STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PREMIER GROUP INSURANCE COMPANY, Petitioner, vs. OFFICE OF INSURANCE REGULATION AND THE FINANCIAL SERVICES COMMISSION, Respondents.	)	Case No. 12-1201RU

FINAL ORDER

On May 22 and 23, 2012, a duly-noticed hearing was conducted in Tallahassee, Florida, before Administrative Law Judge Lisa Shearer Nelson, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Kenneth Tinkham, Esquire
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STATEMENT OF THE ISSUES

At issue in this case is whether Respondents, the Office of Insurance Regulation ("OIR" or "the Office") or the Financial Services Commission ("the Commission") have developed agency statements of general applicability meeting the definition of a rule in section 120.52(10), Florida Statutes (2011), governing its review, evaluation, recalculation, and disposition of excessive profits filings submitted pursuant to section 627.215, Florida Statutes (2011). If so, it must be determined whether those statements have been adopted as rules pursuant to the rulemaking process in section 120.54(1).

PRELIMINARY STATEMENT

On March 19, 2010, the Office issued a Notice of Intent to Issue Order to Return Excess Profits to Petitioner, Premier Group Insurance Company ("Premier" or "PGIC"). Premier challenged the intended agency action, and eventually, on January 13, 2012, filed an Amended Petition for Administrative Hearing Involving Disputed Issues of Fact with OIR. The Office referred the case to the Division of Administrative Hearings the same day, and the case was docketed as DOAH Case No. 12-0439 (hereinafter referred to as "the merits case"). A pivotal issue contested by the parties in the merits case is the Office's treatment of federal income taxes when determining the amount, if any, of excess profits pursuant to section 627.215.

The merits case was scheduled for hearing April 10-11, 2012. However, at the request of the parties, the matter was continued because the parties advised that a Petition Challenging Agency Statements Defined as Rules had been filed with the office and was going to be referred to DOAH, and that the cases should be consolidated for hearing. Accordingly, the merits case was rescheduled for hearing on May 22-23, 2012.

On April 5, 2012, the Petition Challenging Agency Statements Defined as Rules was filed with the Division, and docketed as Case No. 12-1201RU (referred to herein as the unadopted rules case), which is the subject of this Final Order. On April 10, 2012, the cases were consolidated for hearing. The Order of Consolidation stated that the case would be heard May 22-23, as previously noticed in the merits case, unless the parties requested earlier dates.

The hearing on both cases began as scheduled. However, at the beginning of the hearing, the undersigned was notified that Petitioner had discovered a statute not previously contemplated by either party dealing with the allocation of federal income taxes for insurance companies. Because the potential application of this allocation method would materially affect the presentation of the merits case, it was agreed that the merits case would be continued and the unadopted rules case would proceed.

Prior to hearing, the parties submitted a Joint Prehearing Stipulation containing stipulated facts that, to the extent that they are relevant to the unadopted rules case, are incorporated into the Findings of Fact below. At hearing, Petitioner presented the testimony of Robert Prentiss, Esquire, James Watford, Raymond Neff, and Donnie Hunter. Respondent presented the testimony of Donnie Hunter and James Watford. Joint Exhibits 1 through 21 were admitted into evidence, as were Petitioner's Exhibits 1-5, 10, 12, 14, 20-41, and Respondent's Exhibits 1-2, 4, 10-12, 15-18, 20-23, 25, 34, 37-38.

After the hearing, the cases were severed so that a final order could be issued in the unadopted rule challenge, and the merits case was continued until after the issuance of the final order in this case. A two-volume Transcript was filed with the Division on June 4, 2012. Both parties timely filed Proposed Recommended Orders that were carefully considered in the preparation of this Final Order. Both the Transcript and the Exhibits submitted in this case will be retained and included in the record for Case No. 12-0439

FINDINGS OF FACT

1. Premier is a foreign insurer authorized to write workers' compensation insurance in the State of Florida. As a workers' compensation insurer, Premier is subject to the

jurisdiction of the Office. Premier began writing workers' compensation insurance coverage in Florida on January 1, 2005.

2. The Office is a subdivision of the Financial Services Commission responsible for the administration of the Insurance Code, including section 627.215.

3. Section 627.215(1)(a) requires that insurer groups writing workers' compensation insurance file with the Office on a form prescribed by the Commission, the calendar-year earned premium; accident-year incurred losses and loss adjustment expenses; the administrative and selling expenses incurred in Florida or allocated to Florida for the calendar year; and policyholder dividends applicable to the calendar year. Insurer groups writing other types of insurance are also governed by the provisions of this section. The purpose of section 627.215 is to determine whether insurers have realized an excessive profit and if so, to provide a mechanism for determining the profit and ordering its return to consumers.

4. Insurer groups are also required to file a schedule of Florida loss and loss adjustment experience for each of the three years prior to the most recent accident year. Section 627.215(2) provides that "[t]he incurred losses and loss adjustment expenses shall be valued as of December 31 of the first year following the latest accident year to be reported, developed to an ultimate basis, and at two 12-month intervals thereafter, each developed

to an ultimate basis, so that a total of three evaluations will be provided for each accident year."

5. Section 627.215 contains definitions that are critical to understanding the method for determining excess profits. Those definitions are as follows:

a. "Underwriting gain or loss" is computed as follows "the sum of the accident-year incurred losses and loss adjustment expenses as of December 31 of the year, developed to an ultimate basis, plus the administrative and selling expenses incurred in the calendar year, plus policyholder dividends applicable to the calendar year, shall be subtracted from the calendar-year earned premium." § 627.215(4).

b. "Anticipated underwriting profit" means "the sum of the dollar amounts obtained by multiplying, for each rate filing of the insurer group in effect during such period, the earned premium applicable to such rate filing during such period by the percentage factor included in such rate filing for profit and contingencies, such percentage factor having been determined with due recognition to investment income from funds generated by Florida business, except that the anticipated underwriting profit . . . shall be calculated using a profit and contingencies factor that is not less than zero." § 627.215(8).

6. Section 627.215 requires that the underwriting gain or loss be compared to the anticipated underwriting profit, which,

as previously stated, is tied to the applicable rate filing for the insurer. Rate filings represent a forecast of expected results, while the excess profits filing is based on actual expenses for the same timeframe.

7. The actual calculation for determining whether an insurer has reaped excess profits is included in section 627.215(7)(a):

> Beginning with the July 1, 1991, report for workers' compensation insurance, employer's liability insurance, and commercial casualty insurance, an excessive profit has been realized if the net aggregate underwriting gain for all these lines combined is greater than the net aggregate anticipated underwriting profit for these lines plus 5 percent of earned premiums for the 3 most recent calendar years for which data is filed under this section. . .

8. Should the Office determine, using this calculation, that an excess profit has been realized, the Office is required to order a return of those excess profits after affording the insurer group an opportunity for hearing pursuant to chapter 120.

9. OIR B1-15 (Form F) is a form that the Office has adopted in Florida Administrative Code Rule 69O-189.007, which was promulgated pursuant to the authority in section 627.215.

10. The information submitted by an insurer group on Form F is used by the Office to calculate the amount of excessive profits, if any, that a company has realized for the three calendar-accident years reported.

11. The terms "loss adjustment expenses," and "administrative and selling expenses," are not defined by statute. Nor are they defined in rule 69O-189.007 or the instructions for Form F.

12. On or about June 30, 2009, Premier filed its original Form F Filing with the Office pursuant to section 627.215 and rule 69O-189.007. Rule 69O-189.007 requires that a Form F be filed each year on or before July 1.

13. The first page of Form F includes section four, under which calendar year administrative and selling expenses are listed. Section four includes five subparts: A) commissions and brokerage expenses; B) other acquisition, field supervision and collection expense; C) general expenses incurred; D) taxes, licenses and fees incurred; and E) other expenses not included above.

14. Premier subsequently filed three amendments to its Form F filing on December 11, 2009; on June 21, 2010; and on January 13, 2012. In each of its amended filings, Premier included the federal income tax expense attributable to underwriting profit it earned during the 2005-2007 period. These expenses were included under section four(E).

15. No guidance is provided in section 627.215, in rule 60O-189.007, or in the instructions for Form F, to identify what expenses may properly be included in the Form F filing. There is

no indication in any of these three sources, or in any other document identified by the Office, that identifies whether federal income taxes are to be included or excluded from expenses to be reported in a Form F filing. While the form clearly references taxes, licenses and fees incurred under section 4(D), the instructions do not delineate what types of taxes, licenses and fees should be included. The instructions simply state: "for each of the expenses in item 4, please provide an explanation of the methodology used in deriving the expenses, including supporting data."

16. The Office takes the position that federal income taxes should not be reported as an expense for the purpose of determining excess profits. It position, as characterized by Petitioner, is that "in determining what expenses may be deducted in calculating whether and to what extent excessive profits have been realized during the reporting period, the Office shall disallow any deduction for federal income tax or the net effect of federal income tax accrued or paid during the reporting period." According to James Watford, a Department actuary who reviews the excess profits reports, this position has not changed at any time in the last ten years.

17. In August 2009, a petition was filed against the Office challenging the statement stated above as an unadopted rule. FFVA

Mutual Insurance Co. v. Office of Insurance Regulation, DOAH Case No. 09-4193RU.

18. The proceeding in the FFVA case was placed in abeyance based upon the Office's agreement to initiate rulemaking. A Notice of Development of Rulemaking was published and a workshop was conducted on February 22, 2010.

19. On or about June 17, 2010, James Watford circulated proposed changes to rule 69O-189.007, which included changes to the instructions to Form F. Among those proposed changes was the addition of the following statement: "[f]ederal income tax is not to be included as an expense because the 'anticipated underwriting profit' is based on a pre-Federal income tax profit and contingencies factor." This language would have placed the position consistently taken by the Office in the materials incorporated into the rule.

20. On November 17, 2010, a second rule development workshop was held on the proposed changes to rule 69O-189.007. However, no further action toward adopting the proposed revisions took place. At some point, the FFVA challenge was dismissed based upon a settlement between the parties, and the Office never sought approval from the Commission to notice the proposed changes for rulemaking. No further action has been taken to adopt the Office's position through the chapter 120 rulemaking process, and no credible explanation was provided to explain why the Office did

not present the proposed changes to the Commission to obtain permission to notice the proposed rules.

21. Although Mr. Watford testified that the Office has "clearly enunciated [its] position on federal income tax," he acknowledged that it has not been adopted through the rulemaking process. He stated, "before that ever came into existence, we had discussions with companies about the appropriateness of including that the fact that it is already included in the profit factor. . . . It was not published in a rule, because it is -- we thought it was pretty commonly understood by most parties."

22. The Office insists that it is not feasible to consider federal income taxes in the excess profits calculation. It pointed to no real impediment to adopting its position of not considering federal income taxes through the rulemaking process.

23. On January 4, 2011, Governor Scott issued Executive Order 11-1, which temporarily suspended rulemaking for executive branch agencies reporting to the Governor. Executive Order 11-1 was issued 11 months after the Office published its first Notice of Rule Development in February 2010, and did not apply to either the Office or the Commission.

24. The Office also points to publications published by other entities, such as the Actuarial Standards Board and the National Association of Insurance Commissioners ("NAIC"), to support its position that federal income taxes may not be

considered in determining excess profits. However, section 627.215 does not reference any of these publications, and they are not incorporated by reference in the Office's rule regarding excessive profits. Nor do these publications expressly reference what can be considered for excess profits calculations.

25. During the 2012 legislative session, section 627.215 was amended to delete the excess profits filing requirement for workers' compensation insurance. § 7, ch. 2012-213, Laws of Fla. Section 627.213 had not been amended prior to this year since 2003. However, the Office continues to assert its position with respect to the exclusion federal income taxes as an expense to those filings remaining in the "pipeline." Section 627.215 continues to apply to other types of insurance.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56(4), 120.569 and 120.57(1), Florida Statutes (2011).

27. Premier is subject to the jurisdiction and regulation of the Office pursuant to the Florida Insurance Code, and is subject to the provisions of section 627.215.

28. In order to demonstrate standing to challenge the agency statement, Premier must prove that 1) the agency statement of policy will result in a real or immediate injury in fact; and

2) that the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Medicine, 917 So. 2d 358 (Fla. 1st DCA 2005). Premier has standing to challenge the applicability of the agency statement pursuant to section 120.56(4), as the Office has relied on the statement in determining the amount of excessive profits Premier is required to refund, and application of the policy will result in a higher refund amount.

29. The Legislature has determined that agencies must adopt those policies meeting the definition of a rule as rules. As section 120.54(1) provides,

> (1)(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.
>
> 1. Rulemaking shall be presumed feasible unless the agency proves that:
>
> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
>
> b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.
>
> 2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

(b) Whenever an act of the Legislature is enacted which requires implementation of the act by rules of any agency within the executive branch of state government, such rules shall be drafted and formally proposed as provided in this section within 180 days after the effective date of the act, unless the act provides otherwise.

. . . .

30. Section 120.56(4) provides in pertinent part:

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.—

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) . . . If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible or not practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. . . .

> (d) If an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.
>
> (e) If proposed rules addressing the challenged statement are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance on the statement and any substantially similar statement until rules addressing the subject are properly adopted, and the administrative law judge shall enter a final order to that effect.
>
> (f) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under subsection (3) or under any other section of this chapter. This paragraph does not prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

31. Section 120.52(16) defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." An "unadopted rule" is defined as an agency statement that meets the definition of the term rule, but that has not been adopted pursuant to the requirements of section 120.54. § 120.52(20), Fla. Stat.

32. In this proceeding, Premier has the burden of demonstrating by a preponderance of the evidence that the Office's statement regarding the exclusion of federal income taxes as an expense in excess profits filings meets the definition of a rule and that the agency has not adopted the statement by rulemaking procedures. S.W. Fla. Water Mgmt. Dist. v. Charlotte Cnty, 774 So. 2d 903, 908 (Fla. 2d DCA 2001); § 120.56(4)(a) &(b), Fla. Stat.

33. Premier originally identified three agency statements of general applicability in its Petition. At hearing, however, Premier indicated its intention to litigate only one statement of those originally identified. Therefore, this Final Order addresses only the statement that, in determining what expenses may be deducted in calculating whether and to what extent excessive profits have been realized during the reporting period, the Office will disallow any deduction for federal income tax or the net effect of federal income tax accrued or paid during the reporting period.

34. Premier has met its burden with respect to the above-recited agency statement. A statement is considered to be "generally applicable" if it is intended by its own effect to create rights, to require compliance, or to otherwise have the direct and consistent effect of law. State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010) (use of

telephone hotline to allow employees to make a switch in their pension plan did not meet definition of a rule; simply provided a means of exercising an election consistent with the statute); Coventry First, LLC v. Off. Of Ins. Reg., 38 So. 3d 200, 204-205 (Fla. 1st DCA 2010) (statements not unadopted rules because discretionary in their application); Ag. for Health Care Admin v. Custom Mobility, Inc., 995 So. 2d 984, 986 (Fla. 1st DCA 2008)(sampling formula just one of several permitted under statute, and therefore does not have the direct and consistent effect of law); and Dep't of Rev. v. Vanjaria Enter., Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996) (tax assessment procedures in DOR training manuals not simply a direct application of statute; procedures afford no discretion to auditors and creates DOR's entitlement to taxes while adversely affecting property owners).

35. In this case, the agency statement regarding the exclusion of federal income tax as an expense for excess profits filings has, like the audit procedures in Vanjaria, the direct and consistent effect of law.

36. The undisputed testimony at hearing was that the Office has taken the position that federal income tax cannot be considered as an expense in excess profits filings for at least the last ten years. There is no discretion afforded actuaries on this issue in reviewing the filings. However, it cannot be said to be a simple application of the law to the information provided

in the filing, because neither section 627.215 nor rule 69O-189.007 makes any mention of federal income taxes or how they are to be treated.

37. Much of the Office's evidence at hearing focused on the wisdom of not permitting federal income taxes as an expense, and whether its position was consistent with actuarial standards or publications by the NAIC. The Office misses the point. First, the wisdom of the Office's position is not at issue here. What is at issue is the need to adopt the agency statement as a rule so that all those substantially affected by the agency policy have the opportunity for public input and participation in the rulemaking process. Second, in order to rely on other publications, those publications would have to be incorporated by reference. See § 120.54(1)(i) (a rule may only incorporate by reference materials that exist on the day the rule is adopted); Abbott Lab. v. Mylan Pharm., 15 So. 3d 642 (Fla. 1st DCA 2009) (statutes incorporating materials by reference must follow the same standard). Here, nothing in section 627.215 or rule 69O-189.007 incorporates standards adopted by NAIC or the Board of Actuarial Standards and requires their application to excess profits reporting. The overwhelming evidence at hearing demonstrated that the Office takes the position that federal income taxes are not allowed as expenses for the purposes of determining excess profits for workers' compensation insurers;

that this policy has been applied consistently over at least the last ten years; and that there is no discretion in applying this policy.

38. The Office may avoid a finding that the agency policy is an unadopted rule in violation of section 120.56(4) if it can demonstrate that rulemaking was neither feasible nor practicable. The statutory definitions for these terms are provided in paragraph 29, above. In terms of feasibility, the Office clearly had sufficient time to acquire the knowledge and experience reasonably necessary to address the statement by rulemaking. It has been applying the policy consistently for at least ten years. The same policy was challenged in August of 2009, at which time the Office agreed to engage in rulemaking, but abandoned its attempt when the unadopted rule challenge was settled. Draft language incorporating the Office's position was prepared by June of 2010.

39. While Respondents point to Executive Order 11-1 as an impediment to rulemaking, the Order (which did not by its terms apply to the Commission) did not issue until January 4, 2011. By this time, the Office had been on notice via the FFVA challenge for 17 months that there was an allegation that the agency policy was an unadopted rule; the proposed language to amend the instructions to Form F had been distributed within the Office for

more than six months; and two rule development workshops had been conducted.

40. Judge Watkins determined in Strong v. Department of Children and Families, DOAH Case No. 11-535RU (DOAH Mar. 22, 2011), that Executive Order 11-1 was not among the justifications circumscribed by section 120.54(1)(a). Moreover, since the issuance of Order 11-1, an additional 18 months has passed. Section 120.54(1)(b) directs that rules should be adopted within 180 days of the enactment of the statute being implemented. By any calendar, the Office did not act within that period, and it was feasible to do so.

41. Likewise, the Office has not demonstrated that it was not practicable to engage in rulemaking. The Office has consistently maintained its position regarding the exclusion of federal income taxes and applied it across the board. The policy is not of such a narrow scope that the Office could not address it. Indeed, the draft language clearly shows that the policy was simple to articulate.

42. The most troubling aspect of this case at this point in time is the effect of the amendment to section 627.215 during the 2012 session. As of July 1, there will be no more excess profits filings with respect to workers' compensation insurance groups. However, the Office represented at hearing that its policy would continue to apply to filings that are "in the pipeline" at this

point. The Office will not be able to engage in rulemaking, as they will no longer have statutory authority to do so with respect to workers' compensation excess profits filings.

43. However, this dilemma is one of the Office's own making. Had it proceeded with rulemaking in 2010, any issues related to the policy would have been resolved long before the amendment to section 627.215. Having failed to act in accordance with section 120.54(1), Respondents cannot benefit from a dilemma they have created.

44. The statement regarding the exclusion of federal income taxes from expenses reported for excess profits filings is a statement of general applicability meeting the definition of a rule that has not been adopted pursuant to section 120.54(1)(a).

45. Petitioner seeks attorneys' fees and costs pursuant to section 120.595(4)(a) for bringing this proceeding. Section 120.54(4)(a) provides that if an appellate court or an administrative law judge determines that all or part of any agency statement violates section 120.54(1)(a), a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds. No assertion has been made by the Office regarding federal programs.

46. Because the statement violates section 120.54(1)(a), Premier is entitled to recover fees and costs in this action pursuant to section 120.595(4)(a).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Office's statement that federal income taxes may not be included as an expense which may be deducted on Form F for purposes of calculating excess profits under section 627.215 is a statement meeting the definition of a rule that has not been adopted pursuant to section 120.54(1), and the Office must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

Jurisdiction is retained for the purpose of determining, if necessary, the amount of reasonable attorneys' fees and costs. Should the parties be unable to resolve the amount of the fees and costs to be awarded, Premier shall file with the Division of Administrative Hearings a written request for hearing on the issue of the amount of fees. Any such request for hearing must be filed no later than 60 days after the date of this Final Order.

DONE AND ORDERED this 5th day of July, 2012, in Tallahassee, Leon County, Florida.

LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.