

## Notice of Emergency Rule

### DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

#### Division of Alcoholic Beverages and Tobacco

RULE NO.:        RULE TITLE:

61AER16-1        Definition of Established Price

**SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:** There exists an immediate danger to the public health, safety and welfare due to a final order concluding that the Division of Alcoholic Beverages and Tobacco's implementation of s. 210.25(13), F.S., qualifies as an unadopted rule. On March 3, 2016, the Division of Administrative Hearings issued a final order in consolidated case number 15-6108RU and 15-6148RU, holding that the Division's inclusion of "non-OTP items" such as federal excise tax and shipping within the wholesale sales price is an unadopted rule. This final order is unexpected and will be appealed. The Division of Alcoholic Beverages and Tobacco believes that it has implemented the plain meaning of a statute which has been judicially recognized as clear. The Division has not imposed a requirement not specifically required by s. 210.25(13), F.S.

An emergency rule is necessary during the pendency of the appeal as taxpaying distributors' reliance on the final order will have a substantial and irreparable effect on revenues that are intended for the Health Care Trust Fund within the Agency for Health Care Administration. The Division remitted approximately sixty seven million dollars from the collection of surcharge on tobacco products to the Agency for Health Care Administration in fiscal year 2014-15 and is projected to remit approximately seventy million dollars to the Agency for Health Care Administration in fiscal year 2015-16. These funds are used to pay Medicaid providers for medical assistance related services, including hospice, hospital in-patient care, physician and health care practitioner services, pre-paid health plans, prescribed medicine and drugs, nursing home care, and pre-paid long term care. Without an emergency rule, the final order will, at a minimum, affect these revenues by fifty percent. As such, the final order qualifies as an exigent circumstance resulting in an immediate danger to the public health, safety and welfare.

The emergency rule defines "established price", as used in s. 210.25(13), F.S., and concerns the assessment of tobacco products. The language of the emergency rule substantially comports with the Division's longstanding understanding and interpretation of s. 210.25(13), F.S., which has been adopted in large part by HB 7099 (2016), a taxation bill which has been passed by the House and approved by the Senate Finance and Tax Committee. The language of HB 7099, as presently drafted, would become effective on July 1, 2016.

#### REASONS FOR CONCLUDING THAT THE PROCEDURE USED IS FAIR UNDER THE CIRCUMSTANCES:

The procedure being employed is fair as the final order is effective immediately. The emergency rule does not seek to assess taxpayers in excess of the Division's plain reading of s. 210.25(13), F.S., and it preserves the Division's longstanding interpretation of s. 210.25(13), F.S., which provides funding for the aforementioned health related programs. Other tobacco product taxpayers will not be harmed by the filing of this emergency rule as they will remit tax and surcharge on other tobacco products as they have since the inception of the tax and surcharge. In the event that the final order is upheld, other tobacco product taxpayers will be able to apply for a tax refund. The emergency rule does not restrict entry into the profession, has no effect of the availability of services to the public, does not have an impact on job retention, and does not restrict employment seekers.

**SUMMARY OF THE RULE:** This emergency rule defines "established price" as used in s. 210.25(13), F.S., and concerns the assessment of tobacco products. The rule states that the established price of a tobacco product includes all costs of sale between a manufacturer and a distributor; the plain meaning of the statute.

**THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS:** Renita Walton-Hayes, Operations Review Specialist, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399, (850)488-0062.

#### THE FULL TEXT OF THE EMERGENCY RULE IS:

61AER16-1 The term "established price" as used in Section 210.25(13), F.S., means the full price paid by the distributor to the manufacturer to acquire the tobacco product, including charges by the manufacturer for the cost of materials, the cost of labor and service, charges for transportation and delivery, the federal excise tax, and any other charge, even if the charge is listed as a separate item on the invoice paid by the distributor.

Rulemaking Authority 210.75 FS. Law Implemented 210.25 FS. History—New 3-9-16.

THIS RULE SHALL TAKE EFFECT IMMEDIATELY UPON FILING WITH THE DEPARTMENT OF STATE  
UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.

EFFECTIVE DATE: March 9, 2016

EXPIRATION DATE: June 7, 2016