

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA BANKERS ASSOCIATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 97-2984RP
)	
DEPARTMENT OF INSURANCE,)	
)	
Respondent.)	
<hr/>)	
COMMUNITY BANKERS OF FLORIDA,)	
)	
Petitioner,)	
)	
vs.)	Case No. 97-2985RP
)	
DEPARTMENT OF INSURANCE,)	
)	
Respondent.)	
<hr/>)	
BARNETT BANKS, INC.; BARNETT)	
BANK, N.A.; and BARNETT INSURANCE)	
SERVICES, INC.,)	
)	
Petitioners,)	
)	
vs.)	Case No. 97-2986RP
)	
DEPARTMENT OF INSURANCE,)	
)	
Respondent.)	
<hr/>)	
SPECIALTY AGENTS, INC.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 97-2987RP
)	
DEPARTMENT OF INSURANCE,)	
)	
Respondent.)	
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FINAL ORDER

On December 8 - 10, 1997, a formal administrative hearing was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether proposed rules promulgated by the Florida Department of Insurance related to sale of insurance products by agents affiliated with financial institutions are an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

A series of statutory and case-related legal changes in recent years have permitted financial institutions to enter the consumer insurance market through ownership or association with insurance agencies.

Pursuant to Section 626.5715, Florida Statutes, the Florida Department of Insurance promulgated proposed rules intended to maintain “parity” of insurance regulation between insurance agencies affiliated with financial institutions and agencies which are unaffiliated. These consolidated cases involve challenges to the Department’s proposed Rule Chapter 4-224, Parity of Agent Regulation.

Petitioners Florida Bankers Association; First Union National Bank, N.A.; NationsBank, N.A.; Suntrust Bank; Central Florida, N.A.; and AmSouth Bank, (hereinafter collectively identified as FBA) and Community Bankers of Florida (Community Bankers) challenge Proposed Rule 4-224.004, (Underwriting of Insurance - Authorization Required), Proposed Rule 4-224.012, (Coercion), and Proposed Rule 4-224.014, (Confidential Information).

Barnett Banks, Inc.; Barnett Bank, N.A.; and Barnett Insurance Services, Inc. (hereinafter collectively identified as Barnett) challenge Proposed Rule 4-224.002 (Setting and Circumstances), Proposed Rule 4-224.004, (Underwriting of Insurance - Authorization Required), Proposed Rule 4-224.012 (Coercion), Proposed Rule 4-224.013, (Remedies), and Proposed Rule 4-224.014, (Confidential Information).

Specialty Agents, Inc., challenges the entire proposed rule chapter and specifically challenges Proposed Rule 4-224.007 (Primary Agent).

Petitions to Intervene were filed by the Florida Association of Life Underwriters (FALU), the Securities Industry Association (SIA), the American Council of Life Insurance (ACLI) and the Florida Association of Insurance Agents (FAIA).

At the commencement of the hearing, Barnett filed a "Trial Brief and Motion to Dismiss." The Department filed a response to the motion on December 19, 1997. Upon review of the motion, it appears to be essentially a Motion for Summary Judgment revisiting issues raised in an earlier Motion in Limine which was denied. The Barnett Motion to Dismiss is denied.

At the hearing, the Petitioners offered the testimony of one witness. The Respondents offered the testimony of two witnesses.

Exhibits admitted into evidence as are reflected in the hearing transcript and as clarified in an Order Deeming Exhibits Admitted entered subsequent to the filing of the transcript. A prehearing stipulation filed by the parties was admitted as an Administrative Law Judge's exhibit.

Proposed orders were filed by the FBA, Community Bankers, Barnett, the Department, Specialty Agents, FALU and ACLI. The proposed orders were considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Florida Department of Insurance is responsible for regulation of insurance transactions in the State of Florida.
2. On January 29, 1997, the Department of Insurance issued a notice to interested parties of a rules workshop to address "parity" of insurance regulation.
3. The workshop was conducted on February 21, 1997.

4. The Department of Insurance published the final rule proposal on May 23, 1997.
5. A public hearing was conducted on June 19, 1997.
6. The record of the public hearing remained open until June 25, 1997, for submission of written comments.
7. A Notice of Change was published on July 18, 1997.
8. A Second Notice of Change was published on August 8, 1997.
9. The Petitioners timely filed petitions challenging the proposed rules.
10. All parties have standing to participate in this proceeding.
11. As set forth in the rule proposal, the purpose and effect of the proposed rules is as follows:

Section 626.5715, Florida Statutes, requires the Department to adopt rules to assure parity of regulation in this state of insurance transactions as between an insurance agency owned by or an agent associated with a federally chartered financial institution, an insurance agency owned by or an agent associated with a state-chartered financial institution, and an insurance agency owned by or an agent associated with an entity that is not a financial institution. (Emphasis supplied.)

12. The summary portion of the published rule proposal states that the "proposed rules implement standards to provide parity pursuant to Section 626.5715, Florida Statutes."
13. Section 626.5715, Florida Statutes, the "parity statute," provides as follows:

The department shall adopt rules to assure the parity of regulation in this state of insurance transactions as between an insurance agency owned by or an agent associated with a federally chartered financial institution, an insurance agency owned by or an agent associated with a state-chartered financial institution, and an insurance agency owned by or an agent associated with an entity that is not a financial institution. Such rules shall be limited to assuring that no insurance agency or agent is subject to more stringent or less stringent regulation than another insurance agency or agent on the basis of the regulatory status of the entity that owns the agency or is associated with the agent. For the purposes of this section, a person is "associated with" another entity if the person is employed

by, retained by, under contract to, or owned or controlled by the entity directly or indirectly. This section does not apply with respect to a financial institution that is prohibited from owning an insurance agency or that is prohibited from being associated with an insurance agent under state or federal law. (Emphasis supplied.)

14. The word "parity" is not defined in the statute. Webster's Dictionary defines "parity" as "[t]he quality or state of being equal or equivalent."

15. Pursuant to the specific statute requiring the Department to adopt rules, the Department's authority to adopt rules related to this issue is limited to those rules which provide for equivalent regulation of insurance transactions without regard to ownership or affiliation of the insurance agent or agency.

Rule 4-224.002 (Settings and Circumstances)

16. Proposed Rule 4-224.002 provides as follows:

4-224.002 Setting and Circumstances of Insurance Transactions.

(1) The setting and circumstances in which insurance transactions occur shall be structured so as to avoid deception as to, and to assist the consumer in understanding, the nature of the product sold, the identity of the insurer, and the identity and representative capacity of the insurance agent.

(2) When an agent is transacting insurance, any business cards and stationery used shall reflect his status as an insurance agent. Other materials used in insurance transactions which address the representative capacity of the agent shall identify the individual as an insurance agent.

17. The published rule proposal indicates that Proposed Rule 4-224.002, Florida Administrative Code, is specifically authorized by Section 624.308, Florida Statutes, and implements Sections 624.307, 626.5715, 626.951, 626.9521, 626.9541, 626.9561 and 626.9611, Florida Statutes.

18. Section 624.308, Florida Statutes, provides the Department with the general authority to adopt "reasonable rules necessary to effect any of the statutory duties of the department...."

and states that willful violation of Department rules may result in a range of penalties including revocation of licensure.

19. Section 624.307, Florida Statutes, generally sets forth the powers and duties of the Department.

20. Section 626.5715, Florida Statutes, the "parity" statute, provides as set forth herein.

21. Section 626.951, Florida Statutes, is the "declaration of purpose" for the Unfair Insurance Trade Practices Act, and in part states as follows:

The purpose of this part is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

22. Section 626.9521, Florida Statutes, prohibits and penalizes unfair methods of competition and unfair or deceptive acts or practices and provides penalties.

23. Section 626.9541, Florida Statutes, addresses "unfair methods of competition and unfair or deceptive acts" and provides as follows:

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.--The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

(a) Misrepresentations and false advertising of insurance policies.--Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which:

1. Misrepresents the benefits, advantages, conditions, or terms of any insurance policy.

2. Misrepresents the dividends or share of the surplus to be received on any insurance policy.

3. Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy.

4. Is misleading, or is a misrepresentation, as to the financial condition of any person or as to the legal reserve system upon which any life insurer operates.

5. Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof.

6. Is a misrepresentation for the purpose of inducing, or tending to induce, the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy.

7. Is a misrepresentation for the purpose of effecting a pledge or assignment of, or effecting a loan against, any insurance policy.

8. Misrepresents any insurance policy as being shares of stock or misrepresents ownership interest in the company.

(b) False information and advertising generally.--Knowingly making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public:

1. In a newspaper, magazine, or other publication,
2. In the form of a notice, circular, pamphlet, letter, or poster,
3. Over any radio or television station, or
4. In any other way,

an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance, which is untrue, deceptive, or misleading.

(c) Defamation.--Knowingly making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of, any oral or written statement, or any pamphlet, circular, article, or literature, which is false or maliciously critical of, or derogatory to, any person and which is calculated to injure such person.

(d) Boycott, coercion, and intimidation.--Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation resulting in, or tending to result in, unreasonable restraint of, or monopoly in, the business of insurance.

(e) False statements and entries.--

1. Knowingly:

a. Filing with any supervisory or other public official,

b. Making, publishing, disseminating, circulating,

c. Delivering to any person,

d. Placing before the public,

e. Causing, directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public,

any false material statement.

2. Knowingly making any false entry of a material fact in any book, report, or statement of any person, or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report, or statement of such person.

(f) Stock operations and advisory board contracts.--Issuing or delivering, promising to issue or deliver, or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns or profits as an inducement to insurance.

24. Section 626.9561, Florida Statutes, authorizes the Department to "investigate the affairs of every person involved in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice...."

25. Section 626.9611, Florida Statutes, provides for the adoption of Department rules as follows:

626.9611 Rules.--The department may, in accordance with chapter 120, promulgate reasonable rules as are necessary or proper to identify specific methods of competition or acts or practices which are prohibited by s. 626.9541 or s. 626.9551, but the rules shall not enlarge upon or extend the provisions of ss. 626.9541 and 626.9551. (Emphasis supplied.)

26. Proposed Rule 4-224.002 is an invalid delegation of legislative authority. The proposed rule exceeds the Department specific grant of rulemaking authority which is limited in this case to those rules which provide for equivalent regulation of insurance transactions without regard to ownership or affiliation of the insurance agent or agency. The rule does not provide parity of regulation.

27. Proposed Rule 4224.002 is an invalid exercise of delegated legislative authority because it is vague, fails to establish adequate standards for agency decisions and vests unbridled discretion in the agency. The proposed rule provides no information as to how an insurance transaction may be "structured" so as to "avoid deception" of the purchaser.

28. The determination of whether an insurance transaction has been "structured" to "avoid deception" is at the discretion of the Department. The proposed rule provides no standards for Department decisions which will be made under the rule. The proposed rule provides no assistance or information to regulated parties as to what types of transaction structures are prohibited or acceptable, other than to require that the agent be identified as such during the insurance transaction.

29. Proposed Rule 4224.002 is an invalid exercise of delegated legislative authority because it is not supported by competent substantial evidence. Neither the testimony of the

Department's witnesses, nor the research information offered by the Department in support of the proposed rule, are sufficient to support validation of this rule.

30. The evidence fails to establish the existence of substantial consumer confusion regarding marketing of insurance products by financial institutions.

31. The Department cites a previous administrative action related to the sale of insurance products in a financial institution as evidence that consumer confusion exists. The Department also cites another administrative action where the agency prosecuted an insurer for the misleading sale of insurance products. The evidence establishes that the cited cases were prosecuted under currently existing rules and regulations and does not establish the validity of the proposed rules at issue in this proceeding.

32. The existence of other rules relating to manner and means of insurance product sales is insufficient to establish the validity of the proposed rules at issue in this case.

Rule 4-224.004 (Underwriting of Insurance-Authorization Required)

33. Proposed Rule 4-224.004 provides:

No entity which is not licensed as an insurer by the Department shall directly or indirectly assume the obligation to provide the benefits of an insurance contract, or otherwise transact insurance as an insurer in this state.

34. As identified in the published rule proposal, Proposed Rule 4-224.004, Florida Administrative Code, is specifically authorized by Section 624.308, Florida Statutes, and implements Sections 624.11, 624.401, 626.5715, 626.051 and 628.151(1), Florida Statutes.

35. Section 624.308, Florida Statutes, provides general rulemaking authority to the Department.

36. Section 624.11, Florida Statutes, prohibits any person from transacting insurance in Florida without complying with the provisions of the Insurance Code, and provides for operation of "risk retention groups" pursuant to law.

37. Section 624.401, Florida Statutes, requires each insurer to obtain a certificate of authority from the Department in order to conduct business either directly or indirectly, and provides that failure to obtain a certificate is a third degree felony. The section also provides for preemption by the state of the field of regulating insurers and their agents and representatives from local regulation.

38. Section 626.5715, Florida Statutes, the "parity" statute, provides as set forth herein.

39. Section 626.051, Florida Statutes, provides a definition of "life agent."

40. Section 628.151(1), Florida Statutes, provides as follows:

No domestic insurer shall engage directly or indirectly in any business other than the insurance business and business activities reasonably and necessarily incidental to such insurance business.

41. At the hearing, the Department's witness testified that the proposed rule was in response to comments offered by participants in the rulemaking proceeding suggesting that recent court decisions would permit financial institutions to act as insurers and to assume the obligations of insurance contracts.

42. Proposed Rule 4224.004 is an invalid exercise of delegated legislative authority because it exceeds the specific grant of rulemaking authority which is limited in this case to those rules which provide for equivalent regulation of insurance transactions without regard to ownership or affiliation of the insurance agent or agency. The proposed rule does not implement, interpret or make specific any provision of Florida law.

43. Proposed Rule 4-224.004 is an invalid exercise of delegated legislative authority because it is not supported by competent substantial evidence. Anecdotal recollections of comments made by unidentified persons during rulemaking workshops do not constitute competent substantial evidence.

Rule 4-224.007 (Primary Agent)

44. Proposed Rule 4-224.007 provides:

Each agency location where a licensed and appointed insurance agent is engaged in transactions with respect to insurance products shall be considered an insurance agency for purposes of Section 626.592, Florida Statutes. In those instances where an agent legally conducts insurance transactions at two or more agency locations, a separate primary agent need not be designated at each location, provided that no insurance transactions shall occur at any location when the agent is not present, and no unlicensed employee at the location has engaged in insurance activities requiring licensure. In those instances the agent shall be responsible for insurance transactions occurring at each location and one location shall be designated as the primary location.

45. As identified in the published rule proposal, Proposed Rule 4-224.007, Florida Administrative Code, is specifically authorized by Section 624.308, Florida Statutes, and implements Sections 626.5715, 626.031, 626.041, 626.0428, 626.051, 626.062, 626.094, 626.112, 626.592, Florida Statutes.

46. Section 624.308, Florida Statutes, sets forth the general rulemaking authority of the Department.

47. Section 626.5715, Florida Statutes, the "parity" statute, provides as set forth herein.

48. Section 626.031, Florida Statutes, provides a definition of "agent."

49. Section 626.041, Florida Statutes, provides a definition of "general lines agent."

50. Section 626.0428, Florida Statutes, provides limitations on the activities of agency personnel as follows:

626.0428 Agency personnel powers, duties, and limitations.--

(1) An individual employed by an agent or agency on salary who devotes full time to clerical work, with incidental taking of insurance applications or quoting or receiving premiums on incoming inquiries in the office of the agent or agency, is not deemed to be an agent, customer representative, or solicitor if his or her compensation does not include in whole or in part any commissions on such business and is not related to the production of applications, insurance, or premiums.

(2) No employee of an agent or agency may bind insurance coverage unless licensed and appointed as a general lines agent or customer representative.

(3) No employee of an agent or agency may initiate contact with any person for the purpose of soliciting insurance unless licensed and appointed as a general lines agent, customer representative, or solicitor.

51. Section 626.051, Florida Statutes, provides a definition of "life agent."

52. Section 626.062, Florida Statutes, provides a definition of "health agent."

53. Section 626.094, Florida Statutes, provides a definition of "insurance agency" as

follows:

626.094 "Insurance agency" defined.--An "insurance agency" is a business location at which an individual, firm, partnership, corporation, association, or other entity, except for an employee of the individual, firm, partnership, corporation, association, or other entity, and other than an insurer as defined by s. 624.03 or an adjuster as defined by s. 626.101, engages in any activity or employs individuals to engage in any activity which by law may be performed only by a licensed insurance agent or solicitor. (Emphasis supplied.)

54. Section 626.112, Florida Statutes, requires licensure of agents, agencies and related personnel.

55. Section 626.592, requires the designation of "primary agents" as follows:

626.592 Primary agents.--

(1) On or before January 1, 1990, and annually thereafter, each person operating an insurance agency and each location of a multiple location agency shall designate a primary agent for each insurance agency location and shall file the name of the person so designated, and the address of the insurance agency location where he or she is primary agent, with the Department of Insurance, on a form approved by the department. The designation of the primary agent may be changed at the option of the agency and any change shall be effective upon notification to the department.

(2) For the purpose of this section, a "primary agent" is the licensed agent who is responsible for the hiring and supervision of all individuals within an insurance agency location who deal with the public in the solicitation or negotiation of insurance contracts or in the collection or accounting of moneys from the general public. An agent may be designated as primary agent for only one insurance agency location.

(3) For the purpose of this section, an "insurance agency" is a location where any agent is engaged in the business of insurance.

(4) The department may suspend or revoke the license of the primary agent if an insurance agency employs any person who has had a license denied or any person whose license is currently suspended or revoked. However, when a person has been denied a license for failure to pass a required examination, he or she may be employed to perform clerical or administrative functions for which licensure is not required.

(5) The primary agent in an unincorporated agency, or the primary agent in an incorporated agency in which no officer, director, or stockholder is an agent, shall be responsible and accountable for the acts of salaried employees under his or her direct supervision and control, while acting on behalf of the agency. Nothing in this section shall be construed to render any person criminally liable or subject to any disciplinary proceedings for any act unless such person personally committed or knew or should have known of such act and of the facts constituting a violation of this chapter.

(6) The department may suspend or revoke the license of any agent who is employed by a person whose license is currently suspended or revoked.

(7) No insurance agency location shall conduct the business of insurance unless a primary agent is designated at all times. Failure to designate a primary agent as required under this section shall constitute grounds for requiring that the agency obtain a license in accordance with ss. 626.112 and 626.172.

(8) Any insurance agency may request, on a form prescribed by the department, verification from the department of any person's current licensure status. If a request is mailed to the department within 5 working days after the date an agent is hired, and the department subsequently notifies the agency that an employee's license is currently suspended, revoked, or has been denied, the license of the primary agent shall not be revoked or suspended if the unlicensed person is immediately dismissed from employment as an insurance agent with the agency. (emphasis supplied)

56. Proposed Rule 4224.007 is an invalid exercise of delegated legislative authority because it exceeds the grant of rulemaking authority provided in Section 626.5715, Florida Statutes. The proposed rule does not provide parity of regulation. The proposed rule is not limited to assuring that no insurance agency or agent is subject to more stringent or less stringent regulation than another insurance agency or agent on the basis of the regulatory status of the entity that owns the agency or is associated with the agent.

57. Proposed Rule 4224.007 is an invalid exercise of delegated legislative authority because it enlarges, modifies and contravenes the specific provisions of law implemented. The proposed rule specifically states that "where an agent legally conducts insurance transactions at two or more agency locations, a separate primary agent need not be designated at each location...."

58. Section 626.592, Florida Statutes, requires the designation of a primary agent for each insurance agency location. An insurance agency is defined as a location where any agent is

engaged in the business of insurance. No insurance agency location can conduct the business of insurance unless a primary agent is designated at all times. A primary agent may be so designated for only one insurance agency location. The Department has no authority to waive the requirements of Section 626.592, Florida Statutes. Further, the proposed rule permits an agent to designate one location of several as a "primary location." There is no statutory authorization for designation of a "primary location."

59. Proposed Rule 4-224.007 is an invalid exercise of delegated legislative authority because it is not supported by competent substantial evidence. The only testimony regarding this proposed rule relates to the alleged expense involved in requiring separate primary agent designation for some banks which may choose to offer insurance products. The testimony is not persuasive and does not constitute competent substantial evidence supporting the rule.

Rule 4-224-012 (Coercion)

60. Proposed Rule 4-224.012 provides:

4-224.012 Coercion

(1) No person shall by words, actions, or distribution of written materials require or imply that the purchase of insurance by a borrower or prospective borrower from a particular agent, agency, insurer or other entity is required as a condition of, or will influence the terms or conditions of, the lending of money or the extension of credit.

(2) To the extent that insurance may permissibly be marketed in connection with or in conjunction with any activities described in this section;

(a) The agent shall disclose at or before the initial discussion or in response concerning insurance coverage required or offered in connection with a loan or credit application, that:

1. the purchase of insurance from any particular source is not a condition to the provision of, and will not affect the terms of, any loan of money or extension of credit;

2. Insurance is available through agent not associated with a lender or creditor; and
3. The choice of another insurance provider will not affect decisions relating to or terms of any loan or credit extension.
 - (b)1. A written disclosure which addresses the elements of paragraph (a) above shall be provided to the consumer in a separate documents on Form DI4- (rev /97) or Form DI4- (rev /97) [sic] which are adopted and incorporated herein by reference, or on another form approved in advance by the Department that provides equivalent disclosure, at or before the time the consumer completes an application or enrollment form or otherwise applies for coverage.
 2. One copy of the form signed by the consumer shall be retained by the agent.
 - (3) The requirements of this rule 4-224.012 are inapplicable to credit insurance for which disclosures provided satisfy the disclosure requirements for excluding the premium of charge for insurance from the finance charge pursuant to Federal Truth in Lending Regulation Z, Section 12 CFR 226.4(d)(1) and (2), which is adopted incorporated herein by reference.

61. As identified in the published rule proposal, Proposed Rule 4-224.012, Florida Administrative Code, is specifically authorized by Sections 624.308 and 626.9611, Florida Statutes, and implements Sections 626.5715, 626.051, 626.9541, 626.9551, and 626.9641, Florida Statutes.

62. Section 624.308, Florida Statutes, provides the Department's general rulemaking authority.

63. Section 626.9611, Florida Statutes, provides the Department's authority to adopt rules pursuant to Section 120, Florida Statutes, which specifically identify prohibited methods of competition, but limits such rules to those acts prohibited under Sections 626.9541 and 626.9551.

64. Section 626.5715, Florida Statutes, the "parity" statute, provides as set forth herein.

65. Section 626.051, Florida Statutes, defines "life agent."

66. Section 626.9541, Florida Statutes, addresses "unfair methods of competition and unfair or deceptive acts" and is set forth herein.

67. Section 626.9551, Florida Statutes, addresses the issue of coercion or "favoritism" and provides as follows:

626.9551 Favored agent or insurer; coercion of debtors.--

(1) No person may:

(a) Require, as a condition precedent or condition subsequent to the lending of money or extension of credit or any renewal thereof, that the person to whom such money or credit is extended, or whose obligation the creditor is to acquire or finance, negotiate any policy or contract of insurance through a particular insurer or group of insurers or agent or broker or group of agents or brokers.

(b) Unreasonably disapprove the insurance policy provided by a borrower for the protection of the property securing the credit or lien. For purposes of this paragraph, such disapproval shall be deemed unreasonable if it is not based solely on reasonable standards, uniformly applied, relating to the extent of coverage required by such lender or person extending credit and the financial soundness and the services of an insurer. Such standards shall not discriminate against any particular type of insurer, nor shall such standards call for the disapproval of an insurance policy because such policy contains coverage in addition to that required.

(c) Require, directly or indirectly, that any borrower, mortgagor, purchaser, insurer, broker, or agent pay a separate charge in connection with the handling of any insurance policy required as security for a loan on real estate or pay a separate charge to substitute the insurance policy of one insurer for that of another. This paragraph does not include the interest which may be charged on premium loans or premium advances in accordance with the security instrument.

(d) Use or disclose information resulting from a requirement that a borrower, mortgagor, or purchaser furnish insurance of any kind on real property being conveyed or used as collateral security to a loan, when such information is to the advantage of the mortgagee, vendor, or lender, or is to the detriment of the borrower,

mortgagor, purchaser, or insurer, or the agent or broker, complying with such a requirement.

(2) The department may investigate the affairs of any person to whom this section applies to determine whether such person has violated this section. If a violation of this section is found to have been committed knowingly, the person in violation shall be subject to the same procedures and penalties as provided in ss. 626.9571, 626.9581, 626.9591, and 626.9601.

68. Section 626.9641, Florida Statutes, sets forth a series of standards known as Policyholder's Bill of Rights and provides as follows:

626.9641 Policyholders, bill of rights.--

(1) The principles expressed in the following statements shall serve as standards to be followed by the department in exercising its powers and duties, in exercising administrative discretion, in dispensing administrative interpretations of the law, and in promulgating rules:

(a) Policyholders shall have the right to competitive pricing practices and marketing methods that enable them to determine the best value among comparable policies.

(b) Policyholders shall have the right to obtain comprehensive coverage.

(c) Policyholders shall have the right to insurance advertising and other selling approaches that provide accurate and balanced information on the benefits and limitations of a policy.

(d) Policyholders shall have a right to an insurance company that is financially stable.

(e) Policyholders shall have the right to be serviced by a competent, honest insurance agent or broker.

(f) Policyholders shall have the right to a readable policy.

(g) Policyholders shall have the right to an insurance company that provides an economic delivery of coverage and that tries to prevent losses.

(h) Policyholders shall have the right to a balanced and positive regulation by the department.

(2) This section shall not be construed as creating a civil cause of action by any individual policyholder against any individual insurer.

69. Proposed Rule 4224.012 is an invalid exercise of delegated legislative authority because it exceeds the Department's grant of rulemaking authority. Such authority is limited to those rules which provide for equivalent regulation of insurance transactions without regard to ownership or affiliation of the insurance agent or agency. The evidence fails to establish that this rule provides for parity of insurance regulation.

70. Proposed Rule 4224.012 is an invalid exercise of delegated legislative authority because it enlarges the specific provisions of law being implemented. The rule mandates a statement of disclosure for which there is no statutory requirement. The statutes cited as being implemented by this proposed rule clearly prohibit coercive activities, but do not impose any disclosure requirement as would be required by the rule.

71. Proposed Rule 4224.012 is an invalid exercise of delegated legislative authority because there is no competent substantial evidence supporting the rule. The Department asserts that research indicates consumers can be, and are, coerced into purchasing insurance products by lenders during credit transactions. The Department also cites a previous administrative action prosecuted under existing statutes as evidence that coercion occurs.

72. The evidence offered by the Department, including the testimony of the Department's witnesses, fails to support the assertion that coercion by financial institutions in the sale of insurance products is a substantial problem. Neither the cited research nor the related testimony by the Department's witnesses was persuasive.

73. The greater weight of the evidence, including the testimony of Dr. Michael White, establishes that there is little empirical evidence of coercion in the sale of insurance products by financial institutions.

74. As additional support for the rule, the Department offered testimony related to the existence of other regulatory disclosure rules and of model language adopted by the National Association of Insurance Commissioners. Neither the other rules or the model language establish that the proposed coercion rule meets the current requirements of law. Other disclosure regulations were adopted prior to recent amendments to Chapter 120, Florida Statutes, the Administrative Procedures Act (APA), which altered the "reasonableness" standard under which such rules could have been appropriate. The relevant model language of the NAIC has not been adopted by the Florida legislature.

Rule 4-224.013 (Remedies)

75. Proposed Rule 4-224.013 provides as follows:

4-224.013 Remedies

(1) Any person violating the provisions of the Insurance Code implemented by this rule chapter shall be subject to the issuance of a Cease and Desist Order in accordance with the provisions of Sections 624.310(3) and 626.9581, Florida Statutes, and to the imposition of an administrative penalty pursuant to Sections 624.310(5) and 626.9521, Florida Statutes, and to such other sanctions or proceedings as are authorized by the Florida Insurance Code.

(2) If the majority owner, partner, manager, director, officer or other person who manages or controls an insurance agency violates any provision of the Insurance Code or any department rule, or knowingly permits violation of any requirement of these rules by an agent or employee of the agency, the agency must obtain a license as an insurance agency in accordance with the provisions of Section 626.112(8), Florida Statutes.

76. As identified in the published rule proposal, Proposed Rule 4-224.013, Florida Administrative Code, is specifically authorized by Section 624.308, Florida Statutes, and implements Sections 624.310, 624.4211, 646.418, 626.5715, 626.051, 626.112, 626.9521 and 626.9581.

77. Section 624.308, Florida Statutes, provides the Department with general rulemaking authority.

78. Section 624.310, Florida Statutes, provides the Department with enforcement and prosecutorial powers for violations of the Insurance Code, including cease and desist orders, administrative fines, and removal of "affiliated parties."

79. Section 624.4211, Florida Statutes, provides for imposition of administrative fines in lieu of other disciplinary penalties.

80. Section 624.418, Florida Statutes, provides suspension or revocation of certificates of authority for certain violations and other conditions.

81. Section 626.5715, Florida Statutes, the "parity" statute, provides as set forth herein.

82. Section 626.051, Florida Statutes, provides a definition of "life agent."

83. Section 626.112, Florida Statutes, provides for licensure of agencies, agents and other representatives.

84. Section 626.9521, Florida Statutes, prohibits and penalizes unfair methods of competition and unfair or deceptive acts or practices which are statutorily defined or determined pursuant to Sections 626.951 and 626.9651, Florida Statutes.

85. Section 626.9581, Florida Statutes, provides the Department with the ability to issue cease and desist orders related to the commission of unfair or deceptive acts or practices or the unlawful transaction of insurance, and states as follows:

626.9581 Cease and desist and penalty orders.--After the hearing provided in s. 626.9571, the department shall enter a final order in accordance with s. 120.569. If it is determined that the person charged has engaged in an unfair or deceptive act or practice or the unlawful transaction of insurance, the department shall also issue an order requiring the violator to cease and desist from engaging in such method of competition, act, or practice or the unlawful transaction of insurance. Further, if the act or practice is a violation of s. 626.9541 or s. 626.9551, the department may, at its discretion, order any one or more of the following:

(1) Suspension or revocation of the person's certificate of authority, license, or eligibility for any certificate of authority or license, if he or she knew, or reasonably should have known, he or she was in violation of this act.

(2) Such other relief as may be provided in the insurance code.

86. The Department presented no evidence with respect to Proposed Rule 4-224.013. The Department asserts only that the proposed rule is intended to provide notice to non-traditional sellers of insurance that a violation of the Insurance Code will subject them to the penalties set forth in the Insurance Code.

87. Proposed Rule 4-224.013 is an invalid exercise of delegated legislative authority because it is redundant and unnecessary. The rule does not implement, interpret or make specific any provision of Florida law. There is no competent substantial evidence which establishes the validity of the proposed rule.

Rule 4-224.014 (Confidential Information)

88. Proposed Rule 4-224.014 provides:

4-224.014 Confidential Information

(1) Obtaining confidential information for a stated purpose unrelated to the transaction of insurance when it is known that the information will or may be used for purposes of marketing insurance, and when the insurance-related purpose is not disclosed, constitutes a deceptive statement or omission and is an unfair and deceptive act or practice under the provisions of the Unfair Insurance Trade practices Act, Part X, Chapter 626, Florida Statutes.

(2)(a) Any entity which is a non-insurance transaction obtains confidential information concerning an individual or entity where it is known the information will be used by an affiliate insurance agent or agency for purposes of marketing insurance, or where it is known or reasonably should be known that there is a present intent or plan to use such information in such a manner, shall conspicuously and clearly disclose that fact to the person at the time the information is obtained and the consumer should be afforded an opportunity to object to the utilization of such information.

(b) If the disclosure is not provided on a separate form, it must be made on a document signed by the person, in which case the disclosure shall be made in a larger type size than that used elsewhere in the document, or in a manner that is otherwise clearly distinguishable from the remaining text of the document, and must appear immediately adjacent to the person's signature. If the disclosure is made on a separate form and if information obtained as a result of future transaction may be used for marketing purpose;

1. The disclosure shall clearly reflect such fact, and
2. After a period of three years a new disclosure form must be provided if additional confidential information is secured and this paragraph is not complied with.

(3)(a) Insurance agents and insurance companies are prohibited under the Insurance Code from engaging in practices which are injurious to policyholders or the public.

(b) Use of confidential information concerning any person for purposes of marketing insurance when the person has directed that the information not be used for such purposes entails conduct which is injurious to policyholders or the public.

(4) For purposes of this rule 4-224.014, confidential information is information pertaining to an individual or entity that is generally not available, provided that in no event shall the name, address, or telephone number or any person be considered confidential.

89. As identified in the published rule proposal, Proposed Rule 4-224.013, Florida Administrative Code, is specifically authorized by Section 624.308, Florida Statutes, and implements Sections 624.418(1)(b), 626.5715, 626.621(6), 626.9541(1), 626.9611 and 626.964(1), Florida Statutes.

90. Section 624.308, Florida Statutes, provides the Department's general rulemaking authority.

91. Section 624.418, Florida Statutes, provides suspension or revocation of certificates of authority for certain violations and other conditions. Subsection (1)(b) specifically provides for such penalties where the insurer is using such methods and practices in the conduct of its business as to render its further transaction of insurance in this state hazardous or injurious to its policyholders or to the public.

92. Section 626.5715, Florida Statutes, the "parity" statute, provides as set forth herein.

93. Section 626.621(6), Florida Statutes, sets forth grounds for denial or suspension of licensure, and provides as follows:

626.621 Grounds for discretionary refusal, suspension, or revocation of agent's, solicitor's, adjuster's, customer representative's, service representative's, managing general agent's, or claims investigator's license or appointment.--The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, solicitor, adjuster, customer representative, service representative, managing general agent, or claims investigator, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such

denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

* * *

(6) In the conduct of business under the license or appointment, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part X of this chapter, or having otherwise shown himself or herself to be a source of injury or loss to the public or detrimental to the public interest.

94. Section 626.9541, Florida Statutes, addresses "unfair methods of competition and unfair or deceptive acts" and is set forth herein.

95. Section 626.9611, Florida Statutes, provides the Department's authority to adopt rules pursuant to Section 120, Florida Statutes, which specifically identify prohibited methods of competition, but limits such rules to those acts prohibited under Sections 626.9541 and 626.9551.

96. Section 626.9641(1), Florida Statutes, is the "Policyholder's Bill of Rights" and is set forth herein.

97. Proposed Rule 4224.014 is an invalid exercise of delegated legislative authority because it exceeds the Department's grant of rulemaking authority. The evidence fails to establish that the cited statutes provide the Department with the authority to prohibit the collection or utilization of information. The proposed rule exceeds the Department's specific grant of rulemaking authority which is limited in this case to those rules which provide for equivalent regulation of insurance transactions without regard to ownership or affiliation of the insurance agent or agency.

98. Proposed Rule 4-224.014 is an invalid exercise of delegated legislative authority because it is vague, fails to establish adequate standards for agency decisions and vests unbridled discretion in the agency.

99. The rule states that collection of information "when it is known that the information will or may be used for purposes of marketing insurance, and when the insurance-related purpose is not disclosed, constitutes a deceptive statement or omission...." The phrase "when it is known that the information...may be used" is vague and requires a post-collection determination of the intent of the data collector at the time the information was gathered. Further, proposed definition of "confidential information" as that which is "generally not available" is vague. The vagueness of the rule results in a lack of adequate standards for decision making and vests unbridled discretion in the Department.

100. Proposed Rule 4-224.014 is an invalid exercise of delegated legislative authority because it is not supported by competent substantial evidence. The testimony related to this proposed rule consisted primarily of an analysis of the statutory support for the rule. The evidence is insufficient to establish that the undisclosed collection of information which may be used at some time in a non-insurance setting constitutes an unfair or deceptive trade practice. There is no statutory provision which prohibits or restricts the sharing of information between a financial institution and an affiliated insurance agency.

101. There is evidence that such prohibition as the Department intends to impose by this rule may violate the federal Fair Credit Reporting Act, 12 U.S.C. 1681t(b)(2), and the state Banking Code, Section 655.059(2)(b), Florida Statutes.

CONCLUSIONS OF LAW

102. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Section 120.56, Florida Statutes.

103. The burden is on the Department to establish that, as to the objections raised by the Petitioners, the proposed rule is not an invalid exercise of delegated legislative authority. Section 120.56(2)(a), Florida Statutes. In this case, the burden has not been met. For the reasons set forth in the preceding Findings of Fact, the proposed rules are an invalid exercise of delegated legislative authority.

104. Section 120.52(8), Florida Statutes, provides as follows:

(8) "Invalid exercise of delegated legislative authority" means action which 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;

(f) The rule is not supported by competent substantial evidence;

or

(g) 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, interpret, or make specific the particular 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, 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 the particular powers and duties conferred by the same statute.

105. The Department generally appears to assert that the collection of proposed rules are reasonable related to the agency's consumer protection mission. The Department cites other rules adopted prior to the most recent APA amendments to suggest that the proposed rules at issue in this proceeding are acceptable. The "reasonableness" of the proposed rules is not sufficient to result in validation of the rules. The 1996 APA Amendments clearly narrowed the authority of agencies to adopt rules. As set forth in Section 120.52(8), Florida Statutes, "[n]o agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation...."

106. In this case, the authority for these rules is set forth at Section 626.5715, Florida Statutes. The Department was specifically authorized to adopt rules to assure the "parity of regulation" in insurance transactions. The Department was not authorized to adopt new rules essentially intended as consumer protection devices. The Department was not authorized to adopt new rules which restate existing law. The Department was not authorized to adopt new rules which permit insurance agents to avoid the application of the primary agent statute. The Department's authorization to adopt rules is "limited to assuring that no insurance agency or agent is subject to more stringent or less stringent regulation than another insurance agency or agent on the basis of the regulatory status of the entity that owns the agency or is associated with the agent."

107. In order to avoid determination as an invalid exercise of delegated legislative authority, Section 120.52(8)(f), Florida Statutes, requires that a proposed rule be supported by competent substantial evidence, a requirement which was added to the law by the 1996 amendments to the APA.

108. Petitioners FBA and Barnett assert that the amended APA requires that competent substantial evidence exist as part of the rulemaking record, and that an agency may not rehabilitate an unsupported rule proposal by producing new evidence at an administrative hearing. The Department asserts that such evidence may be produced during an administrative hearing after a rule challenge has been filed.

109. The phrase "competent substantial evidence" has been addressed more frequently in a judicial context than in the quasi-judicial administrative arena. As to the meaning of the phrase, competent substantial evidence has been defined in DeGroot v. Sheffield, 95 So. 2d 912, at 916 (Fla. 1957) as follows:

Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such evidence as a reasonable mind would accept as adequate to support a conclusion....In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed....We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

110. Although the Petitioners argue persuasively in proposed orders that the 1996 APA amendments require an agency to produce the "competent substantial evidence" prior to the close of the rulemaking proceeding, in this case, it is unnecessary to address this issue. The totality of

the evidence supporting the proposed rules fails to meet the meet the requirement that such evidence be "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."

111. As stated in the Findings of Fact set forth herein, the proposed rules at issue in this case constitute an invalid exercise of delegated legislative authority pursuant to Section 120.52(8), Florida Statutes.

Rule 4-224.002 (Settings and Circumstances)

112. Proposed Rule 4-224.002 is an invalid exercise of delegated legislative authority due to noncompliance with Sections 120.52(8)(b),(d)and (f), Florida Statutes.

113. Proposed Rule 4-224.002 fails to comply with Section 120.52(8)(b), Florida Statutes, because it exceeds the Department's specific grant of rulemaking authority.

114. Proposed Rule 4-224.002 fails to comply with Section 120.52(8)(d), Florida Statutes, because, it is vague, fails to establish adequate standards for agency decisions and vests unbridled discretion in the agency.

115. Proposed Rule 4-224.002 fails to comply with Section 120.52(8)(f), Florida Statutes, because it is not supported by competent substantial evidence.

Rule 4-224.004 (Underwriting of Insurance-Authorization Required)

116. Proposed Rule 4-224.004 is an invalid exercise of delegated legislative authority due to noncompliance with Sections 120.52(8)(b) and (f), Florida Statutes.

117. Proposed Rule 4-224.004 fails to comply with Section 120.52(8)(b), Florida Statutes, because it exceeds the specific grant of rulemaking authority.

118. Proposed Rule 4-224.004 fails to comply with Section 120.52(8)(f), Florida Statutes, because it is not supported by competent substantial evidence.

Rule 4-224.007 (Primary Agent)

119. Proposed Rule 4-224.007 is an invalid exercise of delegated legislative authority due to noncompliance with Sections 120.52(8)(b),(c)and (f), Florida Statutes.

120. Proposed Rule 4-224.007 fails to comply with Section 120.52(8)(b), Florida Statutes, because it exceeds the grant of rulemaking authority.

121. Proposed Rule 4-224.007 fails to comply with Section 120.52(8)(c), Florida Statutes, because it enlarges, modifies and contravenes the specific provisions of law implemented.

122. Proposed Rule 4-224.007 fails to comply with Section 120.52(8)(f), Florida Statutes, because it is not supported by competent substantial evidence.

Rule 4-224-012 (Coercion)

123. Proposed Rule 4-224.012 is an invalid exercise of delegated legislative authority due to noncompliance with Sections 120.52(8)(b),(c)and (f), Florida Statutes.

124. Proposed Rule 4-224.012 fails to comply with Section 120.52(8)(b), Florida Statutes, because it exceeds the Department's grant of rulemaking authority.

125. Proposed Rule 4-224.012 fails to comply with Section 120.52(8)(c), Florida Statutes, because it because it enlarges the specific provisions of law being implemented

126. Proposed Rule 4-224.012 fails to comply with Section 120.52(8)(f), Florida Statutes, because there is no competent substantial evidence supporting the rule.

Rule 4-224.013 (Remedies)

127. Proposed Rule 4-224.013 is an invalid exercise of delegated legislative authority due to noncompliance with Sections 120.52(8)(a) and (f), Florida Statutes.

128. Section 120.52(8)(a), Florida Statutes, provides that a proposed rule is an invalid exercise of delegated legislative authority for material failure to follow rulemaking procedures set forth in Chapter 120.

129. On February 13, 1998, subsequent to the formal administrative hearing and on the deadline for filing proposed orders in this case, the Department filed a Motion to Take Official Recognition of a letter dated October 17, 1997, from Thomas Valentine, Department of

Insurance attorney, to Liz Cloud, Bureau Chief of the State Bureau of Administrative Code. The letter provides as follows:

Dear Ms. Cloud:

Please make the following technical change(es) to Rule 224.013, F.A.C., published in the Florida Administrative Weekly on May 23, 1997:

Add 626.621(3) and 626.681(1) as Law Implemented.

This change is to add law implemented, and will have no substantive effect.

Thank you for your assistance in making this technical change.

Sincerely,

(signature)

130. Section 120.54(3)(a), Florida Statutes, requires citation of rulemaking authority at the time the rule is published and specifically requires that the published notice make reference "to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented...."

131. In this instance, the two "technical changes" result in the addition of the Department's authority to suspend, revoke, or refuse to renew various licenses for violation of "any lawful order or rule" of the Department (Section 626.621, Florida Statutes) and the Department's authority to impose an administrative fine in lieu of such other penalties (Section 626.681, Florida Statutes).

132. The Department's failure to cite the law implemented by the proposed rule is a material failure to follow the applicable rulemaking procedures set forth in Chapter 120, Florida Statutes, and violates Section 120.52(8)(a), Florida Statutes.

133. Proposed Rule 4-224.013 fails to comply with Section 120.52(8)(f), Florida Statutes, because there is no competent substantial evidence which establishes the validity of the

proposed rule. The rule does not implement, interpret or make specific any provision of Florida law.

Rule 4-224.014 (Confidential Information)

134. Proposed Rule 4-224.014 is an invalid exercise of delegated legislative authority due to noncompliance with Sections 120.52(8)(b),(d)and (f), Florida Statutes.

135. Proposed Rule 4-224.014 fails to comply with Section 120.52(8)(b), Florida Statutes, because it exceeds the Department's grant of rulemaking authority.

136. Proposed Rule 4-224.014 fails to comply with Section 120.52(8)(d), Florida Statutes, because it is vague, fails to establish adequate standards for agency decisions and vests unbridled discretion in the agency.

137. Proposed Rule 4-224.014 fails to comply with Section 120.52(8)(f), Florida Statutes, because it is not supported by competent substantial evidence.

138. The prevailing Petitioners are entitled to an award of reasonable attorney's fees and costs pursuant to Section 120.595(2), Florida Statutes, which provides as follows:

CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).--If the court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed \$15,000.

139. The law requires that, unless the Department demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust, the Petitioners are entitled to an award of reasonable costs and reasonable attorney's fees in this case.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that as set forth herein, Proposed Rules 4-224.002, 4-224.004, 4-224.007, 4-224.012, 4-224.013 and 4-224.014 are invalid exercises of delegated legislative authority.

Jurisdiction is retained for determination of reasonable costs and reasonable attorney's fees as required by Section 120.595(2), Florida Statutes.

DONE AND ORDERED this 29th day of June, 1998, in Tallahassee, Leon County, Florida.

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the Division of Administrative Hearings
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NOTICE OF RIGHT TO JUDICIAL REVIEW

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