

November 9, 2010

To: FBWA Members

From: Mitch Rubin, Executive Director

Re: Excise Tax Payments by EFT—DABT Demand or Request

Facts: A licensed distributor of alcoholic beverages remitted his excise tax payment to the DABT by corporate check sent through the U.S. mail. The DABT has informed the distributor by email that such payments in the future must be by electronic funds transfer (EFT). The DABT cited section 561.111, Florida Statutes, as its authority for requiring such payment by EFT.

Issue: Whether the DABT may require a distributor to remit excise taxes by EFT?

Brief Answer: No. While section 561.111, Florida Statutes, does provide that the agency may require remittance by EFT for distributors who remitted over \$50,000 in the prior year, the DABT has never adopted the rule needed to implement the statute. Without the adoption of a rule, the agency has unbridled discretion to require it of some distributors and not of others and under some circumstances but not under others.

Analysis: Section 561.111, Florida Statutes, provides:

561.111 Payment of taxes by electronic funds transfer.—

The Secretary of Business and Professional Regulation may require a person who manufactures or distributes alcoholic beverages within the state to remit by electronic funds transfer any tax imposed under chapter 563, chapter 564, or chapter 565 if the taxpayer is subject to tax and if the total of such taxes he or she paid in the prior year amounted to \$50,000 or more.

Under the modern Florida Administrative Procedures Act—specifically section 120.54(1) Florida Statutes--an agency vested with discretion to require an act must adopt a rule to implement the statute. In other words, the agency may adopt a rule that requires manufacturers and distributors to remit by EFT, but the agency can not just say so by email. Nor may an agency announce the policy to all distributors by letter, email or posting on its Website. This would be non-rule policy, which is prohibited.

Manufacturers and distributors are entitled to know, for example, which months comprise the “prior year” (calendar or fiscal), which taxes count toward the \$50,000 threshold, and which of the multiple taxes that a distributor pays must be by EFT.

Conclusion: The agency may not require excise tax payment by EFT because it has failed to adopt an administrative rule implementing this statute. A distributor may,

however, choose to treat the agency's requirement as a request to be paid by EFT and comply with the request.