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***“The first
workshop on the
proposed rules is
scheduled for July
13, 2015 from
9:30 a.m. to
11:30 a.m., at the
Department of
Elder Affairs,
4040 Esplanade
Way,
Tallahassee, FL
32399.”***

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Health Care, Environmental, Governmental Relations,
Zoning – Land Use, Administrative, Regulatory,
Business, Corporate & Bid Protest Law

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July 7, 2015

New ALF Rules May Be Coming Soon



The Department of Elder Affairs is holding a public workshop to consider new regulations that may have a significant impact on Florida assisted living facilities (“ALFs”). Significant changes being discussed at the workshop include changes to record keeping requirements, staff competency and training requirements, medication practices, and patient safety and quality of care processes. The first workshop on the proposed rules is scheduled for **July 13, 2015** from 9:30 a.m. to 11:30 a.m., at the Department of Elder Affairs, 4040 Esplanade Way, Tallahassee, FL 32399. There is currently no draft proposed rule.

The Rulemaking Process

Rulemaking is required and governed by the Florida Administrative Procedure Act, which provides: “rulemaking is not a matter of agency discretion.” A grant of rulemaking authority is necessary, but not sufficient to allow an agency to adopt a rule. Rulemaking also requires a specific law to be implemented. An agency may only adopt rules that implement or interpret the specific powers and duties granted by the enabling statute. An invalid exercise of delegated legislative authority is an action that goes beyond the powers, functions, and duties delegated by the Legislature.

Agencies’ rulemaking authority is also invalid if it fails to adhere to strict procedural requirements. For example, not less than 28 days prior to the intended adoption, amendment, or repeal of any rule (other than an emergency rule) an agency must give notice of its intended action, including an explanation of the purpose and effect of the proposed action, the full text of the proposed rule or amendment, and a summary of

the proposed rule or amendment. The notice must include an estimate of the regulatory cost of implementation.

Where there is a likely impact on small businesses, the agency must consider each of the following methods for reducing the impact: (1) establishing less stringent compliance or reporting requirements in the rule; (2) establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements; (3) consolidating or simplifying the rule’s compliance or reporting requirements; (4) establishing performance standards or best management practices to replace design or operational standards in the rule; and (5) exempting small businesses, small counties, or small cities from any or all requirements of the rule.

Within 21 days of the publication of the notice, any affected person may request a public hearing. When an agency receives such a request it must hold at least one public hearing. In many instances the agency will hold multiple public hearings and may allow written comments to be submitted at or after the public hearing. Substantially affected persons also have the right to challenge a proposed rule under Florida Statute §120.56 as an invalid exercise of delegated legislative authority and have the right to a formal hearing before the Division of Administrative Hearings (“DOAH”). The timing of filing a challenge to a proposed rule varies based upon several criteria, the most common being dependent upon whether a hearing was requested or whether there are amendments to the proposed rule that require it to be republished. In most instances, challenges to proposed rules should either be filed within the same 21 day period or within 10 days after the public hearing is held.

To initiate a formal challenge, a substantially affected person must file a petition at DOAH. Within 10 days after receiving the petition, the

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matter must be assigned to an administrative law judge who shall conduct a hearing within 30 days and render a final decision within 30 days from the end of the hearing, unless these time frames are extended by agreement of the parties or for good cause, which is routine.

These hearings are de novo, meaning the agency has no presumption of correctness in its proposed rule. The standard of proof is a preponderance of the evidence. Hearings are conducted in the same manner as other 120.569 and 120.57, hearings, with one important exception, the administrative law judge's order shall be a final agency action instead of a recommendation to be considered by the agency in a final order. The petitioner and the agency whose rule is challenged shall be adverse parties and other substantially affected persons may join the proceedings as intervenors in support of or against the proposed rule. There are opportunities to challenge a proposed rule after it becomes final, but the burden of proof becomes more difficult to challenge an existing rule than a proposed rule.

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Be a Part of the Process

Rulemaking is the opportunity for facilities that will be affected by the regulatory changes to protect their interests and have input into the rules that will be implemented. Providers know better than the agencies that regulate them the true impacts of the proposed regulation. FALA and other associations are an important part of the process, but they may not know and understand the unique issues your facility faces with regard to proposed regulatory changes. The best regulations are fully vetted through multiple workshops, where stakeholders from diverse backgrounds and facility sizes participate.

Geoffrey D. Smith is a shareholder in the law firm of Smith & Associates, and has practiced in the area of health care law for over 20 years.