State and Federal Government and Administrative Practice Exam Questions

Disclaimer: the following questions are provided to the public as examples of the types of questions that appear on the state and federal government and administrative practice certification exam, as well as, the subject areas that are tested. None of these questions will appear, as worded, on future exams.

1. Florida Home Builders Association v. Department of Labor and Employment Security, 412 So.2d 351 (Fla.1982) established a three part test for an association to demonstrate standing to challenge a proposed rule under Florida's APA that is still applied to determine associational standing. **Which of the following is NOT a part of that test?**

(A) A substantial number of the association's members, although not necessarily a majority, are substantially affected by the challenged rule.

(B) The association or its members will suffer a special injury differing in kind from that suffered by the public generally.

(C) The relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

(D) The subject matter of the rule must be within the association's general scope of interest and activity.

ANSWER: B. Though the department in Home Builders argued that a "special injury" standing rule should be adopted, this was not included in the three-part test enunciated by the court. Fla. Home Builders Ass'n, 412 So.2d at 353. Discussion of "special injury" does arise in associational standing cases, however. See, e.g., NAACP, Inc. v. Fla. Bd. of Regents, 863 So.2d 294 (Fla. 2003) (court disagrees with the First District's conclusion that the NAACP had failed to assert any impact of the rule amendments different in kind than the amendments' impact on all Florida citizens).

(A), (C), and (D) are incorrect because they are the three requirements that were established in Home Builders.

2. A state agency, by statute, provides an internal process for awarding public employee advancement scholarships. Disappointed applicants may request review of their applications by supervisors of the initial decision-makers and appeal to an internal agency review committee. **In the absence of further statutory provisions, a disappointed applicant may:**

(A) Seek review in circuit court within 30 days.

(B) Appeal to the district court of appeal within 30 days.

(C) Seek review pursuant to the Florida Administrative Procedure Act (APA) within 21 days.

(D) Appeal to the agency head within 21 days.

ANSWER: C. Gopman v. State, Dep't of Educ., 908 So. 2d 1118 (Fla. 1st DCA 2005). (A), (B), and (D) are incorrect because an agency's free-form preliminary procedures do not supplant the APA or nullify its provisions by implication. When read in pari materia, the provisions of the scholarship statute and the APA can both be applied and the process of determining scholarship recipients is not specifically exempt from the APA.

3. The Board of Osteopathic Medicine (Board) proposed to adopt new regulations establishing certain practice standards for osteopathic physicians, a number of which qualified as small businesses. After publishing notice of the proposed rule, the Board held one workshop to take written and oral comments of interested parties. Following that workshop, several regulated persons requested that the Board hold a follow-up workshop to address issues that arose during the course of the first workshop, including allegations by the regulated parties that the rule would put osteopathic physicians at a financial disadvantage. The Board chose not to hold a second workshop and issued a written statement that it believes allowing parties to submit post-workshop written comments is sufficient. No statement of estimated regulatory costs (SERC) was requested nor was one prepared by the Board. After consideration of the comments submitted at the workshop and in writing following the workshop, the Board determined that a modification to the published version of the proposed rule is appropriate to address one of the concerns raised by a participant at the workshop. **Which of the following is correct?**

(A) The Board is not required to prepare a SERC.

(B) The Board's failure to hold a second workshop when requested in writing was a material error in procedure that may be the basis to invalidate the rule if challenged.

(C) The Board may modify the proposed rule after publication of notice where the modification is supported by materials or information provided to the agency on or before the date of the final hearing.

(D) The Board met the requirements of chapter 120, Florida Statutes, regarding workshops by orally stating its reasons for not holding a workshop requested by an affected person.

ANSWER: C. Agencies are required to prepare a SERC where the proposed rule would affect a small business. § 120.54(3)(b)(1) and § 120.541, Fla. Stat. Again, workshops are encouraged but are not required, even where an affected party

requests that one be held. The agency is required to provide a written statement of why the workshop is not considered to be necessary. That statement is not final action and may not be challenged. The failure to provide such a statement, however, may be a material error in procedure. § 120.54(2)(c), Fla. Stat. The Board may modify a proposed rule after publication of notice where it is based on the record of public hearing pursuant to section 120.54(3)(d).

4. The Rubbish Ringers, Inc. (RR), a construction and demolition debris disposal company, has a contract with the City of Ft. Myers to transport, store, and dispose of construction and demolition (C & D) debris generated by Hurricane Charlie within the city limits. RR obtained a solid waste facility permit from the Department of Environmental Protection (DEP) authorizing it to conduct these activities. In the course of transporting, storing, and disposing of C & D debris, RR also transported, stored, and disposed of contaminated soil. Claiming that RR's permit did not authorize RR to transport, store, or dispose of contaminated soil, DEP issued a cease and desist order and a notice of violation to RR, advising RR of its right to request a formal administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes. RR filed a petition for formal administrative hearing with DEP and also filed an action in the circuit court seeking a declaratory judgment that it is authorized under its permit to collect and dispose of contaminated soil and injunctive relief ordering DEP to allow it to resume its collection and disposal of contaminated soil. The circuit court issued an order granting the relief RR requested. **On appeal, the district court of appeal should:**

(A) Affirm, because the circuit court retains its jurisdiction to grant declaratory and injunctive relief in this matter.

(B) Affirm, because the administrative remedy, while available, is not adequate.

(C) Reverse, because the circuit court lacks jurisdiction to grant the requested relief.

(D) Reverse, because RR failed to exhaust administrative remedies.

ANSWER: D. In Department of General Services v. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977), the court explained that circuit courts retain jurisdiction to issue declaratory, injunctive, and extraordinary relief. However, judicial relief may be had without exhausting administrative remedies only in extraordinary and narrowly defined circumstances. See also Criterion Ins. Co. v. Dep't of Ins., 458 So. 2d 22 (Fla.

1st DCA 1984); Communities Fin. Corp. v. Fla. Dep't of Envtl. Regulation, 416 So. 2d 813 (Fla. 1st DCA 1982).

5. Under the Florida Administrative Procedure Act and the Uniform Rules of Procedure, an evidentiary hearing conducted pursuant to sections 120.569 and 120.57, Florida Statutes, may be available during the course of agency rulemaking (the so-called "draw out" procedure) under certain circumstances. Under the procedure set forth in the Uniform Rules of Procedure, **which of the following statements is NOT true?**

(A) The person requesting an evidentiary hearing must allege that they are substantially affected by the rulemaking.

(B) The person requesting the evidentiary hearing must demonstrate that the rulemaking procedure does not provide an adequate opportunity to protect his or her substantial interests.

(C) The agency is required to transmit the request to DOAH for a formal administrative hearing.

(D) The agency may not file the proposed rule for adoption until a request for an evidentiary hearing has either been denied or the issues raised in the request have been resolved by the agency.

ANSWER: C. Florida Administrative Code Rule 28-103.005(6) provides that the evidentiary proceeding may be conducted by either an administrative law judge or the agency head or a member thereof.

6. Are classification rulings by local offices of a federal agency afforded deference by federal courts under Chevron U.S.A. vs. Natural Resources Defense Council?

(A) Yes, if the rulings are within the area of expertise recognized by Congress in the relevant enabling statute.

(B) Yes, but only if the rulings are adopted following a formal process and published by the federal agency local office.

(C) No, unless there is express or implied Congressional intent that the federal agency will issue local classification rulings that have the force of law.

(D) No, local offices of federal agencies can never have authority to bind a federal agency.

ANSWER: C. In United States v. Mead Corporation the Court held that "The authorization for classification rulings, and Custom's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here." 533 U.S. 218, 231, 121 S. Ct. 2164, 2173 (2001).

(A) is incorrect because it articulates an element of review under Skidmore v. Swift & Co.

(B) is incorrect because the Court in Mead rejected the notion that a more formal process alone would have entitled the classification rulings to Chevron deference.

(D) is incorrect because the Court in Mead is clear that the defect is not that the rulings were made by the local office, but that there was no authority to issue classification rulings of local application that have force of law.

7. A federal agency's enabling statute does not explicitly provide for judicial review of rulemaking. The agency published its final rule in the Federal Register on Tuesday, February 1, 2000. On Friday, February 3, 2006, an industry association filed suit, alleging that the rule, on its face, is arbitrary or capricious, or otherwise not in accordance with law. **The industry association further alleges that actual notice of the rule was sent by the agency to an incorrect address, and was not received until Thursday, February 3, 2000. Is the suit timely?**

(A) Yes, a federal rule is always subject to a challenge as facially invalid.

(B) No, the federal agency's enabling statute does not provide for judicial review.

(C) Yes, the federal statute of limitations has not elapsed.

(D) No, the federal statute of limitations has elapsed.

ANSWER: D. because the applicable statute of limitations is six-years, and under all facts, more than 6 years have elapsed. See 28 U.S.C. § 2401(a), discussing "Time for commencing action against United States" provides, in relevant part, as follows: (a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues..." Notably, unlike an ordinary statute of limitations, section 2401(a) is a condition attached to the government's waiver of sovereign immunity, and as such, must be strictly construed. United States v. Mottaz, 476 U.S. 834 (1986).

On a facial challenge to a regulation, the limitations period begins to run when the agency publishes the regulation in the Federal Register. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); Dunn-McCampbell Royalty Interest v. Nat'l Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997); Nutt v. Drug Enforcement Admin., 916 F.2d 202, 203 (5th Cir.1990); Friends of Sierra Railroad, Inc. v. Interstate Commerce Comm'n, 881 F.2d 663, 667-68 (9th Cir.1989), cert. denied, 493 U.S. 1093 (1990); see also 44 U.S.C. § 1507 (filing a document in the Federal Register is sufficient to give

notice of the contents to any person subject to or affected by it); Shiny Rock Mining Corp. v. United States, 906 F.2d 1362, 1364 (9th Cir. 1990) (limitations period triggered by Federal Register publication because "[p]ublication in the Federal Register is legally sufficient notice to all interested parties or affected persons regardless of actual knowledge or hardship resulting from ignorance." (citations omitted)). Moreover, even using the industry's own acknowledgment of receipt of actual notice, the industry group's filing is one day late – and thus is still not timely. See, e.g., Kollios v United States, 512 F.2d 1316 (1st Cir. 1975) (finding that "after date of mailing" within 28 U.S.C. section 2401 refers to that date, and not day after, as trigger date.)

8. Which of the following is a CORRECT statement about the application of the First Amendment freedom of speech clause to public employees?

(A) When public employees make statements pursuant to their official duties, they are not speaking as citizens; therefore, they are not protected from employer discipline.

(B) So long as statements made by public employees are in connection with their employment, they are free to engage in "fair comment and criticism" free from employer discipline.

(C) In determining whether a public employee's speech is protected by the First Amendment, the fact that the employee expresses his views inside his office, rather than in a public forum, is a determining factor.

(D) A and C.

ANSWER: A. Garcetti v. Ceballos, 126 S. Ct. 1951 (2006). This is the specific holding of this case.

B is a figment of my imagination.

C is set out to the contrary in Garcetti.

9. Which of the following are public records under chapter 119, Florida Statutes, Florida's Public Records Act?

(A) Disciplinary reports maintained by a private national association used by a Florida state agency to regulate licensees doing business in Florida.

(B) Records maintained by a Florida state legislator relating to public "town hall" meetings conducted by the legislator at various places around her district.

(C) Case files and records relating to administrative operation of the court maintained by a Florida circuit court clerk.

(D) Records maintained by Florida's Parole Commission related to the exercise of clemency.

ANSWER: A. Reports maintained by a private national association but used by a state agency in regulating licensees constitute public records subject to chapter 119, Florida Statutes. Op. Att'y Gen. Fla. 98-54 (1998).

(B) is not correct because the Legislature is not an "agency" under chapter 119, Florida Statutes. Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992).

(C) is not correct because records of the courts are under the oversight and control of the Supreme Court, not the Legislature. Times Publishing Company v. Ake, 660 So. 2d 255 (Fla. 1995).

(D) is not correct because Parole Commission files related to the exercise of executive clemency power are independent of the Legislature. Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993).

10. Which of the following is NOT among the exemptions from the inspection or copying requirements pertaining to public records listed in chapter 119, Florida Statutes, Florida's Public Records Act?

(A) All social security numbers held by an agency.

(B) Any information revealing the identity of a confidential informant or a confidential source.

(C) Bank account numbers and debit, charge, and credit card numbers held by an agency.

(D) Information related to an employee's qualifications and job performance.

ANSWER: D. Although some personnel information on certain classes of employees is exempted in section 119.071(4), Florida Statutes, this does not include qualifications or job performance information, and there is no general exemption for agency personnel records. Michel v. Douglas, 464 So. 2d 545 (Fla. 1985).

(A) is not correct; §119.071(5)(a)3., Fla. Stat.

(B) is not correct; §119.071(2)(f), Fla. Stat.

(C) is not correct; §119.071(5)(b), Fla. Stat.

Sample Essay Question

Disclaimer: This sample essay question includes both state and federal law administrative issues combined. In your exam, these state and federal administrative law issues will be separated.

Instructions: This question tests your knowledge of adjudication, rulemaking, and rule challenges under the Florida Administrative Procedure Act and the Federal Administrative Procedure Act. Section I, which consists of Questions 1 and 2, tests your knowledge under the Florida Administrative Procedure Act. Section II, which consists of Questions 3 and 4, tests your knowledge under the Federal Administrative Procedure Act.

Section I - Florida Administrative Procedure Act

The Florida Exotic Fruit Company (Company) owns and operates growing and processing operations for tropical exotic fruits in south Florida and is a licensed processor.

Chapter 605, Florida Statutes, regulates the growing, harvesting, processing, packing and marketing of tropical fruit within the State of Florida.

Section 605.10 creates the Florida Tropical Fruit Commission (Commission) and provides:

605.10 Power of Florida Tropical Fruit Commission - The Commission shall have the power to:

(1) Adopt rules establishing state grades and minimum maturity and quality standards for tropical fruit, including food products containing 20 percent or more tropical fruit or tropical fruit juices, and governing the distribution or handling in any manner of tropical fruit or tropical fruit products;

Issue orders implementing such regulations, including emergency orders;

(2) Establish procedures for the issuance of certificates of exemption to parties governed by an order where such party establishes that the marketing order is unduly burdensome or confiscatory;

(3) Confer with and cooperate with other legally constituted authorities of other states and of the United States for the purposes of obtaining uniformity in the administration of federal and state marketing orders, regulations or other applicable requirements.

Citing the provisions of Section 605.10, Florida Statutes, the Commission has adopted a rule limiting the types and amounts of fungicides that may be used by growers in the State which provides in part:

5X-1.10 Minimum Criteria for Handling of Tropical Fruit

(1) Prior to shipping any tropical fruit within or exported from the State, the licensed grower or processor shall assure that all fruit has been washed to remove all traces of pesticides or fungicides from the surface of the fruit.

(2) All fruit shall be tested in accordance with the standards set forth in section 5X-1.15 to assure that it has no traces of pesticides or fungicides before packing of fruit into containers for shipment.

(3) Any fruit shipped within or exported from the State must be free of any traces of pesticides or fungicides.

In addition, the Commission has adopted an order, Order No. 07-001 (Order) applicable to all growers and processors, requiring that all tropical fruit products exported from the State be shipped in containers meeting certain minimum requirements. In particular, the Order prohibits the storage or shipment of any fruit or fruit product in containers that have been exposed at any time to any pesticides or fungicides.

The Company acquires a certain percentage of its fruit from growers in South America who ship the fruit into Florida. The Company then processes that fruit together with domestic fruit into a juice concentrate. The Company complies with the Order regarding shipping fruit products out of the State. However, it is concerned that fruit imported from South America may be arriving in containers that do not meet the requirements of the Order and that such fruits may be contaminated with fungicides upon arrival, due either to the application of fungicides to fruit or the contamination of the shipping containers. Because it is not clear whether the final fruit product may be affected by possible fungicide use by South American growers or shipment of fruit in nonconforming containers, the Company is concerned that it may not be fully complying with the Commission's rules and Order.

QUESTION 1

The Company has retained you to advise them as to any actions they may take under the Florida Administrative Procedure Act to address such concerns. Please discuss each of your recommendations to the Company and the basis for such recommendation.

QUESTION 2

The Commission issues an Emergency Order under Section 605.10(2), Florida Statutes, to the Company, stating:

The Commission has determined that the Florida Exotic Fruit Company (Company) is in violation of Rule 5X-1.10 and Commission Order 07-001 because it has processed fruit that may be contaminated with pesticides or fungicides. The Company has not established that fruit imported from South America and used by the Company in processing tropical fruit juice has been tested to assure that it has no traces of pesticides or fungicides. Further, the Company has not established that fruit imported from South America was shipped in containers that were not exposed to pesticides or fungicides.

Please advise the Company of any bases for challenging the emergency order under the Florida Administrative Procedure Act.

Section II – Federal Administrative Procedure Act

Congress has enacted a law regulating the importation of tropical fruit into the United States. Specifically, 7 United States Code (U.S.C.) § 6000 provides as follows:

7 U.S.C. § 6000 Regulation of Tropical Fruit Importation into United States.

(1) Tropical fruits are an important food that is a valuable part of the human diet.

(2) The production of tropical fruit plays a significant role in the Nation's economy, in that tropical fruits are produced by hundreds of tropical fruit producers, distributed through thousands of wholesale and retail outlets, and consumed by millions of people throughout the United States and foreign countries.

(3) Tropical fruit must be of high quality and handled properly, to ensure that the benefits of this important product are available to the people of the United States; and

(4) Tropical fruit moves in interstate and foreign commerce, and tropical fruit, whether produced in the United States or in foreign countries, that is placed in commerce and that does not meet high quality standards poses a health risk to consumers and directly burdens or affects interstate commerce.

(5) It is therefore declared to be the policy of Congress that it is in the public interest to authorize the United States Department of Agriculture (USDA) to establish a program for regulating the importation, inspection, and movement of tropical fruit in interstate commerce.

Pursuant to the authority granted in 7 U.S.C. §6000, the USDA has adopted regulations, codified in Title 7 of the Code of Federal Regulations (C.F.R.), governing the importation of tropical fruit into the United States. In pertinent part, those regulations provide:

7 C.F.R. 1000 -- Importation of Tropical Fruits

The Federal Inspection Service of the U.S. Department of Agriculture is designated as the governmental inspection service for the purpose of certifying the grade and size of tropical fruits that are imported into the United States.

1000.2

(a) The Federal Inspection Service shall conduct an inspection of each container of tropical fruit imported into the United States and, for tropical fruit that meets the applicable grade and size standards, shall issue an Inspection Certificate to the entity importing the tropical fruit, certifying that the tropical fruit meets those standards.

(b) Each Inspection Certificate issued by the Federal Inspection Service shall set forth the following information:

(i) The name and place of the inspection;

(ii) The name of the entity importing the fruit;

(iii) The name of the entity shipping the fruit;

(iv) The quantity of the commodity inspected; and,

(v) The compliance with all applicable regulations governing the grade and size of the tropical fruit.

(c) For tropical fruit that does not meet the applicable grade and size standards, the Federal Inspection Service shall issue a Denial Order. The issuance of such Order shall mean that the fruit fails to meet applicable grade and size standards.

1000.3 Any tropical fruit that fails to meet the applicable grade and size standards may be exported or disposed of under the supervision of the Federal Inspection Service. The cost of such exportation or disposal shall be borne by the entity importing the tropical fruit.

Recently, in response to perceived concerns by domestic mango producers that South American mango producers enjoy an unfair competitive advantage because they are subject to less stringent environmental regulations in producing their mangoes, which are then imported into the United States, the USDA proposes to adopt new regulations imposing standards on shipping containers used for importing tropical fruit into the United States. The proposed regulations, published in the Federal Register, provide the following:

7 C.F.R. 1000.4 All tropical fruit imported into the United States from any foreign country shall be shipped in containers meeting the following standards:

(a) Each container shall be composed of cardboard or wood at least one centimeter (1 cm) in thickness and shall be lined with paper that has been manufactured without the use of bleaching agents containing chlorine dioxide.

(b) Containers shall not be treated with, exposed to, manufactured with, or otherwise come into contact with any types of pesticides or fungicides as

defined in the Federal Insecticide, Fungicide, and Rodenticide Act, U.S.C. § 136.

7 C.F.R. 1000.5 The Federal Inspection Service shall certify, by issuance of an Inspection Certificate issued pursuant to 7 C.F.R. § 1000.2, that the container in which the tropical fruit being imported meets these standards. Containers not meeting these standards, and the tropical fruits being imported in those containers, shall be exported or disposed of and under the supervision of the Federal Inspection Service. The cost of such exportation or disposal shall be borne by the entity importing the tropical fruit.

QUESTION 3

The Company imports South American mangoes for use in its Tropic-GoGo juice products. The Company is concerned that the proposed regulation will have a significant adverse impact on its ability to import South American mangoes. The Company retains you to take any and all appropriate legal actions to prevent the proposed regulations from going into effect. Please identify and discuss any and all actions pursuant to the Federal Administrative Procedure Act that you would take to prevent the proposed regulations from going into effect.

QUESTION 4

Please assume, for purposes of this question (Question 4) only, that 7 C.F.R. §§ 1000.4 and 1000.5 are in effect. Please also assume that the following grade and size standards (codified in 7 C.F.R. 9000) are applicable to mangoes imported into the United States:

7 C.F.R. 9000 The following standards shall apply to mangoes imported into the United States from any foreign country:

(a) Grade: Mangoes imported into the United States shall be graded as A, A+, or A++. No mangoes graded below A shall be imported into the United States.

(b) Size: Mangoes imported into the United States shall be a minimum size of twelve (12) centimeters in length and eight (8) centimeters in width. Mangoes not meeting these minimum size standards shall not be imported into the United States.

After the newly adopted regulations (7 C.F.R. §§ 1000.4 and 1000.5) go into effect, the Company enters into a purchase and shipping contract with Mango Mama, a Venezuelan company that produces and ships mangoes for importation into the United States. Shortly thereafter, the Federal Inspection Service Office in Miami issues a Denial Order to the Company, denying an Inspection Certification for the importation of a large shipment of mangoes produced and shipped by Mango Mama pursuant to its contract with the Company. The Denial Order states that the basis for the denial of the Inspection Certificate is that the containers in which the mangoes are being imported do not meet the standards of 7 C.F.R. Part 1000 and Part 9000. And specifically, that the containers are not composed of materials adequate to prevent contamination or adulteration of the mangoes during shipping.

The Company retains you to challenge the Federal Inspection Service's Denial Order. Please identify and briefly discuss any and all actions, and the basis in federal law for each, you would take to challenge the Federal Inspection Service's Denial Order denying the Inspection Certification for the importation of Mango Mama's mangoes.

ESSAY 1 -MODEL ANSWER

Section I -- Florida Administrative Procedure Act

Question 1 -- Company has retained you to advise them as to any actions they may take under the Florida APA to address their concerns that they may not be fully complying with the Tropical Fruit Commission's rules and Order (see fact narrative). Please discuss each of your recommendations to the Company and your basis for such recommendation.

1. **Declaratory Statement under s. 120.565, F.S.**

The first option would be to seek a declaratory statement under s. 120.565, F.S. The declaratory statement statute's purpose is to enable a person substantially affected by a statutory provision or an agency's rules or orders to obtain agency's opinion as to the applicability of the statute, rule, or order with respect to the petitioner's particular set of circumstances.

Here, the Company is uncertain whether its practice of using imported tropical fruit that may have been exposed to fungicides in preparing its juice concentrate violates the agency's rules and Order, which establish minimum handling criteria for tropical fruit shipped within or exported from the state and prohibit the exportation of tropical fruit from the state in containers exposed to pesticides or fungicides. The agency clearly has jurisdiction over the subject of the declaratory statement request - *i.e.,* whether a particular business practice violates the agency's rules and Order.

Additionally, the Company is a "substantially affected" person who has standing to request the declaratory statement. The Company is a tropical fruits and fruit juice processor licensed by the state. If it were to violate the agency's rules and Order, it is

subject to potential enforcement action by the agency consisting of a range of sanctions, including license suspension or revocation. As such, the Company would be able to demonstrate that it will suffer an injury in fact of sufficient immediacy entitling it to the declaratory statement, and that the subject matter of the requested declaratory statement falls within the zone of interest of the agency's rules and Order.

Moreover, none of the restrictions on agency issuance of declaratory statements established in case law appear applicable in this instance. Specifically, the declaratory statement request would seek the agency's opinion with respect to specific circumstances personal to the Company; it would not seek an opinion with respect to a third party other than the Company. The request also would not require the agency to issue a declaratory statement so broad that it constitutes a statement of general applicability. (Note, however, the Florida Supreme Court, in *Department of Business and Professional Regulation v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999), stated that even if a declaratory statement petition asks a question that requires the agency to respond with a statement of general applicability, the agency is nonetheless to issue the declaratory statement and should also commence rulemaking to codify the statement of general applicability as a rule.) Additionally, the petition would seek a determination regarding the petitioner's current and future compliance with the law, and would not seek a declaratory statement with respect to past conduct. Also, the facts stated in the exam question do not indicate that the subject matter of the petition is the subject of related pending litigation, so that restriction does not appear applicable in this case. Finally, per the facts stated in the exam question, the petition would seek the agency's interpretation of its rules and Order as applied to the Company's circumstances, and does not appear to require the agency's opinion on a constitutional issue (over which the agency lacks jurisdiction to opine).

For these reasons, the declaratory statement option is available and appears to be the preferred option for the Company to determine whether its current business practice violates the agency's rules and Order.

With respect to the declaratory statement process, once a petition is filed, the agency must issue or deny the petition within 90 days. The agency must publish notice of receipt of the declaratory statement in the first available issue of the Florida Administrative Weekly, setting forth the name of the petitioner, date the petition was received, the statutory provisions, rules, or orders on which the petition seeks a declaratory statement, and the contact information for obtaining a copy of a declaratory statement petition. The agency may conduct a hearing on the petition, and may rely on the statement of facts in the petition without taking a position as to the validity of the facts. Substantially affected persons may intervene into the declaratory statement proceeding up to 10 days before a hearing is held on the petition. The declaratory statement is binding on the agency and the petitioner, and any intervenors, to the extent the facts on which the declaratory statement is based are accurately stated in the petition and the declaratory statement.

The agency's order issuing the declaratory statement or denying the petition constitutes final agency action that is appealable to the District Court of Appeal pursuant to Section 120.68, F.S.

2. **Petition for Rulemaking to Clarify the Existing Rule**

The Company also may file a petition for rulemaking with the agency pursuant to Section 120.54(7), F.S., which authorizes any person regulated by an agency or having a substantial interest in an agency rule to file a petition to adopt, amend, or repeal an agency rule. The Company is regulated by the Commission, and, further, has a substantial interest in amending the existing rule to clarify that its current business practice does not violate the rule. The Company would file the petition to initiate rulemaking with the agency, setting forth facts sufficient to demonstrate it is regulated by the agency and is substantially affected by the rule, identifying the rule to be amended, and setting forth the reason for the requested amendment. Within 30 days of

the filing of the petition, the agency must either initiate rulemaking pursuant to Section 120.54, F.S., or deny the petition and provide a written statement of its reasons for denying the petition. The agency's order denying the petition for rulemaking is final agency action subject to appeal to the District Court of Appeal pursuant to Section 120.68, F.S.

3. **Petition for Variance/Waiver**

If the Company *knew* that it could not meet the rule requirements, it could file a petition with the Commission, seeking a variance or waiver of the rule pursuant to s. 120.542, F.S.

The petition for variance/waiver must allege facts sufficient to establish that the Company is subject to the rule, and that application of the rule causes the Company to a substantial hardship or would violate principles of fairness. To meet the "substantial hardship" standard, the Company must allege facts demonstrating that the rule causes it to suffer an economic, technical, legal, or other hardship. To meet the "violates principles of fairness" standard, the Company must allege facts showing that the rule's application affects the Company in a manner significantly different from the way it affects other similarly situated persons subject to the rule. The Company also must demonstrate that the underlying purpose of the statute authorizing the rule will be achieved by means other than compliance with the rule. If these standards are met, s. 120.542 provides that the requested variance/waiver *shall* be granted.

The agency is required to publish notice of the petition in the Florida Administrative Weekly within 15 days of receipt, providing for interested persons to submit comments on the request within 14 days. The statute also establishes a

"sufficiency" process under which the agency can request additional information and the petitioner may provide such information, until the agency determines it has sufficient information to make a decision whether to grant or deny the requested variance/waiver. The agency must issue or deny the variance/waiver within 90 days of receipt of the petition or the last timely requested information, and the agency's decision must be based on competent substantial evidence in the record of the proceeding. If the agency does not meet this timeframe, the petition is deemed approved. If the agency denies the petition, the Company may request an adjudicatory hearing under ss. 120.569 and 120.57 within 21 days of denial of the petition.

Note, since s. 120.542 only provides for variances and waivers to *rule* requirements, this remedy is not available with respect to the Order, and therefore may not provide a completely adequate remedy for the Company. However, given that the facts provided in the question indicate that the Company is concerned about its *use* of imported fruit that may not meet the rule restrictions, and do not indicate that the Company ships its juice products in containers exposed to pesticides/fungicides, the Company may not be violating the Order under any circumstances, so the variance/waiver remedy may be a viable option (again, assuming the Company knew it did not meet the rule standards).

4. **Unadopted Rule Challenge under Section 120.56(4), F.S.**

The Company also may consider challenging the Order as an unadopted rule pursuant to Section 120.56(4), F.S. Under that statute, any person substantially affected by an agency statement of general applicability that has not been adopted as a rule may seek an administrative determination that the statement violates s. 120.54(1), which requires that agencies codify their statements of general applicability as soon as practicable and feasible.

Here, because the Company is regulated by the Order, it may be considered a "substantially affected" person having standing to challenge the Order as an unadopted rule. Courts have recognized the existence of a real and immediate injury in fact for purposes of having standing to challenge rules when the rule directly regulates the challenger's activity. *Coalition of Mental Health Professions v. Department of Professional Regulation*, 546 So. 2d 27 (Fla. 1st DCA 1989); see, *Ward v. Board of Trustees*, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995). Note, as discussed above (in the variance/waiver discussion), the facts provided in the question indicate that the Company is concerned about its *use* of imported fruit that may not meet the *rule* restrictions, and do not indicate that the Company ships its juice products in containers exposed to pesticides/fungicides (the subject of the Order). Thus, the Company may not be violating the Order. Under these circumstances, the "regulated = injury in fact" case law should provide helpful authority for establishing the Company's standing to challenge the Order as an unadopted rule.

In the proceeding, the Company must establish, by a preponderance of the evidence, that the statement constitutes a rule as defined in s. 120.52(8), and that the agency has not adopted the statement as a rule under s. 120.54. Here, the Order appears generally applicable to all licensed tropical fruit growers and processors, including producers of tropical fruit food products, and establishes substantive law requirements with which these regulated entities must comply. Under the facts provided, the Order has not been adopted as a rule. Accordingly, it appears to violate s. 120.56(4), F.S.

If the ALJ enters a final order that all or part of the Order violates s. 120.54(1), the agency must immediately discontinue all reliance on the statement or any substantially similar statement as a basis for agency action until rules addressing the subject are adopted. If, prior to the final hearing in the proceeding, the agency publishes a notice of rulemaking under s. 120.54(3), the notice operates to stay the proceeding pending adoption of the statement as a rule; the stay will remain in effect

while the agency proceeds expeditiously and in good faith to adopt the statement as a rule.

Of final note: unlike certain agencies (such as DACS), the Commission's orders are not exempt from the definition of rule (and, consequently, the rulemaking requirement) under s. 120.80, F.S., and the Commission's statute as provided, in the question, does not exempt its orders from the definition of rule or the rulemaking requirement.

5. **Challenge to Adopted Rule under Section 120.56(3), F.S.**

The Company also may consider challenging the adopted rule establishing the standards about which the Company has questions regarding its ability to comply, under Section 120.56(3), F.S. This proceeding would be initiated by filing a rule challenge petition with the Division of Administrative Hearings (DOAH), and would challenge the substantive validity of the rule on the ground that it is an invalid exercise of delegated legislative authority, as that term is defined in Section 120.52(8), F.S. The rule would be presumed valid, and the Company would have the burden, by a preponderance of the evidence, to show that the rule is an invalid exercise of delegated legislative authority.

Under the facts provided, it is questionable whether the invalidity grounds set forth in Section 120.52(8) would warrant invalidation of the rule. The statute grants the agency broad authority to adopt "quality" standards for tropical fruit and food products containing tropical fruit and fruit juice, and to adopt rules "governing the distribution or handling, in any manner, of tropical fruit or tropical fruit products, as well as authority to issue emergency orders to implement these regulatory standards. The minimum criteria set forth in Rule 5X-1.10 appear to constitute quality standards and standards governing the distribution and handling of tropical fruit and fruit products. Accordingly, it is questionable whether the challenger could show that the rule exceeds its grant of

rulemaking authority or enlarges, modifies, or contravenes the specific provisions of law implemented. Note, however, with respect to the fruit testing requirement in the rule, it may be argued this establishes a *performance* requirement, whereas the statute only authorizes the agency to establish standards regarding quality, distribution, and handling. Accordingly, this portion of the rule may be susceptible to invalidation on the ground it enlarges, modifies, or contravenes the specific provisions of law implemented.

The rule appears to establish adequate standards for agency decisions, and, in fact, specifically references a test standard established by rule as the test to which fruit must be subjected before it is packed into containers for shipping. Under the facts, it is difficult to determine whether the rule is arbitrary or capricious. Arbitrary means that the rule is not supported by logic or necessary facts, and capricious means that the rule is irrational or not supported by reason. Presumably, the agency had a factual basis for adopting the rule, and the rule is logically or rationally related to those facts, and in any event, the challenger would have the burden to demonstrate the rule is arbitrary or capricious. The facts set forth in the question do not provide any information on which it may be argued that the rule imposes costs on regulated persons, counties, or cities that could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objective.

An additional potential impediment to this option may be the Company's lack of standing to challenge the rule. To have standing, the Company must demonstrate it is substantially affected by the rule. To demonstrate it is substantially affected, the Company must demonstrate that the rule causes it to suffer a direct, immediate injury in fact, and that the injury falls within the zone of interest the rule challenge proceeding is designed to protect. Here, the Company may have difficulty meeting the "injury in fact" standing requirement. The facts in the exam question state that the Company "is concerned" that it may not meet the rule. Under these circumstances, the agency may defend against a rule challenge by arguing that the alleged injury is hypothetical or speculative. However, the Company may be

determined to have standing to challenge

the rule by virtue of being regulated by the rule. Courts have recognized the existence of a real and immediate injury in fact for purposes of having standing to challenge rules when the rule directly regulates the challenger's activity. *Coalition of Mental Health Professions v. Department of Professional Regulation*, 546 So. 2d 27 (Fla. 1st DCA 1989); see, *Ward v. Board of Trustees*, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995). Pursuant to this line of cases, the Company may be determined to have standing to challenge the existing rule.

Assuming the Company were to choose this option and were able to demonstrate standing, a hearing would be conducted within 30 days by a DOAH Administrative Law Judge (ALJ) (unless the Company, agency, and any other parties waived this time period). Within 30 days after the hearing, the ALJ will issue a final order determining that the challenged rule is either valid or invalid. If the ALJ determines the rule is invalid, it becomes void following the period for appealing the agency action under Section 120.68, F.S., or, if the agency action is appealed, following resolution of the appeal.

<u>Administrative Adjudicatory Hearing under Sections 120.569 and 120.57, F.S.</u>

At this point, the Company is uncertain whether its practices violate the agency's rules or Order, and the agency has not, to date, taken any enforcement action against the Company. Since the agency has not taken any proposed agency action against the Company, an adjudicatory hearing under ss. 120.569 and 120.57 is not an available remedy (at this time).

***If* the agency were to take enforcement action, the receipt of the administrative complaint (assuming such complaint sufficiently provided a notice of rights) would constitute the Company's "clear point of entry" to file a petition under ss. 120.569 and**

120.57, challenging the agency's proposed action as set forth in the administrative complaint.

The petition would be filed with the agency within 20 days of receipt of the administrative complaint. The agency would first review it for facial sufficiency with s. 120.54(5) and the Uniform Rule 28-106.201, Florida Administrative Code, and, if it determined the petition was not in substantial compliance with these provisions or was untimely filed, would dismiss the petition. Dismissal must be at least once with leave to amend unless it conclusively appeared from the petition's fact that the defect cannot be cured (including a determination that the petition was untimely filed). If the petition is in substantial compliance with the requirements of s. 120.54(5) and Rule 28-106.201, F.A.C., the agency must refer the petition to DOAH within 15 days of filing of the petition.

DOAH will assign an ALJ, who will conduct an evidentiary hearing pursuant to s. 120.57(1), F.S. In the hearing, the agency will have the burden of proof, either by a preponderance of the evidence or by clear and convincing evidence, depending on the proposed sanctions. In such a hearing, the ALJ would be able to consider any of the rule challenge issues identified above, since s. 120.57(1)(e)(1) provides that an ALJ "not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. "Following the conclusion of the hearing, the ALJ will issue a Recommended Order containing findings of fact and conclusions of law, and relinquish jurisdiction back to the agency. The Company and the agency are authorized to file exceptions to the Recommended Order, and to file responses to the exceptions. The agency will issue the final order, subject to the limitations set forth in Section 120.57(1)(l), with respect to modifying or rejecting the ALJ's findings of fact and conclusions of law. The final order must contain findings of fact and conclusions of law and must respond to the exceptions, and must determine the final agency action.

The agency's final order is appealable to the District Court of Appeal, pursuant to Section 120.68, F.S.

Again, this option is not available to the Company at this time because the Commission has not taken any agency action with respect to the Company.

6. Declaratory Judgment Action in Circuit Court

The Company likely could not obtain a declaratory judgment in circuit court regarding the interpretation of the agency's rules and Order as applied to the Company. This is because the agency likely would assert -- and the circuit court likely would agree

-- that the Company must exhaust administrative remedies. Unless the Company were able to demonstrate that its circumstances were such that one or more of the exceptions to the exhaustion requirement applied, the circuit court would likely decline to exercise its jurisdiction and would dismiss the declaratory judgment action on the basis of failure to exhaust administrative remedies. (Here, it appears the declaratory statement is an available, adequate administrative remedy.)

The circuit court also may dismiss the declaratory judgment action on the basis that primary jurisdiction rests over the subject matter - i.e., regulation of tropical fruit and food products and distribution thereof -- rests with the agency.

Question 2 -- Agency has issued an Emergency Order. Advise Company re: bases for challenge under the Florida APA.

Answer:

There are two potential bases for challenging the Emergency Order (EO), depending on the specific action the agency proposes to take per the EO: (1) a challenge to an immediate final order (IFO) issued under s. 120.569(2)(n), F.S., or (2) a challenge to an order issued under s. 120.60(6), suspending, limiting, or restricting the Company's license.

To issue an order under s. 120.569(2)(n), the agency head must find an immediate danger to the public health, safety, and welfare requiring entry of an IFO. The statute requires the agency to recite *with particularity* the facts on which the findings in the IFO are based. Case law has interpreted this standard to require the agency to allege specific facts showing the existence of an imminent threat, specific incidents of irreparable harm to the public interest, and that the use of this extraordinary statutory mechanism is warranted. *Bertany Ass'n for Travel & Leisure, Inc. v. Florida Department of Financial Svcs.*, 877 So. 2d 854 (Fla. 1st DCA 2004). Additionally, the IFO must be narrowly tailored. *Id*.

There are two means for challenging an IFO issued under s. 120.569(2)(n): (1) appealing the final order to the District Court of Appeal under s. 120.68 on the basis that the agency has not alleged facts establishing the existence of an immediate danger to the public health, safety, and welfare; and (2) challenging the correctness of the agency's action in issuing the IFO, pursuant to ss. 120.569 and 120.57, F.S.

Here, the agency has not alleged any facts establishing the existence of an immediate danger to the public health, safety, or welfare that would support its entry of the EO. Accordingly, it appears that an appeal under s. 120.68 would yield the desired result of obtaining a determination that the EO is invalid and should be dissolved.

In a challenge to the merits of the IFO under ss. 120.569 and 120.57, *agency* would have the burden of proof by clear and convincing evidence to establish facts supporting whatever sanction is imposed by its EO. *Evans Packing Co. Department of*

***Agriculture and Consumer Svcs.*, 550 So. 2d 112 (Fla. 1st DCA 1989). Here, the EO is based on allegations that *the Company* has not established that its imported fruit used in its juice products has been tested to assure no traces of pesticides/fungicides, and that the imported fruit was not shipped in containers exposed to pesticides/fungicides. The EO improperly attempts to shift the burden of proof in this enforcement proceeding to the Company with respect to compliance with the testing and shipping requirements. In enforcement proceedings, the agency has the burden of proof and will not prevail in the ss. 120.569 and 120.57 hearing unless it sustains its burden of proof.**

For an agency to issue an emergency order imposing license sanctions under s. 120.60(6), F.S., the agency must state in writing, specific facts and reasons for finding an immediate serious danger to the public health, safety, or welfare, and its basis for concluding that the emergency suspension, restriction, or limitation of a license is fair under the circumstances. The agency's action under the order also must provide the same procedural protection as given by law and the state and federal constitutions, and must be narrowly tailored to take only the action necessary to protect the public interest.

With respect to emergency orders issued under s. 120.60(6), again, there are two remedies: (1) appeal to the District Court of Appeal under s. 120.68; and (2) challenging the correctness of the agency's action with respect to the license. In the appeal of a 120.60(6) EO, the court will review the EO to determine whether the agency has stated specific facts supporting the finding of an immediate danger to the public health safety and welfare, whether the emergency order is necessary under these specific facts, and whether the procedure provided in the EO is fair. As in a s. 120.569 and 120.57 challenge to an IFO under s. 120.569(2)(n), the burden of proof in a s.120.569 and 120.57 challenge to an EO issued under 120.60(6) would be on the agency, by clear and convincing evidence.

In addition to either of the foregoing challenge options under ss. 120.569(2)(n) or 120.60(6), I would seek a stay of the agency's action pending appeal, which would require filing a request for stay of agency action with the agency, or by filing a request for stay with the appellate court by showing good cause.

The Company retains you to take any and all appropriate legal actions to prevent the proposed regulations from going into effect. Please identify and discuss any and all actions pursuant to the Federal Administrative Procedure Act that you would take to prevent the proposed regulations from going into effect.

To begin with, following the APA process for informal notice and comment rulemaking, pursuant to the APA Sec. 553, the Company should file comments providing opposition to the proposed rules. In particular, the Company should provide specific information about why they would be ineffective, or excessively expensive, so that the materials become part of the administrative record in any subsequent rule challenge.

The Federal Inspection Service's (FIS) proposed rule is not a mere policy statement, and meets the requirements of a substantive legislative rule, because it has the force and effect of law, was adopted based upon APA procedures, and will have immediate and final consequences that will injure the Company's business practices. Therefore, upon publication in the Federal Register, the rule can be subject to a rule challenge within the first 30 days before the effective date. See, APA Sec. 553(d). Stopping the effectiveness of the rule will be difficult, but an effective strategy includes advance preparation of, and concurrent filing, of a complaint and a motion for a preliminary injunction (PI) in a U.S. District Court.

On the PI "likelihood of success" analysis, the Federal APA requires the court to set aside and remand any rule that is found to be arbitrary or capricious or otherwise not in accord with law. 5 U.S.C. Sec. 706. In this case, Company can argue that 1000.5,

related to bleaching agents and pesticides, exceeds the legal and statutory authority under which rule is proposed, pursuant to 5 U.S.C. Sec. 553(d) and 706(2)(c), because the rules are not within the scope of the importation, inspection and movement of tropical fruit. In fact, Rule 1000.5 affect a completely different regulatory scheme (which FIS, as an "inspection service," is presumably unqualified to implement) and other federal agencies bear responsibility for FIFRA implementation.

In addition, the Company should ask the agency in its comments, and the court in the motion for a PI, for relief pending review of the rule, pursuant to the APA Sec. 705. Both the agency and the court have authority to postpone the effective date of action, pending judicial review, when necessary to prevent irreparable injury – which the company will suffer if the import of its mangos is interfered with, causing them to rot during transport and before delivery to market, and further causing substantial economic harms.

Finally, depending upon the adequacy of the response to the Company's comments, additional opportunities may arise to challenge the final rule as violating the Regulatory Flexibility Act, 5 U.S.C. 601-612. For example, FIS will need to adequately respond to the Company's expressed concerns in the responsive comments, which should include a discussion of unfair burdens upon small business, the significant likelihood of inconsistent local interpretations of the rules, and potentially available alternatives.

The Company retains you to challenge the Federal Inspection Service's Denial Order. Please identify and briefly discuss any and all actions, and the basis in federal law for each, you would take to challenge the Federal Inspection Service's Denial Order denying the Inspection Certification for the importation of Mango Mama's mangoes.

Pursuant to Sec. 554(a)(3), FIS will argue that its Denial Order are proceedings in which decisions rest solely on inspections, tests, or elections, and thus, will claim that no hearing was needed. However, that Denial Order is still a final agency action, subject to a Federal APA challenge as arbitrary or capricious or otherwise not in accordance with law, pursuant to Sec. 706. On its face, the order says that the mango containers were inadequate "to prevent contamination or adulteration" but these terms do not reflect the requirements of the existing statutes or rules. The FIS regulations provided for containers of certain thickness and materials, and minimum mango sizes; the Denial Order makes no findings on these points, and provides no explanation. Similarly, the FIS regulations require no treatment with or exposure to prohibited compounds regulated by FIFRA; again, the Denial Order provides no explanation. In fact, the denial order does not even cite any specific regulations that were violated, instead, making only generic references to Parts 1000 and 9000. In the absence of these essential statements and factual findings, the agency has failed to demonstrate a "rational connection between the facts found and the decision made." See, Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989). Thus, the denial order was arbitrary or capricious or in violation of law. Even if, pursuant to CFR 1000.2(c), FIS argues that "The issuance of such Order shall mean that the fruit fails to meet applicable grade and size standards," on its face, the Denial Order does not mention either size or grade, and instead, bases its conclusion upon contamination or alteration.

Furthermore, to the extent that the FIS Miami office might only have offered an initial decision subject to D.C. approval, then, pursuant to the APA Sec. 557, the Company was given no opportunity to respond, nor offer any exceptions to the decisions or recommended decisions.