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September 27, 2022

Jennifer Ensley
Technical Assistance and Dispute Resolution
Department of Revenue, P.O. Box 7443
Tallahassee, FL 32314-7443
RuleComments@floridarevenue.com

VIA ELECTRONIC DELIVERY

Re: **WRITTEN COMMENT ON THE PROPOSED DEVELOPMENT
AMENDING RULE 12-6.001, FLORIDA ADMINISTRATIVE CODE.
PUBLIC HEARING DATE – SEPTEMBER 21, 2022**

Dear Ms. Ensley:

Please find these comments related to the Notice of Proposed Rule published on August 24, 2022, which proposed to amend rule 12-6.001, Florida Administrative Code (F.A.C.). These comments are provided by the undersigned on behalf of clients including the Florida Chamber of Commerce and the Florida Retail Federation.

I apologize for not providing these comments during the rule hearing last week. I was traveling for work at the time of the scheduled meeting. I attempted to provide comment via the phone line, but there was no option to unmute the line. I then attempted to log directly into the GoToMeeting, but the app would not allow me to connect to the audio.

This proposed rule seeks to update Rule 12-6.001, F.A.C., and codify the Department's process is sending notices electronically, by postal mail, or both, pursuant to section 213.0537, Florida Statutes. The bulk of the additional language clarifies that Notices of Proposed Assessments and

Notices of Proposed Refund Denials may also be sent by email or fax when the Department receives affirmative consent.

The concerning language of the proposed rule is the first full-sentence: “[a] notice is issued when the notice is created and dated.” While a simple statement on its face, the result of this sentence will likely have substantial impacts on taxpayers. As the Department is aware, the “Notices” referenced in this Rule each provide statutory deadlines for responses in order to protect a taxpayer’s Due Process rights. For example, the deadline to informally protest a Notice of Proposed Assessment is 60-days. The deadline to formally protest a Notice of Decision is 60-days. The deadline to contest a Notice of Final Amount is 30-days. When a taxpayer misses these strict deadlines, the assessments become final, and the Department takes the position the taxpayer’s rights are extinguished.

Here, it appears the proposed rule would unilaterally define the issuance date, without any requirement that the Notice be issued and **actually sent** to a taxpayer or the United States Postal Service. This clear language proposed by the Department is problematic.

While we understand that there may have been issues with US mail delivery, specifically during the pandemic, the Department’s sole acts of “creating and dating” a Notice cannot be the only determination of when the Notice was “issued.” There must be some affirmative act that the Department seek to have the Notice actually sent or delivered to a taxpayer. This proposed rule language requires no affirmative steps towards mailing or delivery.

Any unintentional or intentional delay in the service of a notice issued by the Department would result in the taxpayer losing valuable time and potentially its Due Process rights without ever being aware that a Notice was “issued” to them. The proposed rule can only operate in the Department’s favor by *shortening* the amount of time a taxpayer has to respond to a Notice, as the Department has exclusive control of what date is placed on a created Notice. Executive agencies are obligated to protect their interests in a narrowly tailored fashion through the least restrictive alternative when basic rights are implicated. *Dep’t of Law Enforcement v. Real Property*, 588 So.2d 957, 964-5 (Fla. 1991) (citing Art. 1, §9, Fla. Constitution).

Section 72.011, Florida Statutes, provides for the procedural process for contesting a Department audit assessment or denial of a refund. While the Department has rulemaking authority to determine the date on which an assessment or denial of a refund becomes final and the procedures by which a taxpayer must be notified, the Department should not use this proposed rule to abridge a taxpayer’s right to actual Notice or a taxpayer’s ability to timely protest the Department’s

actions. Moreover, the Department's proposed rule suggesting the document must only be "created and dated" to be "issued" appears to be without statutory and common law support.

Florida precedent recognizes that there is a rebuttable presumption of receipt arising **from proof of mailing**. *Home Ins. Co. v. C & G Sporting Goods, Inc.*, 453 So. 2d 121, 123 (Fla. 1 DCA 1984) (there is no administrative provision requiring that the receipt of notice be irrefutably presumed following an allegation of mailing). Here, the Department's proposed rule completely ignores any proof of mailing. Additionally, the Department's proposed rule seeks to define when a Notice is sent, without ever requiring that the Notice be mailed.

Fundamentally, procedural Due Process guarantees notice and an opportunity to be heard at a meaningful time and defend in a meaningful manner when substantive rights are at issue. *See Shelley v. Dep't. of Financial Services*, 846 So. 2d 577, 579 (Fla. 1DCA 2003) (citing various cases that describe Due Process rights). There is no single test used by courts to determine whether Due Processes requirements have been met. *Id.* at 579-80. Instead, Due Process protections apply based on the interests and nature of the process involved. *Id.*, *Massey v. Charlotte County*, 842 So. 2d 142, 146 (Fla. 2DCA 2003). At the bare minimum, the Department must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (holding that published notice of an action was not sufficient to inform individuals whose names and addresses were known).

Here, a taxpayer's interest in both proceedings initiated by the Department to collect additional revenue as well as those brought by a taxpayer against the Department to claim a refund of overpaid taxes are clear and undeniable. Moreover, the nature of the process involved requires substantial protection, as the issuance of each of the aforementioned Notices trigger procedural deadlines requiring taxpayers to affirmatively exercise their protest and/or appellate rights before they are permanently foreclosed from doing so. *See* §72.011, Fla. Stat. These matters are often complicated and novel. Thus, the interests at hand are already straining the various 30-day and 60-day deadline periods without the hinderance of the proposed language, while also being among the most fundamental to the concept of Due Process.

Therefore, we request the Department consider a lower cost regulatory alternative requiring proof of actual mailing. The Department may want to consider the following change:

"A notice is issued when the notice is created, dated, and mailed."

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Anything less than requiring actual mailing could be seen as an unconstitutional infringement on Due Process and arguably arbitrary or capricious position. Therefore, we respectfully request that the Department remove or amend the language at issue to comply with statutory and constitutional requirements.

Sincerely,

A handwritten signature in blue ink, appearing to read "French Brown", with a stylized, flowing script.

French Brown

HFB:ajh