the obligation existed, which it does not, an examination of the Challenged Rule and the ARCI Document

incorporated into the rule would simply support the penalty actually proposed.[2/]

56. Finally, offers of settlement do not require compliance, create rights while adversely affecting others, or otherwise have the direct and consistent effect of law. State Bd. of Admin. v. Huberty,; Beverly Enter.-Fla., Inc. v. Dep't of HRS. Petitioner has not demonstrated that statement number four is an accurate portrayal of agency policy or that it is an agency policy that meets the definition of a rule.

The Challenge to Rule 61D-6.011

57. In the alternative, Petitioner argues that the Challenged Rule is an invalid exercise of delegated legislative authority in violation of section 120.52(8)(c), (d), and (e).

58. Petitioner is challenging an existing, as opposed to a proposed, rule. Section 120.56(3) requires Petitioner to prove by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

59. A preponderance of the evidence has been defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

60. Section 120.56(1)(a) provides that any person substantially affected by a 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. Section 120.52(8) defines that term 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:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (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 s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (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; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> 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.

61. In her Second Amended Petition, Petitioner identifies three bases in section 120.52(8) for invalidating the rule: that the rule modifies and contravenes the express directive of section 550.2415(7)(c), in violation of section 120.52(8)(c); that the rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency in violation of section 120.52(8)(d); and that the rule is arbitrary and capricious in violation of section 120.52(8)(e).

62. Petitioner contends that the Challenged Rule constitutes an invalid exercise of delegated legislative authority under section 120.52(8)(c) "because the Division's failure to incorporate to the rule the provisions of ARCI Model Rule ARCI -025-020(E) contravenes the specific provisions of section 550.2415(7)(c) that require the Division to incorporate

that model rule into Rule 61D-6.011." (Second Amended Petition at 22).

63. Section 550.2415(7)(c) requires the Division's rules to "include a classification system for drugs and substances and a corresponding penalty schedule for violations which incorporates the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the Association of Racing Commissioners International, Inc." It does not require the Division to adopt the ARCI Document and all documents to which the ARCI Document may refer. To interpret section 550.2415(7)(c) in the manner Petitioner claims is mandated would require the statute to include a phrase that it does not contain. As noted above, it would be beyond an administrative law judge's authority to engraft language into section 550.2415 that does not currently exist. The Challenged Rule does not enlarge, modify, or contravene the specific provisions of the law implemented, in violation of section 120.52(8)(c).[3/]

64. Petitioner also argues that the Challenged Rule is impermissibly vague pursuant to section 120.52(8)(d) because "it fails to inform the public that certain provisions of the ARCI Document that are displayed upon clicking the hyperlink set forth in rule 61D-6.011(2) are in actuality not part of the adopted rule and therefore are not in full force or effect."[4/]

65. A rule is considered to be vague in violation of section 120.52(8)(d) if it requires performance of an act in terms that are so vague that people of common intelligence must guess as to its meaning. State v. Peter R. Brown Constr., Inc., 108 So. 3d 723, 728 (Fla. 1st DCA 2013)(no standards identified to determine what constitutes "decorative items").

66. As stated previously, the entire ARCI Document was incorporated by reference into the Challenged Rule, and the ARCI Document contains a penalty for stacking violations. It is simply not the more lenient penalty identified in the Model Stacking Rules to which the ARCI Document refers. Further, in paragraph (3), the Challenged Rule specifies that "[t]he penalties corresponding to the classification of a substance, provided by the incorporated document in subsection (2) of this rule, shall be imposed . . . ." A logical reading of the Challenged Rule, as it then existed, is that the penalties actually contained in the ARCI Document are the penalties that control, as opposed to the more lenient penalties included in the Model Stacking Rules.

67. Petitioner relies heavily on the "subject to" language in the ARCI Document, saying that this phrase is rendered meaningless without the inclusion of the ARCI Model Rules to which the ARCI Document refers, and makes the Challenged Rule vague. The phrase "subject to" is not defined in the rule, but

Merriam-Webster defines it as "1: affected by or possibly affected by (something); 2: likely to do, have or suffer from (something); 3: dependent on something else to happen or to be true." See "Subject To" https://merriam-webster.com/dictionary/subjectto (last visited Jan. 3, 2020; examples omitted). This definition does not support the assertion that the penalties in the ARCI Model Rules will automatically apply. The Challenged Rule is not vague.

68. Finally, Petitioner claims that the Challenged Rule is arbitrary and capricious in violation of section 120.52(8)(e), which provides that a rule is arbitrary if it is not supported by logic or the necessary facts, and a rule is capricious if it is adopted without thought or reason or is irrational. See Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 (Fla. 1st DCA 1992). Petitioner argues that it is "neither logical nor rational--given that the purpose of the penalty guidelines is that the more the serious the violation the more severe penalties--that the acknowledged minor violation of NSAID stacking would carry the same penalty as the other severe medication violations involving prohibited substances that carry a Category B penalty."

69. As noted by Respondent in the Second Motion for Summary Final Order, the basis upon which the Division relied in adopting the Challenged Rule was the direct mandate from the Legislature

to incorporate the ARCI Document. After some initial prodding, the Division did just that. The Division was free to consider the penalties in the Model Stacking Rules and eventually incorporated these penalties into the rule. However, there is nothing in section 550.2415 that mandated inclusion of the Model Stacking Rules, and it was not arbitrary or capricious to adopt only what the Legislature required.

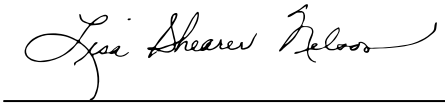
70. Petitioner argues that NSAID stacking violations are minor violations in the racing industry, and it is arbitrary to impose a more severe penalty for such a minor offense. However, the penalties for NSAID stacking violations are included in the ARCI Document. Beyond the requirement that the Division adopt the ARCI Document, it is within its discretion to adopt, or not adopt, the Model Rules of the ARCI or portions thereof.

71. Petitioner presented the deposition of Ed Martin, Executive Director of ARCI, from a prior dispute, in which Mr. Martin stated that NSAID stacking violations are considered to be minor violations. Mr. Martin's opinion is consistent with the Model Rules of his organization. While clearly that is the position of the ARCI, as articulated in its Model Rules, there was no statutory requirement for Florida to adopt the ARCI position in every respect. Petitioner has not demonstrated that the Challenged Rule is arbitrary or capricious.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Second Amended Petition be dismissed.

DONE AND ORDERED this 17th day of January, 2020, in Tallahassee, Leon County, Florida.



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Division of Administrative Hearings
this 17th day of January, 2020.

ENDNOTES

[1/] The timing of the Amended Petition is significant, because section 120.56(3)(a) provides that a substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. If Petitioner had not amended her Petition to include the challenge to the Challenged Rule prior to the most recent amendments to the rule, there would be no jurisdiction to consider the challenge. Petitioner (or at least, Petitioner's counsel) in all likelihood knew that the Division was in the process of amending rule 61D-6.011. All that matters is that the Amended Petition was filed before the most recent amendment became effective.

[2/] In a way, Petitioner's argument that the Division "concealed" this information demonstrates the fallacy in her position that

the Model Stacking Rule was part of rule 61D-6.011. Section 120.54(1)(i) expressly requires that the full text of any incorporated material must be made available for free public access through an electronic hyperlink from the rule making reference to it. The Model Stacking Rules clearly are not so provided. While the Challenged Rule is readily available, the reference Petitioner claims is controlling is not, because it is not part of the rule.

[3/] It is noted that the most recent version of rule 61D-6.011 does not incorporate the ARCI Model Stacking Rule, but includes the substantive language from that rule in its text at paragraph (4) of the rule. The most recent version also removes the language in subsection (3) that stated, "[t]he penalties corresponding to the classification of a substance, provided by the incorporated document in subsection (2) of this rule, shall be imposed . . ." and instead states, "[t]he penalties corresponding to the drug or medication classification, as provided in the incorporated Classification and Penalty Guidelines, shall be imposed . . . ."

[4/] The ARCI Document comprises several introductory pages, numbered i through vii, followed by pages numbered 1 through 32. At deposition, the agency representative stated that the Division of Pari-Mutuel Wagering adopted "all 32 pages," which resulted in Petitioner claiming in the Second Amended Petition that the Division did not adopt the entire document. That argument was withdrawn during the motion hearing.

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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.