STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA PROPERTY AND CASUALTY ASSOCIATION, INC.,

Petitioner,

and

FIRST PROTECTIVE INSURANCE COMPANY d/b/a FRONTLINE INSURANCE,

Intervenor,

vs. Case No. 15-4811RX

FLORIDA HURRICANE CATASTROPHE FUND AND STATE BOARD OF ADMINISTRATION,

Respondents.
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FINAL ORDER

On September 25, 2015, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Tallahassee, Florida.

APPEARANCES

For Petitioner and Intervenor:

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STATEMENT OF THE ISSUES

Pursuant to section 120.56(1)(a), the issues are whether Petitioner and Intervenor are substantially affected by rules requiring that covered insurers report their policyholders' street addresses on Form FHCF-D1A Rev. 05/15 (2015 Data Call), as incorporated by reference in Florida Administrative Code Rule 19-8.029(4)(e), and, if so, whether these rules are an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On August 27, 2015, Petitioner filed a Petition to Determine the Partial Invalidity of a Rule (Petition). The Petition challenges the portions of 2015 Data Call that require insurers to provide the street number and secondary address, such as an apartment number, for each covered property. The specific provisions of the 2015 Data Call challenged by Petitioner are: 1) the first paragraph 2 on page 2, which identifies this requirement as an important change from the 2014 data call; 2) under "file layout" on pages 7 and 8, fields 13 and 14, which elicit the street number and secondary address of each covered

property; and 3) paragraphs 13 and 14 on page 14, which set forth fields 13 and 14 requiring, respectively, the street number and secondary address of each covered property. For convenience, these portions of the form will be referred to as fields 13 and 14 or, cumulatively, the street address data, and these rules will be referred to as the street address rules.

Petitioner alleges that it is an industry trade group that was organized in 1997 to promote a healthy, competitive insurance market in the state of Florida. The Petition alleges that Petitioner's Homeowners Division consists of 17 domestic members that account for 40% of the homeowners insurance written in Florida. The Petition alleges that Petitioner is substantially affected by the 2015 Data Call because its members are substantially affected by the 2015 Data Call, which is within Petitioner's general scope of interest and activity, and the invalidation of the challenged portions of the 2015 Data Call is a type of relief that is appropriate for Petitioner to pursue on behalf of its members. The Petition also alleges that Petitioner is substantially affected because a failure by any of its members to provide the street address information demanded by fields 13 and 14 constitutes a violation of the Florida Insurance Code, as described below.

The Petition explains that, pursuant to section 215.555, Florida Statutes, insurers writing policies covering residential

property in Florida are required annually to purchase reimbursement contracts from Respondent Florida Hurricane Catastrophe Fund (FHCF). The Petition states that, in each reimbursement contract, FHCF promises to reimburse the insurer for a certain percentage of its hurricane losses in return for which the insurer pays FHCF a premium based on the actuarial calculations of an independent consultant.

The Petition alleges that the reimbursement premium is based on each $1000 of insured value under covered policies by zip code. Accordingly, the Petition alleges that section 215.555(5)(c) provides that, by September 1 of each year, each insurer must notify Respondent State Board of Administration (SBA) of "its insured values under covered policies by zip code, as of June 30 of that year."

The Petition alleges that SBA annually prepares a data call instructing insurers how to prepare and submit their annual report of insured values under covered policies by zip code. The 2015 Data Call is allegedly the data call for the reimbursement contract year ending May 31, 2016. For the first time, the 2015 Data Call allegedly requires an insurer to report insured values under covered policies by street addresses, not merely zip codes.

The Petition alleges that Petitioner's members consider the street addresses of their policyholders to be confidential and proprietary information. Pursuant to rule 19-8.030(9), a failure

to comply with the requirements of the 2015 Data Call constitutes a violation of the Florida Insurance Code, and FHCF is authorized to report any violation of the Florida Insurance Code to the Office of Insurance Regulation (OIR) for "whatever action that it deems appropriate."

The Petition alleges that the street address rules exceed the powers, functions, and duties that the Legislature delegated to SBA in section 215.555; SBA has exceeded its grant of rulemaking authority; the street address rules enlarge, modify, and contravene the specific provisions of the law implemented; the street address rules are vague, fail to establish adequate standards for SBA's decision-making, and vest unbridled discretion in FHCF; and the street address rules are arbitrary and capricious because they are not supported by logic or the necessary facts and were adopted without reason.

On September 25, 2015, First Protective Insurance Company, doing business as Frontline Insurance (Intervenor), filed a Motion to Intervene, which challenges the street address rules on the grounds set forth in the Petition. The motion alleges that Intervenor is a member of Petitioner and a Florida domestic insurer transacting property and casualty insurance business in Florida, including residential property insurance business. Due to its insurance business activities, Intervenor allegedly is

required to participate in the FHCF for the year ending May 31, 2016.

The motion notes that the 2015 Data Call was due to be filed on or before September 1, 2015, and that Intervenor timely filed its 2015 Data Call, but without the information required by fields 13 and 14. By letter dated September 17, 2015, with a copy to OIR, FHCF advised Frontline that its omission of street address data rendered its filing not in compliance with rule 19-8.029, and the 2015 reimbursement contract authorizes FHCF to withhold reimbursement payments until Intervenor files a compliant 2015 Data Call.

Respondents objected to the Motion to Intervene. After hearing argument of counsel at the start of the hearing, the Administrative Law Judge granted the motion and issued an Order memorializing this ruling on September 28, 2015.

At the hearing, Petitioner and Intervenor called two witnesses, and Respondents called one witness. The parties jointly offered 23 exhibits: Joint Exhibits 1 through 23. Petitioner offered four exhibits: Petitioner Exhibits 1 through 4. Intervenor offered one exhibit: Intervenor Exhibit 1. Respondents offered three exhibits: Respondent Exhibits 1 through 3. All exhibits were admitted.

Intervenor requested an expedited disposition of this case due to the ongoing risk that OIR may commence a proceeding to

suspend or revoke its certificate of authority based on Intervenor's failure to file a compliant 2015 Data Call. Accordingly, the Administrative Law Judge ordered that the parties file any proposed final orders within seven days of the date of the filing of the transcript.

The court reporter filed the transcript on September 28, 2015. Petitioner and Intervenor filed their proposed final order on October 5, 2015, and Respondents filed their proposed final order on the next day. The Administrative Law Judge has considered Respondents' proposed final order as though it had been timely filed.

FINDINGS OF FACT

1. Insured losses from Hurricane Andrew in 1992 revealed that numerous property and casualty insurers had over-insured certain exposures. After the storm, worldwide insurance capacity contracted, which eliminated an important means by which insurers could address the problem of over-exposure. These conditions forced many insurers to reduce their Florida exposure to preserve their solvency. § 215.555(1)(b), Fla. Stat. (2013).

2. Finding that many insurers were unable or unwilling to maintain the reserves, surplus, and reinsurance sufficient to pay all claims following catastrophic insured losses, § 215.555(1)(d), Fla. Stat., the Legislature in 1993 created FHCF to be administered by SBA. The purpose of FHCF is "to provide a

stable and ongoing source of reimbursement to insurers for a portion of their catastrophic losses . . . ." § 215.555(1)(e), Fla. Stat. The Legislature structured FHCF as "a state trust fund under the direction and control of the [SBA to operate] exclusively for the purpose of protecting and advancing the state's interest in maintaining insurance capacity in this state." § 215.555(1)(f), Fla. Stat.

3. To maintain insurance capacity in Florida, each insurer issuing an insurance policy on residential property in Florida is required to enter into a reimbursement contract with FHCF. § 215.555(2)(c) and (4)(a), Fla. Stat. In general, the reimbursement contract provides that, in the event of covered losses, FHCF shall pay a specified reimbursement amount in return for the payment of an annual premium by the insurer. Id.

4. An insurer's covered losses in excess of its non-reimbursable retention amount will be reimbursed at one of three percentages--45%, 75%, or 90%--that the insurer selects for the reimbursement contract year, although reimbursements are subject to a specified maximum payout on all reimbursement contracts in a single contract year. § 215.555(2)(e) and (4)(b)1. and (c)1., Fla. Stat. SBA annually retains an independent actuarial consultant to develop a formula for determining the reimbursement premium to be paid by each insurer to FHCF. § 215.555(5)(a) and (b), Fla. Stat. The formula "shall specify, for each zip

code or other limited geographical area, the amount of premium to be paid by an insurer for each $1,000 of insured value under covered policies in that zip code or other area." § 215.555(5)(b), Fla. Stat. By September 1 of each year, "each insurer shall notify [SBA] of its insured values under covered policies by zip code, as of June 30 of that year." § 215.555(5)(c), Fla. Stat. SBA then calculates a reimbursement premium by applying the reported insured values, by zip code, to the premium formula developed by the actuarial consultant. Id.

5. Reimbursement premiums are a major source of revenue for FHCF. Other sources of revenue may include investment income, pursuant to section 215.555(3); emergency assessments on all premiums paid for any property and casualty insurance in Florida, pursuant to section 215.555(6)(b); interest on certain advances made to insurers likely to be due reimbursements, pursuant to section 215.555(4)(e); and certain fees that FHCF may impose on insurers filing untimely or incorrect exposure data, pursuant to section 215.555(7)(e). FHCF may also anticipate revenues and maintain cash flow by issuing post-loss revenue bonds, pursuant to section 215.555(6)(a), and borrowing money by other means, such as by issuing pre-event bonds, pursuant to section 215.555(7)(b).

6. Allowable expenditures of FHCF are reimbursements to insurers, debt service, costs of legislatively authorized

hurricane-loss mitigation programs, reinsurance costs, and administrative costs. § 215.555(3), Fla. Stat. Section 215.555(7)(a) specifically authorizes FHCF to enter into reinsurance contracts with reinsurers acceptable to OIR "consistent with the prudent management of the fund."

7. FHCF purchases reinsurance to manage its loss exposure and maintain its ability timely to reimburse Florida insurers for covered losses. FHCF's reinsurance contracts are unique due to a variety of factors, such as the loss amounts retained by individual insurers, the three tiers of reimbursement rates, and the limits on total reimbursements in a reimbursement contract year. FHCF's reinsurance contracts thus require customized pricing, which places a premium on careful negotiations to ensure that FHCF is purchasing reinsurance contracts at favorable prices.

8. For a variety of reasons, including the emergence of pension funds, hedge funds, and wealthy individuals as reinsurers, reinsurance costs have declined in recent years. For instance, FHCF was quoted, in 2008, 25 cents for each dollar of reinsurance, but was quoted, in 2015, 6.78 cents for each dollar of reinsurance, presumably for comparable loss exposures.

9. In recent negotiations, FHCF representatives were concerned that some reinsurers may have had access to more detailed loss-exposure data than was available to FHCF--

specifically, to covered properties' street addresses or other locational coordinates, rather than merely zip codes. Knowledge of street address data would permit more accurate pricing of reinsurance because, for the past ten to fifteen years, loss-projection models have been able to analyze street address data to produce more accurate projections of covered losses from specified wind events. It is unnecessary to determine whether the concern of the FHCF representatives was well-founded. Regardless of whether the possession of more-detailed data by FHCF would restore parity with reinsurers or confer an advantage over reinsurers, access to this more-detailed data would improve FHCF's bargaining position when negotiating for the purchase of reinsurance.

10. For these reasons, SBA and FHCF decided to obtain from insurers their street address data with the 2015 Data Call. Rule 19-8.029, which incorporates the 2015 Data Call by reference, cites as rulemaking authority section 215.555(3) and cites as the law implemented sections 215.555(2), (3), (4), (5), (6), (7), and (15) and 627.351(6).

11. The rule-amendment process did not take long. On January 22, 2015, SBA published notice of development of the proposed street address and other rules. By January 28, 2015, FHCF had prepared the street address rules. FHCF provided notice of a rule development workshop for the morning of February 5,

2015, and the FHCF Advisory Council provided notice of a meeting to consider the proposed rules for the afternoon of the same day. Pursuant to section 215.555(8), the advisory council is a nine-member body that includes one representative of carriers, one representative of reinsurers, one representative of insurance agents, and representatives of other industries and consumers.

12. At the workshop, a FHCF representative explained the street address rules, asked for questions or comments, and received none. At the advisory council meeting, which was attended by five of its members, a FHCF representative explained the street address data and, again, received no questions or comments.

13. On March 24, 2015, the SBA Trustees met to authorize FHCF to file the proposed rule changes. The Trustees approved the filing without discussion, and, on March 25, 2015, FHCF published the proposed rules, including the street address rules. On May 12, 2015, the proposed rules became final.

14. The silence of participating carriers during the rulemaking process undermines the claim of the chief witness of Petitioner and Intervenor that each carrier's street address data represents its "crown jewels." Nonetheless, there is ample evidence of the importance of street address data to insurers. Street address data is the foundation of the carrier's relationship with its policyholders. Unlike zip code data,

street address data facilitates communications with policyholders and access to other databases for policyholder information that an insurer may use to generate additional revenues, not limited to insurance. In this era of Big Data, the growth in the amount of information accessible through a person's street address has increased in the past year by an amount in excess of the increase of this information in the preceding 30 years. Presently, over 500 pieces of additional information is available to the possessor of street address data, obviously presenting marketing opportunities across many industries, not just insurance. And this data retains much of its value even after a policyholder has moved to another residence.

15. This data is less valuable to an insurer to the extent that it is available from sources other than the insurer. In particular, if an insurer's street address data is obtained by a competitor, the competitor may target the insurer's customers, sparing itself much of the customary costs of obtaining new business. Thus, when transferring rights to their confidential data, insurers include within the transfer agreement various provisions ensuring the proper and secure use of the data and providing for relief in the event of a breach of the agreement.

16. Property and casualty insurers also protect their street address data from unauthorized disclosure by implementing data-security technology. The ongoing threats posed by hackers

and advances in their technology requires constant updating of insurers' data-security technology.

17. The importance of policyholders' locational data has long been recognized. In 1993, when creating FHCF, the Legislature enacted section 215.557, which treats as confidential and exempts from public records laws insurers' reports of covered property by zip code, which the statute acknowledges is "proprietary and trade secret information" that, if revealed, "could substantially harm insurers in the marketplace and give competitors an unfair economic advantage." Ch. 93-413, § 2, Laws of Fla.

18. For its part, FHCF has implemented data-security technology to safeguard insurers' confidential information. The reinsurance contracts and SBA Policy 10-043 preserve the confidentiality of all information submitted under a claim of confidentiality. SBA and FHCF have imposed contractual provisions requiring their consultants to preserve the confidentiality of all data identified as confidential by SBA or FHCF, strictly limiting access to such data, and directing the destruction of any such data received by the consultants after the completion of their work. However, in the event of a breach of an agreement between SBA or FHCF and a contractor, Petitioner's members would have no effective relief against SBA, FHCF, or the contractor of SBA or FHCF.

19. To transmit their 2015 Data Calls to SBA, insurers upload the data, including the street address data, onto an SBA server using FHCF's Web Insurer Reporting Engine (WIRE). First used for the 2014 data call, WIRE is a "secure web-based program." Fla. Admin. Code R. 19-8.029(2)(k). WIRE transfers the data to an SBA server, where it is stored. In general, SBA and FHCF prohibit the removal of confidential data stored on an SBA server; consultants, including the actuarial consultant, may use their software to analyze this data, but may not remove data from an SBA server. FHCF's chief operating officer testified that, in connection with the premium-setting process, he intends to share only the zip code data with the actuarial consultant. Access to the street address data is further limited by the fact that SBA and FHCF do not presently have programs to access the data; someone trying to access this data would have to write code to remove this data. Of course, FHCF write such code when it uses the street address data to support its negotiations with reinsurers. Based on these and perhaps other security precautions, FHCF's chief operating officer testified that the SBA server on which the street address data is stored cannot be hacked.

20. Computer-related crime, such as that prohibited by sections 815.01, et seq., may be perpetrated by an unknown third party or by an employee or consultant, with access to the data,

who acts with an intent to enrich himself, embarrass Respondents, harm insurers, or cause panic among policyholders. It is impossible to credit completely the blanket assurance of FHCF's chief operating officer, whose range of expertise spans insurance and loss modeling, but not computer security. The ongoing nature of data-security efforts suggests that the security risks posed by hackers and malevolent insiders are themselves dynamic. Section 815.02(1) and (3) finds as much in acknowledging that "[c]omputer-related crime" is a "growing problem" in the public and private sectors, and the "opportunities for computer-related crimes in financial institutions, government programs, government records, and other business enterprises . . . are great." These risks to the among the most closely guarded collections of data would not be "growing" and "great," if absolute protection of data were technologically feasible.

21. Prior to transmitting its street address data to FHCF, each carrier's street address data is exposed to the risks associated with its storage on the insurer's server or servers and its accessibility by the insurer's employees and consultants. New risks attach when the data is transmitted by internet to FHCF and when the data is then stored on an SBA server; multiple storage points create multiple sets of risks.

22. Petitioner is a trade association comprising 16 property and casualty insurers required to participate in the

FHCF. Petitioner's insurer members include Intervenor, as well as four insurance industry consultants, who are irrelevant to this case and are not included in references to Petitioner's "members." Established in 1997, Petitioner's purpose is to promote a healthy, competitive insurance market in Florida. By the September 1, 2015, filing deadline for the 2015 Data Call, all of Petitioner's members, except Intervenor, had timely filed their 2015 Data Calls with the information required by fields 13 and 14.

23. Intervenor timely filed its 2015 Data Call, but omitted the information called for in fields 13 and 14 to avoid Respondents' mootness argument against Intervenor's standing, as discussed below. By letter dated September 17, 2015, a copy of which was sent to OIR, FHCF advised Intervenor that, as a result of this omission, it was not in compliance with rule 19-8.029. The letter warns that possible consequences include FCHF's withholding of reimbursement payments or advances from Intervenor until it becomes compliant.

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the subject matter because Petitioner and Intervenor are substantially affected by the street address rules. §§ 120.56(1)(a) and (e), 120.569, and 120.57, Fla. Stat. Although it has been determined that Petitioner is substantially affected by the street address rules,

DOAH would have jurisdiction, even if only Intervenor were substantially affected. This is a challenge to existing rules, and Intervenor's filing did not fail to meet any deadline, so it could have been filed as an original petition. The Administrative Law Judge rejects as inapplicable to a rule challenge proceeding Respondents' arguments in their proposed final order for the prioritization of parties, so as to confer primary importance on a permit applicant and the permitting agency and relegate the intervenor to secondary status, so that, for example, it may not survive a settlement between the applicant and agency or may not raise issues not raised by the applicant and agency.

25. Intervenor's status as a substantially affected person is clear. Rule 19-8.029(4)(e) incorporates the 2015 Data Call. Rule 19-8.029 implements provisions of section 215.555. Section 215.255(10) provides that a violation of section 215.255 or the rules adopted under section 215.255 constitutes a violation of the Florida Insurance Code. Section 624.418(2)(a) authorizes OIR to suspend or revoke the certificate of authority of any insurer that has violated any provision of the Florida Insurance Code. On this authority, OIR has the discretion to suspend or revoke Intervenor's certificate of authority for its failure timely to submit the street address data demanded by fields 13 and 14 of the 2015 Data Call.

26. A person is substantially affected by a rule that regulates the person. See, e.g., Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94 (Fla. 1st DCA 1999); Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404 (Fla. 1st DCA 1997); Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995) (per curiam). A person is not required to violate a regulatory rule to be substantially affected. Prof'l Firefighters of Fla. v. Dep't of HRS, 396 So. 2d 1194 (Fla. 1st DCA 1981). Sharpening its presentation of impact, though, Intervenor has violated the filing requirement that includes the street address rules, and FHCF has formally notified OIR of this violation of the Florida Insurance Code.

27. Petitioner's status as a substantially affected person is more complicated. In Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), the Florida Supreme Court held that a trade association may be substantially affected by a rule if its members are substantially affected by the rule that does not otherwise affect the association. Seven years later, in Coalition of Mental Health Professions v. Department of Professional Regulation, 546 So. 2d 27 (Fla. 1st DCA 1989), the court applied to an association the well-established principle concerning regulatory rules set forth in the preceding paragraph, so that, if the

association's members are regulated by the challenged rule, the association is also substantially affected by the rule.

28. However, Respondents claim that the street address rules no longer regulate Petitioner's members because, other than Intervenor, they have already filed their street address data. The case law does not address a rule requiring a one-time act, such as filing the 2015 Data Call, or whether a person, post-compliance, still is regulated by a rule requiring a one-time act. In recognizing that a person regulated by a rule is substantially affected by the rule, courts have adopted an abbreviated impact determination in the interest of simplicity and predictability. Respondent's argument for ephemeral regulation invites the kind of excessively demanding analysis of impact that is discussed below and, on this ground alone, should be rejected. Of course, standing determinations are reviewed on appeal de novo, see, e.g., Off. of Ins. Reg. v. Secure Enters., 124 So. 2d 332, 336 (Fla. 1st DCA 2013), so, in an abundance of caution, id., this final order will consider whether Petitioner is substantially affected, even if its members, other than Intervenor, are no longer regulated by the street address rules since their filing of their 2015 Data Calls with the street address data.

29. An association is substantially affected by a rule if "a substantial number of its members, although not necessarily a

majority, are "substantially affected" by the challenged rule[,] the subject matter of the rule [is] within the association's general scope of interest and activity, and the relief requested [is] of the type appropriate for a trade association to receive on behalf of its members." NAACP v. Fla. Bd. of Regents, 863 So. 2d 294, 298 (Fla. 2003) (citing Fla. Home Builders, supra at 353-54).

30. Petitioner satisfies the second and third prongs. Members' loss of street address data reduces competition in the marketplace. Obtaining relief in the form of the invalidation of the street address rules would promote the competitive interests of the members.

31. Petitioner satisfies the first prong if a substantial number of its members, not merely Intervenor, are substantially affected by the street address rules. Respondents' defense of mootness claims that these members are unable to show an injury in fact. This defense acknowledges a past impact--essentially, being subject to the regulatory requirement of filing the street address data--but contends that no present effects remain from this past impact. This clear past impact, as well as the possibility of a future impact, as discussed below, are major impacts that yield a lesser, but still substantial, present impact that means that Petitioner satisfies the first prong.

32. In Department of Offender Rehabilitation v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA), cert. denied, 359 So. 2d 1215 (Fla. 1978), an inmate was charged with violating a rule prohibiting prison assault, was found guilty, served the penalty of disciplinary confinement, and then challenged the rule. The agency made a mootness argument, claiming that the inmate was no longer affected by the disciplinary rule.

33. In this early case of rule challenge standing, the Jerry court surveyed a wide array of cases to find the meaning of "substantially affected." From a United States Supreme Court case involving a third-party challenge to an environmental permit, the Jerry court borrowed a two-prong test: the challenger had to show an "injury in fact," and the injury had to be to an interest arguably within the "zone of interest" to be protected or regulated by the statute that the agency was claimed to have violated. Id. at 1233. The court focused on the requirement of an injury to ensure that the litigant had a direct stake in the controversy and to prevent the litigant from reducing the judicial process to "no more than a vehicle for the vindication of the value interests of concerned bystanders." Id. at 1234.

34. The Jerry court cited another United States Supreme Court case to suggest that the inmate had not suffered an injury. In a class action seeking injunctive relief against law

enforcement officers, the Supreme Court held that past exposure to illegal conduct does not establish a case and controversy warranting injunctive relief, if unaccompanied by any continuing, present adverse effects. Id. at 1234-35. The Supreme Court characterized as "speculation and conjecture" the possibilities that the plaintiffs would be arrested in the future and taken before the court officials whom they claimed had engaged in illegal discrimination in setting bond. Id. at 1235.

35. Applying the requirement of an injury in fact to the inmate, the Jerry court found that he "failed to show injury which is accompanied by any continuing, present adverse effects" because he was no longer serving disciplinary confinement. Id. The prospect of future injury was dependent on a future disciplinary infraction--a contingency that the court found to be a matter of "speculation and conjecture." Id. at 1236. Such speculation would not be consistent with the inmate's presentation of "issues of 'sufficient immediacy and reality' necessary to confer standing." Id. Finding no injury, the Jerry court did not address the zone of interest prong.

36. The Jerry court recognizes that a present impact may be traced to a past or future impact. The evidentiary record was not particularly well developed as to present impact. Perhaps for this reason, the opinion does not attempt to trace present impacts from past and future impacts, such as by discussing

whether a second disciplinary offense would result in harsher punishment or whether the first disciplinary offense, if the assault was the first offense, might have established a proclivity toward noncompliant behavior or fighting in particular. The record did reveal that the rules entitled the inmate to "at least" 24 hours from receipt of the notice to the commencement of the disciplinary hearing, and any punishment was typically administered within seven days of the hearing, so the inmate's opportunity to challenge the disciplinary rule was likely less than ten days; but the latter fact escaped the court's notice, or these facts were irrelevant to the court.

37. In Department of Health and Rehabilitative Services v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979), several persons challenged a proposed rule discontinuing Medicaid reimbursements to health care providers for therapeutic, elective abortions. The holding of the case applies only to two petitioners because the petitions of the other challengers were untimely (on grounds not applicable to Intervenor's petition). Although unnoted in the final order, answers to interrogatories revealed that the two petitioners, Alice P. and another woman, were no longer pregnant. The agency filed a motion to dismiss based on a mootness argument, claiming that the two challengers were no longer affected by the proposed rule. Rejecting the challengers' characterization of Jerry as a "somewhat restrictive view" of

rule challenge standing, id. at 1051--a point later addressed by the Florida Supreme Court, as mentioned below--the Alice P. court held that the challengers were not substantially affected by the proposed rule and compared their situation to that of the Jerry inmate, who "had prior to the challenge been directly affected by the [rule's] operation." Id. It is impossible to determine from the record the duration of time between when the petitioners had discovered they were pregnant to when they decided that they could wait no longer to terminate their pregnancies.

38. Jerry and Alice P. were similar in the presentation of challengers who had been substantially affected by rules in the past and could possibly be substantially affected by these rules in the future, although the Alice P. court did not address that aspect of the case. In both cases, present, lesser impacts could be traced from these past and future impacts, but the courts did not analyze them in any detail.

39. A different holding resulted in Professional Firefighters of Florida v. Department of Health and Rehabilitative Services, 396 So. 2d 1194 (Fla. 1st DCA 1981). Two firefighters who performed paramedic services challenged a rule that would require them to obtain paramedic certifications by a specific deadline. The two firefighters had not filed applications and, thus, had not been denied certification. The Professional Firefighters court distinguished the challengers in

Jerry and Alice P., who "were not subject to the rule or immediately affected by it at the time suit was filed and were unlikely to be affected in the future." Id. at 1196. By contrast, the court found that the firefighters "were affected by the licensing rules because they currently work in the area to be regulated." Id. To some degree, the Professional Firefighters court also relied on the principle that a person is substantially affected by a rule regulating the person's occupation or profession. Id. But, as the subject case reveals, the duration of sufficient impact is not always clear when applying the principle that a person is substantially affected by a rule that regulates the person. The most interesting aspect of Professional Firefighters is that the court recognized the sufficiency of a present impact that was overshadowed by the possibility of a more substantial future impact following application, denial, and, after the deadline for compliance had passed, disciplinary prosecution.

40. In none of these three opinions is there much of an attempt to trace the linkage between the challenger and the challenged rule. Instead of undertaking this sometimes-challenging, case-by-case determination, the opinions reveal a preference for a more abbreviated process in which, say, a regulatory rule may always be challenged or a present injury must

achieve a level of robustness that demands more than that the challenger be substantially affected.

41. In Florida Home Builders, supra, nonunion Florida building contractors challenged a rule concerning apprenticeship programs in the building trades. No one challenged the hearing officer's determination that the contractors were competitively disadvantaged by the challenged rule. As noted above, the holding was merely that the contractors' trade association could be substantially affected by the rule on the sole ground that its members were substantially affected.

42. The Florida Supreme Court's opinion disapproves of Jerry to the extent that Jerry conflicts with Florida Home Builders, but the opinion does not reveal the precise object of disapproval. Jerry had nothing to do with associations, so the court was not disapproving of the lower court's treatment of associations. Jerry clearly involved the extent to which a present impact could be derived from a past and possibly a future impact, but the present impact of the rule in Florida Home Builders was not in dispute, so the court was not likely disapproving of the lower court's failure to trace a present impact from a past or future impact. By a process of elimination, the court seems to have been targeting the requirement of an "injury in fact" and similar language used to restate the requirement that the challenger be substantially

affected by the rule. Early in the Florida Home Builders opinion, the court noted that Jerry "expressly requires a person to show injury or immediate threat of injury from operation of the challenged rule in order to have standing under section 120.56(1)." Fla. Home Builders at 351. At the end of the Florida Home Builders opinion, the court expressed the first prong of its associational standing test in the language of the statute, as emphasized by its quotation marks: "To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged rule." Id. at 353.

43. Twenty-one years later, in NAACP, supra, the Florida Supreme Court again disapproved of the Jerry language. Three persons challenged several rules withdrawing advantages previously enjoyed by minorities seeking admission to state universities. In addition to the NAACP, whose members were predominantly prospective, not current, university applicants, the other challengers were a tenth-grade student who had not yet applied to a university and his mother, who wanted the best, educationally, for her son.

44. In a 2-1 decision with a dissenting opinion by Judge Browning, the First District Court of Appeal reversed the hearing officer who had found that each challenger was substantially

affected by the rules. In doing so, the court summarized rule challenge standing law as follows:

> Standing to challenge proposed or existing administrative rules is governed by statute in Florida. Section 120.56(1)(a), Florida Statutes (1999), states that only those who are "substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." To demonstrate that one is or will be "substantially affected by a rule or a proposed rule," one must establish both that application of the rule will result in "a real and sufficiently immediate injury in fact" and that "the alleged interest is arguably within the zone of interest to be protected or regulated." See, e.g., Lanoue v. Fla. Dep't of Law Enforcement, 751 So. 2d 94, 96 (Fla. 1st DCA 1999); Ward v. Bd. of Trs. of Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); All Risk Corp. of Fla. v. State Dep't of Labor & Employment Sec., 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982); Fla. Dep't of Offender Rehab. v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978). An injury is not "real and sufficiently immediate" if the likelihood of its occurrence rests upon speculation or conjecture. See, e.g., Ward, 651 So. 2d at 1237; Jerry, 353 So. 2d at 1236.

NAACP v. Fla. Bd. of Regents, 822 So. 2d 1, 3-4 (Fla. 1st DCA 2002).

45. Although it could have relied on Professional Firefighters to conclude that prospective applicants were substantially affected, the Florida Supreme Court attempted a reorientation of rule challenge standing law. The court rejected

any requirement that a substantially affected person "demonstrate immediate and actual harm--i.e., rejection of admission to a state university," explaining that "[w]e required no such showing in Florida Home Builders." NAACP at 300. Characterizing the requirement of "immediate and actual harm" as a "substantial narrowing of the concept of standing as defined in Florida Home Builders," id., the court required a showing only of a "substantial effect of the rule change on a substantial number of the association's members." Id. It was sufficient that a substantial number of NAACP members were "genuine prospective candidates for admission," even though they were not "current applicants." Id.

46. The Florida Supreme Court ignored completely the zone of interest prong. The existence of this prong, which alone has never denied standing to a rule challenger, suggests that a person could suffer a real and sufficiently immediate injury in fact from a rule, but not be substantially affected because the person's interest was not in the proper zone. At least as applied, the first prong may overstate the statutory requirement, but the second prong, adding a requirement to the first prong, has no legitimate role whatsoever in determining whether a person is substantially affected by a rule.

47. The NAACP court restated one of its reasons, as noted in Florida Home Builders, supra, for holding that a trade

association could have standing to challenge a rule for which only its members were substantially affected. The court explained that "a key purpose of [section 120.56(1)] was to expand rather than restrict public participation in the administrative process." The NAACP opinion recites the following from Florida Home Builders:

> We find the district court's restriction on the standing of associations is an excessively narrow construction of section 120.56(1) and results in restricted public access to the administrative processes established in the Florida Administrative Procedure Act, chapter 120, Florida Statutes (1979). Expansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative Procedure Act. [footnote omitted.] In our view, the refusal to allow this builders' association, or any similarly situated association, the opportunity to represent the interests of its injured members in a rule challenge proceeding defeats this purpose by significantly limiting the public's ability to contest the validity of agency rules.

NAACP, supra at 298 (citing Fla. Home Builders, supra at 352-53).

48. Considerations of access may explain the Florida Supreme Court's first holding that the status of the members passes through to the association and its second holding that the members were themselves substantially affected. Considerations of access, though, should at least militate against the formation and application of judge-made principles that require challengers

to show more than that they are substantially affected by the challenged rules.

49. For its test, the NAACP court agreed with Judge Browning's dissenting opinion that NAACP's members were substantially affected by the new affirmative action rules because the impact of these rules on them was different than the impact of these rules on all citizens and nonminority applicants in particular. Id. at 299. This language suggests a test no more rigorous than that described in the language quoted in Jerry that the purpose of the requirement of an injury was to ensure that the litigant had a direct stake in the controversy and to prevent the litigant from reducing the judicial process to "no more than a vehicle for the vindication of the value interests of concerned bystanders."

50. Three related impacts are evident in the subject case. The greatest impact is the risk of unauthorized disclosure of the street address data, such as by hacking or unauthorized action by a rogue employee or consultant. The next greatest impact was the requirement that carriers transmit their street address data from the carriers to FHCF by the WIRE. (Intervenor is substantially affected, not only because it is clearly still regulated by fields 13 and 14, but because the transmission of this data to FHCF remains imminent.) The least impact is the present impact from the transmission of the street address data and the present

impact reflecting the prospect of unauthorized disclosure of the street address data. As in Professional Firefighters, a lesser impact is not, by definition, an insubstantial impact.

51. Petitioner's members remain substantially affected by the transmission of the street address data to SBA and FHCF. Respondents' mootness argument assumes that Petitioner's members cannot unring the bell. This would be true if the rule had required public disclosure, and Petitioner's members had already complied. But the data has been disclosed only to SBA and FHCF--and they have had the data for no more than a few weeks--so an order invalidating the rules may facilitate relief, by negotiation or judicial process, in the form of eliminating all vestiges of this data in the possession of Respondents.

52. Petitioner's members are also substantially affected, at present, by the risk of disclosure of the street address data in the future. The measure of this present impact is a function of the consequence of disclosure and the likelihood of disclosure. As noted above, the consequence clearly would be great. The risk or probability of disclosure requires consideration of contingencies.

53. In NAACP and Professional Firefighters, the consequences were great, and the risks were much harder to address. These cases demonstrate that the risk analysis is not so fine as to require that a court attempt some sort of

quantification of risk--and then apply some test for minimum required risk. In both of these cases, myriad contingencies stood between the challengers, in their present circumstances, and the major impacts that they sought to avoid.

54. In Professional Firefighters, the contingencies included the continued performance of paramedic services by the firefighters to the point at which the rule became effective, the firefighters' applications for certification, the agency's denial of their applications, and the agency's prosecution of the firefighters for violating the rule. In NAACP, the contingencies included the students' successful completion of high school, their desire and academic, financial, and emotional readiness to pursue a higher education, their application to one or more state universities, their satisfaction of otherwise-applicable requirements for admission to a state university; and the denial of their applications solely on the marginal grounds between what was required before and after the challenged affirmative-action rule amendments.

55. Considering the consequences of denied university admissions and the inability to provide paramedic services without disciplinary exposure and the probabilities that these consequences would occur, the challengers in NAACP and Professional Firefighters proved that they had direct stakes in the challenged rules; they were affected differently from other

citizens, nonminority students, and paramedics; and they were clearly not concerned bystanders using rule challenge proceedings as vehicles for the vindication of their value interests.

56. The analysis of consequence and risk in the subject case likewise supports the conclusion that Petitioner's members are substantially affected by the street address rules. As in NAACP, and Professional Firefighters, there is a risk of disclosure beyond SBA and FHCF. Further description of the risk invites the identification of hard and fast rules, but it suffices to describe the risk as not speculative or theoretical, as evidenced by the Legislature's concern with these "growing" and "great" risks to computer-stored data and the focus of Respondents, as well as the private sector, on meeting the ever-increasing challenges of computer-related crime.

57. Petitioner's members are not mere bystanders using this proceeding to vindicate their value interests. As the challengers in NAACP litigated their educational opportunities and the challengers in Professional Firefighters litigated their conditions of employment, so the challengers here are litigating their ability to exploit financially the locational data attached to their policyholders. Without characterizing the impacts on a privacy foundation or small group of policyholders challenging the same street address rules on privacy grounds, the impacts on Petitioner's members present comparatively in a most graphic

manner: the preservation of core assets and the leveraging of these assets into income streams and cash flow.

58. For these reasons, a substantial number of Petitioner's members are substantially affected persons. Having satisfied the three prongs set forth in Florida Home Builders, Petitioner itself is a substantially affected person.

59. Section 120.56(1) authorizes a substantially affected person to seek the invalidation of a rule on the ground that it is an invalid exercise of delegated legislative authority. Section 120.56(3)(a) imposes upon Petitioner and Intervenor the burden of proving by a preponderance of the evidence that the street address rules are an invalid exercise of delegated legislative authority.

60. Section 120.52(16) states that a rule includes "a form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." The street address rules contained in the 2015 Data Call meet this definition.

61. Section 120.52(8)(b) through (e) provides that a rule is an invalid exercise of delegated legislative authority if:

> (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; [or]

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational[.]

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

62. Petitioner and Intervenor have failed to prove that the street address rules are arbitrary or capricious or are vague, fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency. Fields 13 and 14 are quite clear in the information that they demand, and the street address data would be useful to FHCF in purchasing as much

reinsurance for as low a price as possible. The street address rules would help FHCF "provide a stable and ongoing source of reimbursement to insurers for a portion of their catastrophic losses . . .," as it is required to do by statute.

63. The rulemaking authority cited by the rule is section 215.555(3). In material part, this statute states:

> The board may adopt such rules as are reasonable and necessary to implement this section and shall specify interest due on any delinquent remittances, which interest may not exceed the fund's rate of return plus 5 percent. Such rules must conform to the Legislature's specific intent in establishing the fund as expressed in subsection (1), must enhance the fund's potential ability to respond to claims for covered events, must contain general provisions so that the rules can be applied with reasonable flexibility so as to accommodate insurers in situations of an unusual nature or where undue hardship may result, except that such flexibility may not in any way impair, override, supersede, or constrain the public purpose of the fund, and must be consistent with sound insurance practices. The board may, by rule, provide for the exemption from subsections (4) and (5) of insurers writing covered policies with less than $10 million in aggregate exposure for covered policies if the exemption does not affect the actuarial soundness of the fund.

64. The third sentence of the statute authorizes SBA to adopt rules to exempt certain small insurers from entering into reimbursement contracts and paying reimbursement premiums--authority that is not at issue in this case. The first sentence

of the statute contains a general grant of rulemaking authority and a specific grant of authority--in fact, a statutory directive--for SBA to adopt rules specifying interest on delinquent remittances from insurers. The statutory directive concerning interest is not at issue in this case.

65. The second sentence starts with "[s]uch rules." This reference is to rules in the first sentence. The breadth of some of the provisions of the second sentence, such as the requirement that such rules must conform to the intent of the Legislature in establishing FHCF, clarifies that "such rules" applies to all rules referenced in the first sentence. SBA enjoys so little discretion in setting interest rates on delinquent remittances that a reminder that its interest rate rules must conform to the overall intent of the Legislature would make little sense.

66. "Such rules" thus modifies the general grant of rulemaking authority. In itself, the general grant of rulemaking authority is, in the above-cited words of the flush language of section 120.52(8), "necessary but not sufficient to allow an agency to adopt a rule." The question thus arises whether the provisions of the second sentence of section 215.555(3) constitute grants of additional authority or limitations upon the grant of general authority in the first sentence. If the latter, the insufficiency of the general grant of authority in the first

sentence would not support limitations because the initial grant of general authority is effectively a nullity.

67. But, even if the provisions of the second sentence constitute grants of additional authority, they would fail to meet the standards of the flush language of section 120.52(8). The first provision of the second sentence provides that such rules must conform to the Legislature's intent in establishing the fund: i.e., provide a stable and ongoing source of reimbursement to insurers. If this is a grant of additional authority, it is too general to support the street address rules or any rules except possibly a rule of interpretation to be applied to other rules. The same is clearly true of the third and fourth provisions of the second sentence: the third sentence provides that the rules must be general so they can be applied flexibly, and the fourth sentence provides that the rules must conform to sound insurance practices. These statutory provisions clearly do not authorize SBA to adopt a wide range of substantive rules providing a stable and ongoing source of reimbursement, affording insurers flexibility, and conforming to sound insurance practices.

68. In this context, the limitations of the second provision in the second sentence are more apparent. Such rules must enhance FHCF's ability to respond to claims for covered events. Arguably, the street address data fit within this

provision because FHCF's access to this data will maximize the reinsurance that FHCF may obtain for the funds that it has available to purchase reinsurance. The problem is in the general nature of the second provision. If it authorizes the demand for street address data, it equally authorizes reimbursement premium surcharges or demands for personal guarantees from insurers' principals for overdue remittances, either of which would also enhance FHCF's ability to respond to claims for covered events. The statutory reference to enhancing FHCF's ability to respond to claims for covered events is too broad to constitute a specific power to support rulemaking requiring the disclosure of street address data.

69. Although not cited as a source of rulemaking authority, section 215.555(4)(f) confers a specific power or duty and authorizes SBA to adopt rules pursuant to such power or duty. This statute authorizes a rule to establish standards for SBA to conduct audits to ensure that insurers have properly reported insured values and losses for which FHCF has paid reimbursements. Specifically, the statute directs SBA to "inspect, examine, and verify the records of each insurer's covered policies . . . according to standards established by rule for the specific purpose of validating the accuracy of exposures and losses required to be reported under the terms and conditions of the reimbursement contract." This statute involves covered property,

but authorizes SBA merely to adopt standards for the inspection, examination, and verification of records, not standards for what records, such as street address data, must be maintained or transmitted to FHCF.

70. For these reasons, the street address rules are an invalid exercise of delegated legislative authority because SBA has exceeded its grant of rulemaking authority.

71. The flush language of section 120.52(8) provides that SBA may adopt rules only that "implement or interpret the specific powers and duties granted by the enabling statute." SBA has specific powers and duties underlying its demand for data concerning covered property. Section 215.555(5)(c) provides that, by September 1 of each year, each insurer shall notify SBA of its "insured values under covered policies by zip code," and, "on the basis of these reports, [SBA] shall calculate the premium due from the insurer, based on the formula adopted under paragraph (b)." The level of locational detail authorized by statute is zip code, not street address. The specific power or duty of SBA is to demand annually zip code data, not street address data. Consistent with the statutory authority vested in SBA to demand zip code data, section 215.557 provides that "reports of insured values under covered policies by zip code . . . are confidential."

72. Respondents rely on other statutory provisions covering different matters and claim that these provisions are the law implemented by the street address rules. The problem with this argument is that these provisions do not directly apply to the annual requirement to report information about covered property. By stretching these more general provisions to the specific, clearly applicable provisions of section 215.555(5)(c), Respondents create a tension between these general provisions and the more specific provision, where the plain reading of the general provisions leaves no hint of a conflict. Statutes providing FHCF to adopt an annual reimbursement contract or a reimbursement premium formula, to issue post-loss revenue bonds, to obtain reinsurance, and to enter into various financial transactions constitute specific powers and duties to be implemented by rules--covering those matters, not the disclosure of street address data.

73. For these reasons, the street address rules are an invalid exercise of delegated legislative authority because the rules enlarge, modify, and contravene the law implemented.

ORDER

It is ORDERED that:

1. The street address rules are invalidated as an invalid exercise of delegated legislative authority.

2. The Administrative Law Judge reserves jurisdiction on the request of Petitioner and Intervenor for attorneys' fees and costs under section 120.595(3). The Administrative Law Judge will address this issue only if, within 30 days of the date of this Final Order, Petitioner or Intervenor files with DOAH a petition for attorneys' fees and costs.

DONE AND ENTERED this 9th day of October, 2015, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
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Filed with the Clerk of the
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this 9th day of October, 2015.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. Courtesy