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MEMORANDUM

TO: Rose Naff, CEO

FROM: Wilbur E. Brewton 

DATE: February 16, 2011

RE: Summary of Legal Status Regarding Sovereign Immunity
File No: 125030.0001

Florida Health Choices, Inc. ("Health Choices") is an instrumentality of the state subject to extensive governmental control. Factors considered by courts in determining if an entity is an instrumentality of the state include, state control over the Board of Directors, decision making authority, sovereign immunity, and other similar factors showing state control over the entity. PRIDE v. Betterson, 648 So. 2d 778, 780 (Fla. 1st DCA 1995) (concluding that Prison Rehabilitative Industries and Diversified Enterprises, due to sufficient governmental control over its day-to-day operations, is an instrumentality of the state as a matter of law); Gambetta v. PRIDE, 112 F. 3d 1119 (11th Cir. 1997). Even though the Legislature decided to establish Health Choices to run somewhat independently of the state for efficiency sake, Health Choices is still considered an instrumentality of the state when examined in light of the factors set forth in Betterson and Gambetta.

Health Choices is a creature of statute. Health Choices is the recipient of State appropriated funds to accomplish its statutory purpose. Section 409.910, Florida Statutes, creates the Health Choices as follows:

(11) CORPORATION.--There is created the Florida Health Choices, Inc., which shall be registered, incorporated, organized, and operated in compliance with part III of chapter 112 and chapters 119, 286. The purpose of the corporation is to administer the program created in this section and to conduct such other business as may further the administration of the program.

(a) The corporation shall be governed by a 15 member board of directors consisting of:

1. Three ex office, nonvoting members to include:
 - a. The Secretary of Health Care Administration or a designee with expertise in health care services.
 - b. The Secretary of Management Services or a designee with expertise in state employee benefits.
 - c. The commissioner of the Officer of Insurance Regulation or a designee with expertise in insurance regulation.
2. Four members appointed by and serving at the pleasure of the Governor.
3. Four members appointed by and serving at the pleasure of the President of the Senate.
4. Four members appointed by and serving at the pleasure of the Speaker of the House of Representatives.

Thus, Health Choices, like government agencies, is subject to the Florida Public Records Act and the Florida Government in Sunshine Law requiring its records and meetings be open to the public, and subject to the code of ethics of public officers and employees pursuant to Chapter 112, Florida Statutes.

Section 409.910(11)(d), Florida Statutes, also provides that the board of directors serves without salary, but shall be reimbursed for expenses incurred in the performance of official duties in accordance with Section 112.061, Florida Statutes. Section 409.910, Florida Statutes, dictates the duties and obligations of Health Choices, and components of the Health Choices Program in which it was created to administer, and the Office of Insurance Regulation has oversight and review authority regarding certain aspects of the Health Choices Program.

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Finally, Section 409.910(12), Florida Statutes, provides that Health Choices submit an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives documenting the corporation's activities in compliance with the duties delineated in Section 409.910, Florida Statutes.

Pursuant to Section 768.28, Florida Statutes, which governs state sovereign immunity, "state agency" is defined as including "corporations primarily acting as instrumentalities of the state." Health Choices Board of Directors is appointed by the Governor, and both branches of the Florida legislature. Health Choices' actions in administering Section 409.910, Florida Statutes, are overseen by the Office of Insurance Regulation of the Financial Services Commission, the Governor, and the Legislature pursuant to state law. Taken as a whole, these constraints and requirements statutorily placed on Health Choices constitute extensive state control over essential day-to-day operations. Review of Health Choices in relation to the above factors requires the conclusion, as a matter of law that Health Choices acts primarily as an instrumentality of the state for purposes of sovereign immunity. See Betterson, 648 So. 2d at 780; Gambetta v. PRIDE, 112 F. 3d 1119 (11th Cir. 1997).

Attached is an Addendum 1 to the proposed Agreement with TD Bank, which basically denotes that notwithstanding anything contained in the Cash Management Master Agreement, Florida Health Choices is not waiving sovereign immunity. It is my recommendation that this Addendum be added to the proposed Agreement.

WEB/art
Enclosure

Addendum 1

Florida Health Choices, Inc. ("HEALTH CHOICES") administers the Florida Health Choices Program pursuant to the provisions of Section 409.910, Florida Statutes. As such, notwithstanding any other provisions of this Agreement, the following provisions apply:

1. HEALTH CHOICES is an instrumentality of the State of Florida, and is extended sovereign immunity. Therefore, HEALTH CHOICES cannot comply with any indemnification or hold harmless clauses in any contract pursuant to Section 768.28, Florida Statutes. HEALTH CHOICES agrees that any and all damage to or loss, where such damage is due solely to the negligence or intentional misconduct of HEALTH CHOICES or its employees/agents, shall be the sole responsibility of HEALTH CHOICES. However, nothing in this Agreement should be construed as a waiver of sovereign immunity and the limits, terms, and conditions of Section 768.28, Florida Statutes, shall apply.

2. No action under this Agreement shall conflict, nor shall any provision in this Agreement be interpreted to conflict with the limitations set forth in Section 409.910, Florida Statute.

3. Pursuant to Section 409.910(11), Florida Statutes, HEALTH CHOICES's books and records are subject to Chapter 119.07(1), Florida Statutes, and Article I, Section 24 of the Florida Constitution regarding open records with certain exceptions. In the event that HEALTH CHOICES is requested or becomes legally compelled to disclose any information designated as confidential under this Agreement to a court, administrative agency, or other governmental body, HEALTH CHOICES shall provide the Bank with written notice thereof within five (5) calendar days of such event so that Bank may seek a protective order or other appropriate remedy. If such protective order or other remedy is not obtained, HEALTH CHOICES agrees to furnish only that portion of the confidential information which is legally required to be furnished, and to exercise best efforts to obtain assurance that confidential treatment will be accorded such information. In no event, however, shall HEALTH CHOICES be deemed to be liable under this Agreement for compliance with any such request, order, or requirement of any court, administrative agency, or other governmental body.

TD Bank _____

Florida Health Choices _____