STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TAMPA BAY DOWNS, INC.,

Petitioner,

vs. Case No. 22-1121RU

FLORIDA GAMING CONTROL COMMISSION,

Respondent.
_____/

FINAL ORDER

An administrative hearing was held in this case on July 11, 2022, in Tallahassee, Florida, and by Zoom conferencing before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: Marc D. Taupier, Esquire
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## STATEMENT OF THE ISSUE

Whether the Florida Gaming Control Commission's (Respondent or Commission)[1] interpretation of section 550.0951(3)(c)1., Florida Statutes,[2] regarding the tax rate applicable to the handle generated by intertrack wagering (ITW) on out-of-state races by pari-mutuel permitholders constitutes an invalid unadopted rule in violation of section 120.54(1)(a), Florida Statutes.

## PRELIMINARY STATEMENT

In a letter dated September 2, 2021, Tampa Bay Downs, Inc. (TBD or Petitioner), notified Respondent that it would file a challenge to the alleged unadopted rule pursuant to section 120.56(4) and would seek to recover its attorney's fees and costs pursuant to section 120.595(4), unless Respondent ceased reliance on the rule and proceeded to rulemaking.

On April 11, 2022, Petitioner filed a Petition Challenging Agency Statement Defined as an Unadopted Rule. Thereafter, the parties agreed to extend the time for holding the final hearing beyond the statutory 30-day period and the final hearing was scheduled and held on July 11, 2022.

At the final hearing, TBD presented the testimony of its vice president of finance, Greg A. Gelyon, and Respondent's revenue program administrator, Tracy Swain, and offered 13 exhibits, which were received into evidence as

[1] As of July 1, 2022, the Commission assumed all duties of the Department of Business and Professional Regulation's Division of Pari-mutuel Wagering. The Commission was substituted as the named party Respondent in this proceeding by Order dated July 6, 2022. All references to Respondent shall include reference to the current Commission, as well as the former Division of Pari-mutuel Wagering.

[2] All references to the Florida Statutes are to the 2021 codification of the Florida Statutes, unless otherwise noted. The revised amendments were enacted in 2022 to effectuate the transfer of responsibilities to the Commission, but such amendments did not otherwise contain substantive amendments to chapter 550.

Exhibits P-1 through P-13. Respondent presented the testimony of Tracy Swain and offered four exhibits received into evidence as Exhibits R-1 through R-4.

The proceedings were recorded and a transcript was ordered. The parties were given until July 29, 2022, to file proposed final orders. The one-volume Transcript was filed on July 20, 2022. Thereafter, the parties timely filed their respective Proposed Final Orders, both of which were considered in rendering this Final Order.

## FINDINGS OF FACT[3]

1. Chapter 550, Florida's Pari-mutuel Wagering Act, governs the conduct of pari-mutuel wagering activities in Florida. Respondent is tasked with implementing and administering chapter 550 and regulating the pari-mutuel industry.

2. Each pari-mutuel permitholder must obtain an annual operating license in order to conduct pari-mutuel activities pursuant to its pari-mutuel permit, which generally includes the authority to conduct racing or games, as well as conduct simulcast and ITW activities. The issue in this proceeding involves the interpretation and application of the statutory tax rate by Respondent relative to the conduct of simulcast and ITW activities.

3. "Simulcast," as pertinent here, means "receiving at an in-state location events occurring live at an out-of-state location." § 550.002(32), Fla. Stat.

4. ITW means "a particular form of pari-mutuel wagering in which wagers are accepted at a permitted, in-state track, fronton, or pari-mutuel facility, on a race or game transmitted from and performed live at, or simulcast signal rebroadcast from, another in-state pari-mutuel facility." An "intertrack wager" is a "form of pari-mutuel wagering in which wagers are accepted at a

[3] Findings of Fact 1 through 19 are derived from the parties' admitted facts section of their Joint Pre-Hearing Stipulation.

permitted, in-state track, fronton, or pari-mutuel facility on a race or game transmitted from and performed at, or simulcast signal rebroadcast from, another in-state pari-mutuel facility." § 550.002(17), Fla. Stat.

5. The pari-mutuel facility that broadcasts the simulcast signal which is subject to an intertrack wager is referred to as a "host track." § 550.002(16), Fla. Stat. The pari-mutuel facility that receives the signal broadcast from the host track and receives or accepts an intertrack wager thereon is the "guest track." § 550.002(12), Fla. Stat.

6. As set forth in section 550.0951(3), pari-mutuel facilities conducting ITW are required to pay taxes on the "handle," which is the "aggregate contributions to pari-mutuel pools," including amounts collected on the out-of-state rebroadcast races. § 550.002(13), Fla. Stat.

7. Section 550.0951(3)(c)1. sets forth the tax rate for ITW activities.

8. The applicable tax rate under section 550.0951(3)(c)1. varies depending on the type of pari-mutuel activity permitted at the host track, as well as the type of pari-mutuel activities permitted at the guest track conducting ITW and the location of the facilities. Section 550.0951(3)(c)1. is applicable to all pari-mutuel permitholders conducting simulcast and intertrack wagers.

9. Section 550.0951(3)(c)1. provides:

> The tax on handle for intertrack wagering is 2.0 percent of the handle if the host track is a horse track, 3.3 percent if the host track is a harness track, 5.5 percent if the host track is a dog track, and 7.1 percent if the host track is a jai alai fronton. The tax on handle for intertrack wagering is 0.5 percent if the host track and the guest track are thoroughbred permitholders or if the guest track is located outside the market area of the host track and within the market area of a thoroughbred permitholder currently conducting a live race meet. The tax on handle for intertrack wagering on rebroadcasts of simulcast thoroughbred horseraces is 2.4 percent of the handle and 1.5 percent of the handle for intertrack wagering on rebroadcasts of simulcast

> harness horseraces. The tax shall be deposited into the Pari-mutuel Wagering Trust Fund.

10. Market area is defined in section 550.002(19) as "an area within 25 miles of a permitholder's track or fronton."

11. Section 550.0951 was amended in 2000, to provide for tax breaks to the pari-mutuel industry, including, specifically, thoroughbred permitholders.

12. The Commission is the state agency tasked with implementing and administering chapter 550 and regulating the pari-mutuel industry, including the adoption of administrative rules. The Commission has authority to adopt administrative rules pursuant to sections 550.0251 and 550.3511(10).

13. TBD is a Florida for-profit corporation, located in Hillsborough County, Florida. TBD holds a pari-mutuel thoroughbred horseracing permit (Pari-Mutuel Permit #320) and an annual license to operate a pari-mutuel facility in Hillsborough County. Pursuant to such permit and annual license, TBD is authorized to broadcast and receive signals for ITW and conduct ITW thereon.

14. TBD has operated, and continues to operate, a live thoroughbred meet year round, from July 1 through June 30 of each fiscal year. At all material times hereto, TBD was, and is, conducting live race meets.

15. As a thoroughbred permitholder, TBD contracts with other pari-mutuel facilities, including Daytona Beach Kennel Club (DBKC), a greyhound permitholder, to conduct ITW on out-of-state greyhound races re-broadcast through DBKC. In that instance, DBKC is a host track and TBD is a guest track, and TBD accepts wagers thereon. The other tracks TBD has contracted with for ITW activities include License Acquisitions, LLC, d/b/a Palm Beach Kennel Club; Orange Park Kennel Club, Inc., d/b/a Bestbet; Jacksonville Kennel Club, Inc., d/b/a Bestbet; Bayard Raceways, Inc., d/b/a St. Johns Greyhound Park; and Penn Sanford, LLC, d/b/a Orlando Kennel Club.

16. The specific tax provision of section 550.0951(3)(c)1. at issue in this proceeding is:

> . . . The tax on handle for intertrack wagering is 0.5 percent if the host track and the guest track are thoroughbred permitholders *or if the guest track is located outside the market area of the host track and within the market area of a thoroughbred permitholder currently conducting a live race meet*. (Emphasis added).

This provision provides for two situations where the tax on handle is 0.5 percent (rather than the specified higher tax rate). At issue in this proceeding is the second situation (emphasized above), which mandates the application of the 0.5 percent rate when the guest track is located outside the market area of the host track and within the market area of a thoroughbred permitholder currently conducting a live race meet.

17. Pursuant to contracts with the host tracks referenced above, TBD has paid the higher tax rate of 5.5 percent through the host tracks with which it contracted. All taxes collected on the handle for ITW by pari-mutuel facilities are remitted to the Commission and deposited in the Pari-mutuel Wagering Trust Fund pursuant to section 550.0951(3)(c)1.

18. The Commission agrees that the first requirement for the application of the lower tax rate is that a guest track must be located outside the market area of the host track. With respect to TBD serving as the guest track, all of the aforementioned host tracks lie outside Hillsborough County and outside TBD's market area.

19. Based on its interpretation of section 550.0951(3)(c)1., Respondent has required and continues to require that the higher tax rate of 5.5 percent be applied to TBD's ITW activities as a guest track on a regular, on-going basis.

20. Although TBD is a guest track located outside the market area of the host track and is within its own market area in which it is conducting a live thoroughbred race meet, the Commission interprets the statute to require the application of the 5.5 percent tax rate to TBD's ITW activities with out-of-

market host tracks because TBD does not lie within the market area of *another* thoroughbred permitholder conducting a live race meet.

21. The Commission has not promulgated its interpretation at issue in this proceeding as a rule.

22. TBD filed requests for tax refunds asserting that there was an overpayment (or payment in error) of the tax on handle which was remitted at the tax rate of 5.5 percent rather than 0.5 percent. Those tax refund requests were denied by Respondent based on its view that there was no tax overpayment. The tax refund denials are the subject of a related challenge scheduled for hearing in September 2022. *See Tampa Bay Downs, Inc. v. Fla. Gaming Control Comm'n*, DOAH Case No. 22-1127.

23. At the final hearing, the Commission's designated representative, Ms. Swain, explained the agency interpretation as follows:

> Q. Ms. Swain, can you walk us through how you applied in this case the section regarding tax statutes in connection with the definition?
>
> A. The way it's been applied is that when a host track sends their signal to a guest, if they are outside of the market area of that host track, which is outside the 25 miles but within the market area of a thoroughbred that is currently conducting a live meet, that we apply the .5 to those guest tracks. If there is not a -- if one -- if they're within the market area of the host or they're not within the market area of the thoroughbred conducting a live meet, it is applied to be 5.5 percent or 3.9, depending on the location of where they are in the state.

24. As explained by Ms. Swain, the Commission does not view TBD as qualifying for the lower tax rate because it is not located within the market area of *another* thoroughbred permitholder conducting a live race meet. Even though the statute does not include the word "another," the Commission interprets the statute to not include the permitholder within its own market area.

25. The Commission provided examples as to how it applies this statute using Derby Lane and Tampa Greyhound, both of which are greyhound permitholders located in the market area of TBD. Both Derby Lane and Tampa Greyhound are deemed entitled to 0.5 percent tax rate on signals from DBKC since they are located within the market area of TBD, a thoroughbred permitholder conducting a live race meet. But, under the Commission's interpretation, wagering on the *same* signal from DBKC at TBD would result in the application of the 5.5 percent tax rate since it is not within the market area of *another* thoroughbred permitholder conducting a live race meet.

26. Similarly, the Commission has informed DBKC that Dania Jai Alai located in Broward County is entitled to the 0.5 percent tax rate when wagering on the same signal TBD receives from DBKC since Dania Jai Alai lies within the market area of a thoroughbred permitholder operating a live race meet.

27. The Commission acknowledges that there are instances where two thoroughbred permitholders are located at and operate at the same facility. For example, Gulfstream Park Racing Association (Gulfstream) and Gulfstream Park Thoroughbred After Racing Program, Inc. (GTARP), both operate at the Gulfstream Park racetrack. The Commission did not explain how it would interpret the definition of market area in such instance where two thoroughbred permitholders operate at the same location (i.e., would Gulfstream lie within the market area of GTARP).

28. Based on its interpretation of section 550.0951(3)(c)1., the Commission has required, and continues to require, the higher tax rate of 5.5 percent be applied to TBD's ITW activities on signals received from host tracks outside its market area.

29. The Commission's regulatory responsibilities include the adoption of "reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all

racetracks, race meets, and races held in this state." The statutes expressly require the rules to be uniform in their application and effect. § 550.0251(3), Fla. Stat.; *see also* § 550.3551, Fla. Stat. The Commission may levy fines and penalties against pari-mutuel permitholders that do not comply with chapter 550, including the failure to remit the taxes on handles at the rates determined by the Commission. §§ 550.0251(10) and 550.0951(6), Fla. Stat.

30. TBD's contention that the lower tax rate of 0.5 percent should apply to its ITW based on the signals from out-of-market host tracks is entirely consistent with the statutory language.

31. The Commission's interpretation that for TBD to qualify for the 0.5 percent tax rate, there must be another thoroughbred permitholder operating a live race meet within TBD's market area is an agency statement, which is generally applicable and has the force and effect of law but has not been adopted as a rule.

32. As a matter of fact, the Commission's interpretation of section 550.0951(3)(c)1. is an agency statement, which is generally applied and constitutes an agency rule that has not been promulgated.

## CONCLUSIONS OF LAW

33. DOAH has jurisdiction over this case pursuant to sections 120.56(4), 120.569, and 120.57(1).

34. The Florida Administrative Procedures Act, chapter 120 (the APA), imposes limitations and obligations on policymaking by executive agencies. The Commission is an "agency" within the meaning of section 120.52(1) and is subject to the rulemaking requirements of section 120.54. *See* §§ 16.71 and 120.52(1), Fla. Stat.

35. Section 120.56(4) provides substantially affected parties the ability to challenge agency policies that have not been adopted through the formal rulemaking process. The parties stipulated, and the evidence confirms, that Petitioner has standing to initiate this proceeding under section 120.56(4).

36. TBD bears the burden of proof to establish by a preponderance of the evidence: (1) the substance of the agency statement(s) and (2) facts sufficient to show that the agency has not adopted the statement(s) according to required rulemaking procedures. *See* §§ 120.56(1)(e) and 120.56(4)(a), Fla. Stat. Once TBD satisfies this burden, then the Commission has the burden of proving rulemaking is not feasible and practicable as provided in section 120.54(1)(a).

37. TBD met its burden and demonstrated that the Commission's interpretation of section 550.0951(3)(c)1. is an agency statement meeting the definition of a rule under section 120.52(16), which has not been adopted through formal rulemaking as required by the APA.

38. Section 120.54(1)(a) requires agencies to follow the rulemaking procedures to enunciate policies which meet the definition of a "rule." The Legislature has made it clear that agencies must adopt policies that meet the definition of a "rule" through the formal rulemaking process set forth in the APA. "Rulemaking is not a matter of agency discretion. Each 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." § 120.54(1)(a), Fla. Stat.

39. Section 120.52(16) defines a rule as "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. . . ."

40. Section 120.52(20) 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."

41. An administrative agency is required to promulgate rules on "those statements which are intended by their own effect to create rights or to require compliance, or otherwise to have the direct and consistent effect of

law." *Coventry First, LLC v. State, Off. of Ins. Regul.*, 38 So. 3d 200 (Fla. 1st DCA 2010)(quoting *Ag. for Health Care Admin. v. Custom Mobility*, Inc., 995 So. 2d 984, 986 (Fla. 1st DCA 2008)); *see also Grabba-Leaf, LLC v. Fla. Dep't of Bus. and Pro. Regul.*, 257 So. 3d 1205 (Fla. 1st DCA 2018).

42. While agency statements qualifying as "rules" are often reduced to writing, the existence or form of writing is not dispositive to the determination of whether there has been an agency statement meeting the definition of a rule. *See Dep't of High. Saf. & Motor Veh. v. Schluter*, 705 So. 2d 81, 84 (Fla. 1st DCA 1997). An agency cannot avoid the statutory definition of a rule in section 120.52(16) by simply refraining from memorializing the agency statement in clear written terms. *See Schluter*, 705 So. 2d at 86.

43. An agency statement can be any declaration, expression, or communication that requires compliance or otherwise has the direct and consistent effect of law. *Fla. Qtr. Horse Racing Ass'n, Inc., et al v. Dep't of Bus. and Pro. Regul., Div. of Pari-mutuel Wagering*, DOAH Case No. 14-5796RU, ¶ 57 (DOAH Final Order May 6, 2013).

44. The focus in determining whether an agency statement is a rule within the meaning of section 120.52(16) is the effect of the statement rather than the label ascribed to it by the agency. *Balsam v. Dep't of Health and Rehab. Serv.*, 452 So. 2d 976, 977 (Fla. 1st DCA 1984).

45. A generally applicable statement purports to affect a category or class of persons or activities. *See McCarthy v. Dep't of Ins.*, 479 So. 2d 135 (Fla. 2d DCA 1985); *Schluter*, 705 So. 2d at 83; *see also Fla. Qtr. Horse Track Ass'n v. Dept. of Bus. and Pro. Regul., Div. of Pari-mutuel Wagering*, 133 So. 3d 1118, 1119-120 (Fla. 1st DCA 2014).

46. An agency statement interpreting a statute is "generally applicable" if it is intended to create rights, to require compliance, or to otherwise have the direct and consistent effect of law and purports to affect a category or class of persons or activities. *See McCarthy,* 479 So. 2d at 136; *Schluter,* 705 So. 2d

at 83. The statement is not required to apply universally to every person or activity within the agency jurisdiction. It is sufficient that the statement applies uniformly to a class of persons or activities over which the agency may properly exercise authority. *Schluter,* 705 So. 2d at 83.

47. In this case, the evidence established that the Commission's interpretation of section 550.0951(3)(c)1. is applied to every pari-mutuel permitholder conducting ITW activities. Thus, the Commission's interpretation is a statement of general applicability. The remaining questions are: (i) whether the challenged agency statement gives section 550.0951(3)(c)1., a meaning not readily apparent from its plain language, and, if so, (ii) whether the agency statement has the direct and consistent effect of law.

48. "An agency's interpretation of a statute is a rule if it gives the statute a meaning not readily apparent from a literal reading . . ." *Beverly Enterprises-Fla., Inc. v. Dep't of Health and Rehab. Serv.*, 573 So. 2d 19, 22-23 (Fla. 1st DCA 1990). "The test is whether an agency statement reiterates a law, or declares what is 'readily apparent' from the text of a law." *See Grabba-Leaf,* 257 So. 3d at 1210.

49. The Commission claims that in requiring the higher tax rate in section 550.0951(3)(c)1. it is not interpreting section 550.0951(3)(c)1., but simply applying the plain meaning of the statute.

50. The plain language of section 550.0951(3)(c)1. provides that the applicable tax rate on handle is 0.5 percent "if the guest track is located outside the market area of the host track and within the market area of a thoroughbred permitholder currently conducting a live race meet."

51. Despite the statutory language setting forth the criteria for the 0.5 percent tax rate, Respondent has consistently imposed a higher tax rate on a thoroughbred permitholder that is a "guest track" while conducting live racing as a thoroughbred permitholder. This interpretation is premised upon Respondent's view that a thoroughbred permitholder cannot qualify for the

lower rate if it is not located within the market area of "another" thoroughbred permitholder.

52. While Respondent interprets the requirement that a thoroughbred permitholder serving as a guest track must lie within the market area of "another" thoroughbred permitholder in order to qualify for the lower tax rate, the statute does not include the term "another." Rather, the statute unambiguously refers to the market area of "a thoroughbred permitholder."

53. The word "another" does not appear anywhere in the statutory language of section 550.0951(3)(c)1., and is it *not* readily apparent from reading the plain language of the statute that the guest track has to be within the market area of another thoroughbred track to receive the lower tax rate.

54. The Commission's interpretation is not simply an application of the existing language, it clearly requires reading the word "*another*" into the statute even though that word is not contained in the law. *See Grabba-Leaf,* 257 So. 3d at 1210-11 (holding that whether an agency's statement regarding the taxation of loose leaf tobacco is an unadopted rule "[b]ecause the statute does not clearly include whole leaf tobacco wraps, we conclude that the Department cannot by memorandum extend the statutory definition to cover them and disregard its rulemaking obligations.").

55. The Commission's alternative argument that its interpretation is correct because the statute does not specifically state the permitholder may be located within its own market is without merit. "Taxes cannot be imposed except in clear and unequivocal language. Taxation by implication is not permitted." *Fla. S & L Servs., Inc. v. Dep't of Rev.*, 443 So. 2d 120, 122 (Fla. 1st DCA 1983). The "authority to tax must be strictly construed." *Dep't of Rev. v. GTE Mobilnet of Tampa, Inc.*, 727 So. 2d 1125, 1128 (Fla. 2d DCA 1999). "The primary consideration in the construction and interpretation of tax statutes is to ascertain and give effect to legislative intent, determined primarily from the language of the statute." *Dep't of Rev. v. James B. Pirtie*

*Constr. Co., Inc.*, 690 So. 2d 709, 711 (Fla. 4th DCA 1997); *Dep't of Rev. v. GTE Mobilnet of Tampa, Inc.*, 727 So. 2d at 1128. "It is a fundamental rule of construction that tax laws are to be construed strongly in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer. This salutary principle is found in the reason that the duty to pay taxes, while necessary to the business of the sovereign, is still a duty of pure statutory creation and taxes may be collected only within the clear definite boundaries recited by statute." *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967)(internal citations omitted); *GTE Mobilnet of Tampa, Inc.*, 727 So. 2d at 1128.

56. Significantly, the Commission's interpretation is not entitled to any deference in this proceeding. The issues here are to be reviewed *de novo*. Art. 5, § 21, Fla. Const.; *Kanter Real Estate, LLC v. Dep't of Envtl. Prot.*, 267 So. 3d 483, 487 (Fla. 2019).

57. The challenged agency statement has the direct and consistent effect of law. The authority to proscribe taxes on pari-mutuel wagering activities, however, lies with the Florida Legislature. It is the Commission's duty to interpret the tax statutes in accordance with the purpose and intent of the law. *Grabba-Leaf,* 257 So. 3d at 1208. Here, the Legislative staff analysis makes it clear the legislation adopted in 2000 giving rise to the tax statute at issue was a deliberate effort to afford tax breaks to the pari-mutuel industry as a whole, and specifically to thoroughbred permitholders. The varying tax rates in the statute are dependent on several factors including the status of the guest track in relation to a thoroughbred permitholder operating a live race meet. By requiring a higher tax rate for ITW activities conducted by a thoroughbred permitholder guest track conducting a live race meet unless there is *another* thoroughbred permitholder operating a live race meet in the market area, the Commission, is improperly and unlawfully increasing the tax burden on handle collected on the ITW activities conducted at facilities like TBD.

58. If a statement of general applicability creates or extinguishes rights, privileges, or entitlement, then the statement is a rule. As explained by the First District Court of Appeal in *State of Florida, Department of Administration, Division of Personnel v. Harvey*, 356 So. 2d 323, 325 (Fla. 1st DCA 1977):

> The breadth of the definition [of "rule"] 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," *Stevens*, 344 So .2d at 296, 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). *See also Straughn v. O'Riordan*, 338 So. 2d 832 (Fla. 1976); *Price Wise Buying Group v. Nuzum*, 343 So. 2d 115 (Fla. 1st DCA 1977).

59. In applying its interpretation of this statute for years and preliminarily denying the tax refunds sought by TBD based on its interpretation of the statute, the Commission has confirmed its intent to continue to rely on the agency statement at issue and determine pari-mutuel permitholder's substantial interests based thereon. Because the Commission's statement has the force and effect of law, it is an invalid unpromulgated rule.

60. In sum, TBD met its burden of demonstrating that Respondent's interpretation of section 550.0951(3)(c)1. imposing a tax rate of 5.5 percent instead of 0.5 percent on ITW activities as set forth above constitutes an unadopted rule.

61. Because TBD met its burden, to avoid a finding that it has violated section 120.56(4), the Commission must demonstrate that rulemaking was neither practicable nor feasible. The Commission did not offer any evidence that it was not practicable to engage in rulemaking nor did it present any

evidence regarding the feasibility or lack of feasibility of rulemaking. The statute includes a presumption that rulemaking is feasible and practical, *see* § 120.54(1)(a), Fla. Stat, and that presumption has not been rebutted.

62. A petitioner who prevails in a section 120.56(4) proceeding is entitled to reasonable costs and attorneys' fees under section 120.595(4). Petitioner has requested such an award of attorneys' fees and costs in this proceeding.

63. Section 120.595(4)(a) provides that, if an appellate court or an administrative law judge determines that all or part of any agency statement violates section 120.54(1)(a), a judgment or order shall be entered against the agency for reasonable costs and attorney's fees, unless the agency demonstrates that the statement is required by the federal government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds. The Commission does not claim that its interpretation is based on any federal requirement. Accordingly, an award of fees is warranted.

ORDER

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

ORDERED that the Respondent's interpretation of the tax rate applicable to ITW activities is a statement meeting the definition of a rule that has not been adopted pursuant to section 120.54(1). Respondent must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

The undersigned reserves jurisdiction to determine, if necessary, the amount of attorneys' fees and costs Petitioner should be awarded. Should the parties be unable to amicably resolve this issue, Petitioner shall file with DOAH a written request with the undersigned seeking resolution of the matter.

DONE AND ORDERED this 9th day of August, 2022, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
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this 9th day of August, 2022.

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## NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.