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<h2 style="margin: 0;">Regulatory Analysis Form</h2> <p style="margin: 0;">(Completed by Promulgating Agency)</p> <p style="margin: 0; font-size: small;">(All Comments submitted on this regulation will appear on IRRC's website)</p>	<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p>
<p>(1) Agency Treasury Department for the Board of Finance and Revenue</p>	
<p>(2) Agency Number: 64 Identification Number: 64-5</p>	<p>IRRC Number: 3091</p>
<p>(3) PA Code Cite: 61 Pa. Code §§ 702 and 703</p>	
<p>(4) Short Title: General Provision and Tax and Other Appeal Proceedings</p>	
<p>(5) Agency Contacts (List Telephone Number and Email Address): Primary Contact: Jennifer Langan, Deputy Chief Counsel, 717.787.9738, jlangan@patreasury.gov Secondary Contact:</p>	
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input type="checkbox"/> Proposed Regulation</p> <p><input checked="" type="checkbox"/> Final Regulation</p> <p><input type="checkbox"/> Final Omitted Regulation</p>	<p><input type="checkbox"/> Emergency Certification Regulation;</p> <p><input type="checkbox"/> Certification by the Governor</p> <p><input type="checkbox"/> Certification by the Attorney General</p>
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p>The rulemaking creates new regulations consistent with Act of 2013 (P.L. 270, No. 52), which reorganized the Board of the Finance and Revenue – a tax appeal board - and instituted new procedures for practicing before the Board. There are two chapters of regulations to be implemented <i>General Provisions</i> and <i>Tax and Other Appeal Proceedings</i>. The regulations include: an extensive definition section; filing procedures and deadlines; rules for representation before the Board, <i>ex parte</i> communications, compromise settlement procedures; procedures for the hearing process; and, to request reconsideration.</p> <p>This rulemaking would rescind the prior regulations 61 Pa. Code § 701 <i>et seq.</i></p>	
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p>Tax Reform Code of 1971 - 72 P.S. § 9703.1(m).</p>	
<p>(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.</p>	

No

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The General Assembly passed Act 52 of 2013 which reorganized the Board of Finance and Revenue. The Board of Finance and Revenue is a state tax appeal board that has equitable powers as they can abate penalties and interest for taxpayers when a case warrants. The Board has attorneys, financial professionals, and citizens who practice before it each month. The regulations will provide clarification to the statutes governing practice before the Board specifically, 72 P.S. § 9701 *et seq.* It will also provide specific procedures for those practicing before the Board and streamline processes.

Approximately, 5000 cases a year are filed with the Board.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

Not applicable.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

The Board of Finance and Revenue has been in existence for a long time however, prior to this statutory reorganization Revenue, who administers the tax code, and the Office of Attorney General, which enforces the tax code by acting as Revenue's attorneys in court. Both Revenue and Attorney General had seats on the Board. Therefore, the Board was accused of being biased.

No other state has a two- tiered administrative appeal procedure prior to appealing to court. In Pennsylvania, the first appeal is to the Board of Appeals, an administrative appeal board administered by the Department of Revenue, and then the Board of Finance of Revenue, which is statutorily given equitable powers. The statute made Revenue a party to the proceedings rather than a board member. Further, the Board is more transparent and useful to future taxpayers insofar as orders of the board are now published on our website and there is a more clearly outlined structure. Additionally, the burden on the court system has been relieved which saves the taxpayers and government resources through the Board's new compromise and reconsideration processes.

By making our tax appeals system fairer and more transparent to the taxpayer, we are affording the

taxpayer a better opportunity to understand the tax system.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

These regulations will rescind and supersede the prior regulations governing the Board of Finance and Revenue specifically 61 Pa. Code § 701.

As these regulations are specific to practicing before the Board, we do not foresee them affecting another agency's regulations.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The proposed regulations were sent to the Pennsylvania Institute for Certified Public Accountants, Pennsylvania Bar Association Tax Section, the Pennsylvania Chamber of Business and Industry, and the Pennsylvania Department of Revenue. The groups offered some comments on the regulations which were incorporated to the proposed regulations herein.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

Taxpayers in the Commonwealth who challenge an assessment or a non-refund of corporate, personal, sales, motor fuels tax, property tax/rent rebate, etc. may be affected by the regulation if they wish to seek relief before the Board of Finance and Revenue. However, the regulations would not affect the amount of the tax or how a tax is levied rather, the regulations are simply the procedures for appearing before the Board.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

Taxpayers and the representatives that appear before the Board would be required to comply. The Board adjudicates approximately 5000 cases a year.

(17) Identify the financial, economic and social impact of the regulation on individuals, small

businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

As the regulation simply institutes procedures for appearing before the Board of Finance and Revenue, we do not expect any financial, economic or social impact to anyone.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

There is no expected cost to regulations. The new regulations simply streamline Board processes.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No anticipated costs and/or saving to the regulated community associated with this rulemaking,

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Not applicable.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

As the Board of Finance and Revenue has been provided with compromise authority, many cases will be resolved at the Board thereby eliminating the need for a costly and prolonged appeal to Commonwealth Court. Although a cost savings will be realized, it is difficult to predict how many cases will be resolved early through compromise since the Parties must agree to the compromise.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

There will be no additional legal, accounting or consulting procedures or additional reporting, recordkeeping or other paperwork required.

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

Not applicable.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(23a) Provide the past three year expenditure history for programs affected by the regulation.

Not applicable.

Program	FY -3	FY -2	FY -1	Current FY

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

Not applicable.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

Not applicable.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

After extensive review of other Commonwealth regulations involving hearing boards similar to the Board of Finance and Review, Treasury was careful to draft regulations that were the least burdensome on taxpayers. Additionally, the regulations provide the Board and staff administrative support because the procedures for practicing before the Board are more clearly articulated.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting

- requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performing standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The regulations really have no impact on small business other than simply changing and/or codifying the procedures for filing an appeal and appearing before the Board of Finance and Revenue. Taxpayers, including small businesses, have had the opportunity to appear before the Board since it was established however, with the enactment of Act 270 of 2013 which changed some administrative procedures at the Board, the Department wanted to establish more defined procedures for appearing before the Board.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Not applicable.

(29) Include a schedule for review of the regulation including:

- A. The date by which the agency must receive public comments: 30 days after publication of the proposed rulemaking in the *Pennsylvania Bulletin*.
- B. The date or dates on which public meetings or hearings will be held: No public meetings or hearings will be held.
- C. The expected date of promulgation of the proposed regulation as a final-form regulation: Spring 2015
- D. The expected effective date of the final-form regulation: Date of publication in the *Pennsylvania Bulletin*
- E. The date by which compliance with the final-form regulation will be required: Effective date
- F. The date by which required permits, licenses or other approvals must be obtained: Not applicable

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The proposed regulations will be reviewed annually.

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**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU
(Pursuant to Commonwealth Documents Law)**

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<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>BY: _____ (DEPUTY ATTORNEY GENERAL)</p> <p>_____ DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is here by certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p>Pennsylvania Treasury Department/Board of Finance and Revenue _____ (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>64/5</u></p> <p>DATE OF ADOPTION: <u>1/13/2016</u></p> <p>BY: <u>Jacqueline Cook</u> Chairman</p> <p>TITLE _____ (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY: <u>[Signature]</u> Chief Counsel Treasury Department</p> <p><u>1/14/16</u> DATE OF APPROVAL</p> <p>(Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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FINAL RULEMAKING
COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA TREASURY DEPARTMENT
BOARD OF FINANCE OF REVENUE
61 Pa. Code Chapters 702 and 703
Rescind 61 Pa. Code Chapter 701

Questions and Answers for Treasury Regulation 64-5

IRRC Comments

We submit for your consideration the following comments on the proposed rulemaking published in the May 16, 2015 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Board of Finance and Revenue (Board) to respond to all comments received from us or any other source.

1. Implementation procedures; Clarity.

This proposed rulemaking deletes 61 Pa. Code Chapter 701, relating to special rules of administrative practice and procedure, and replaces it with Chapter 702, relating to general provisions, and Chapter 703, relating to tax and other appeal proceedings. Section 702.1 and 702.2 explain the scope of Chapter 702 and note that it shall be liberally construed. As written, these sections do not apply to Chapter 703. Is that the intent of the Board? We ask the Board to clarify this in the Preamble to the final-form rulemaking. If the scope and liberal construction provisions are meant to be applicable to Chapter 703 as well, the Board should amend the rulemaking to make that fact clear to the regulated community.

It was the intent of the Board that the scope of both Chapter 702 and 703 shall be liberally construed. It is clarified in the Preamble and to the final-form rulemaking.

In addition, § 702.1(b) states that Chapter 702 supersedes the General Rules of Administrative Practice and Procedure (GRAPP) in 1 Pa. Code Part II. If so, then why is the supersession language in subsection (c) necessary? This same issue arises throughout numerous sections of Chapter 702 and 703. In the Preamble to the final-form rulemaking, we ask the Board to explain how these rules will be implemented in relationship to GRAPP, and if appropriate, to delete the suppression language found in the numerous sections of both chapters.

The Preamble has been revised to explain that in Eugene F. Ciavarra v, Commonwealth of Pennsylvania, 711 F.R. 208 (2009), the court in footnote 5 wrote:

The GRAPP governs the practice and procedure before agencies of the Commonwealth, except where a statute or regulation sets forth inconsistent rules on the same subject. 1 Pa. Code §31.1. If an agency intends that its own regulation supersede the GRAPP, the superseded provision must be expressly cited, along with a statement that the cited provision is not applicable to proceedings before the agency. 1 Pa. Code §13.38. There is no other statute or regulation governing a request for reconsideration before the

Board; thus, we conclude that the GRAPP governs such requests.

The final-form regulations have been amended in §702.1(b) to read, "This part supersedes 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) to the extent the GRAPP is applicable to the Board. Consistent with the conclusion of the Court, the supersession for each section is expressly cited and will not be deleted from the numerous sections.

2. Consistency with statute; Implementation procedures; Clarity.

In order for a person to participate in appeal proceedings before the Board, that person must understand and comply with the regulations of the Board and Article XXVII of the Tax Reform Code of 1971. 72 P.S. §§ 9701-9901. The proposed rulemaking includes and expands upon certain provisions of Article XXVII, but is silent on other provisions. For example, the proposed rulemaking does not provide time frames for when petitions for reassessments must be filed or when a decision and order must be issued by the Board. This framework could be confusing to those not familiar with the nuances of the tax appeal environment in the Commonwealth. We believe it would be beneficial to the regulated community if they could rely on one document, the Board's regulations, to understand how to effectively file an appeal and participate before the Board. To improve the overall clarity of the regulation and to assist the regulated community with participation and compliance with the Commonwealth's tax appeal process, we recommend that the Board amend this regulatory package to more accurately reflect all aspects of it.

Consistent with IRRC's recommendation, the Board has amended this regulatory package to more accurately reflect all aspects of Article XXVII of the Tax Reform Code of 1971.

3. Determining whether the regulation is in the public interest.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers the information a promulgating agency is required to provide under §745.5(a) in the regulatory analysis form (RAF). As required by Item 12 of the RAF, we ask the Board to provide a comparison of this regulation to those of other states. We also ask the Board to update its response as to the expected delivery date of the final-form regulation in Item 29 of the RAF.

No other state has a two- tiered administrative appeal procedure prior to appealing to court. In Pennsylvania, the first appeal is to the Board of Appeals, an administrative appeal board administered by the Department of Revenue, and then the Board of Finance of Revenue, which is statutorily given equitable powers. These regulations are in the public interest insofar as the Board has become independent by the statutory restructuring of the board. The statute made Revenue a party to the proceedings rather

than a board member. Further, the Board is more transparent and useful to future taxpayers insofar as orders of the board are now published on our website. Additionally, the burden on the court system has been relieved which saves the taxpayers and government resources through the Board's new compromise and reconsideration processes.

CHAPTER 702. GENERAL PROVISIONS

4. Section 702.3. Definitions. - Clarity.

The term "business day" is defined as a "day on which the Board's office is *scheduled* to be open" (Emphasis added.) What if the office is scheduled to be open but then closes? We recommend that the phrase "scheduled to be" be deleted from the final-form rulemaking.

Consistent with IRRC's recommendation, "scheduled to be" is deleted from the final-form rulemaking.

The terms "confidential proprietary information" and "trade secret" are taken from Section 102 of Pennsylvania's Right-to-Know Law and are defined as such by reference to that law. 65 P.S. § 67.102. The term "personal financial information" is a verbatim recitation of the same term from the Right-to-Know Law, but it does not include any reference to the Right-to-Know Law. We ask the Board to be consistent in the way it defines terms that come from the Right-to-Know Law and believe the proposed definitions of "confidential proprietary information" and "trade secret" are appropriate. Also, since there are several references throughout the rulemaking to the Pennsylvania Right-to-Know Law, some with citations and some without, we recommend the Board include a definition for that statute.

Consistent with IRRC's recommendation, the Board has made the way it defines terms that come from the Right-to-Know Law consistent and has included a definition of the statute.

The term "party" is broadly defined as "a person who appears in a proceeding before the Board." Does the Board have persons who appear before it who are not parties? If so, the Board should amend this definition to provide a more accurate description of a party.

The Board has amended the definition of "party" to provide a more accurate description of a party.

A commentator has noted that the terms "submission," "document," and "evidence" are used interchangeably throughout the rulemaking, but are not defined. We believe the clarity of the rulemaking would be improved if these terms are defined and used consistently.

The Board has amended its final-form rulemaking to include a definition of "submission" and to delete references to "document" and "evidence" throughout the rulemaking.

5. Section 702.4. Filing generally. - Implementation procedures; Reasonableness; Clarity.

Subsection (b) states that when the Board "is of the opinion" that a filing is not sufficient, the filing may be accepted and the person submitting the filing will be required to correct the deficiency. The phrase "is of the opinion" is not regulatory language and should be replaced with a more definitive word or phrase.

The terms "the Board is of the opinion that" has been delete from Subsection (b).

Subsection (c) provides that the petitioner will accept the risk that a document filed electronically will not be properly filed. What if there is a delay in transmission because of a problem at the Board and through no fault of the petitioner? We agree with commentators that suggest this provision penalizes petitioners for circumstances that may be beyond their control and question the need for it.

In order to make the burden of proof for delivery of an electronic transmission similar to the burden of proof for delivery of paper transmissions, Subsection (c) has been amended to read, "The petitioner bears the burden of proving timely submission of an electronic petition for which there was a delay due to transmittal issues."

6. Section 702.5. Board office hours. - Clarity. (Deleted)

Subsection (a) lists the Board's office hours "[u]nless otherwise directed by the Chairperson." We have two questions. First, what is the need for including Board office hours in a regulation? Second, how will a party be notified if the hours change?

Consistent with IRRC's comments, Section 702.5. Board office hours, has been deleted from the final-form rulemaking.

7. Section 702.6. Oaths. - Implementation procedures; Clarity. (New Section 702.5. Oaths)

This provision allows a "Board member or the secretary" to administer oaths or affirmations with respect to a proceeding. Since the Secretary is a Board member, the reference to "the secretary" is not needed and should be deleted. In addition, will staff of the Board be permitted to administer oaths or affirmations? If so, the Board should make reference to that fact in this section

of the rulemaking.

The Tax Reform Code of 1971, Section 2703.1(i), instructs, "The board shall elect a secretary, who need not be a member of the board." As such, the reference to "the secretary" will not be deleted. The staff of the board will not be permitted to administer oaths or affirmations.

8. Section 702.8. Subpoenas and depositions. - Need; Clarity. (deleted)

Subsection (a) states that the "Board does not possess the power to issue subpoenas or take depositions." Since the Board does not possess that power, we question the need for including this provision in the rulemaking.

Consistent with IRRC's recommendation, the final-form rulemaking has been amended to delete Section 702.8. Subpoenas and depositions.

9. Section 702.21. Representation. -Need; Clarity.

This section addresses who may appear before the Board in proceedings. Subsection (a) includes language taken directly from Section 2704 (d.1) of the Tax Reform Code of 1971 and reads as follows: "Appearances in proceedings before the Board may be by the petitioner or by an attorney, accountant or other representative provided the representation does not constitute the unauthorized practice of law as administered by the Pennsylvania Supreme Court." 72 P.S. § 9704 (d.1)(a). Commentators have suggested the rulemaking be amended to include examples of the types of arguments that non-attorneys can make before the Board and to specifically address the matter of negotiating compromises. Has the Board experienced problems with non-attorneys attempting to make arguments that only attorneys can make before the Board? What currently happens in situations where this occurs? Based on the Board's experience is there a need to include clarifying language in the regulation? We ask the Board to answer these questions in the Preamble to the final-form rulemaking and to amend the regulation accordingly, if needed.

The Preamble has been amended to explain that the Pennsylvania Supreme Court administers what constitutes the unauthorized practice of law. The Court has not defined what constitutes the unauthorized practice of law regarding non-attorneys representing a petitioner before the Board of Finance and Revenue. The board has not experienced problems regarding this matter and has determined that the statute stands on its face.

Subsections (e) and (f) require the prompt reporting of a change in representation or address. How should the report be made? The Board should specify the reporting method in the final-form rulemaking.

Subsections (c), (e), (f) and (g) have been amended in the final-form rulemaking to include specific reporting methods.

10. Section 702.22. Limited practice before the Board.- Clarity.

Under Subsection (a)(l), the Board may deny a representative the privilege of representing a party if that representative "lacked the requisite qualifications" to represent others. We ask the Board to clarify what qualifications are required to represent a party before the Board.

Subsection (a)(1) has been amended in the final-form rulemaking to read, "Lacked the competency to represent others."

11. Section 702.31. Definitions. - Clarity.

This section of the proposed regulation provides definitions for the Board's rules on ex parte communication. The term "ex parte communication" is defined as, "A communication, regarding the merits of a petition, outside of a public hearing, by one party with the Board or staff not in the presence of the other party." A commentator has suggested that both procedural and substantive issues be covered by this definition. Would the "merits" of a petition include both procedural and substantive issues? We ask the Board to clarify this in the final-form rulemaking.

The definition of "ex parte communication" has been amended in the final-form rulemaking to read, "A communication regarding the substantive merits of a petition outside of a public hearing, by one party with the Board or the staff, without notice and opportunity for the other party to participate."

12. Section 702.32. General rules. - Whether the regulation is consistent with the intent of the General Assembly.

Subsection (b) prohibits Board staff from participating in an ex parte communication and lists two exceptions to that rule. We note that Section 2704 (d.3) of the Tax Reform Code of 1971 provides the statutory basis for ex parte communication and it does not provide any exceptions for Board members or staff. 72 P.S. § 9704 (d.3). How is this subsection consistent with the intent of the General Assembly? Is there another statutory provision that would allow for this exception? If not, we ask the Board to delete this provision from the final-form rulemaking.

Section 2704(d.3) of the Tax Reform Code of 1971 indicates, "The members or staff of the board shall not participate in an ex parte communications with the petitioner or the department or their representatives regarding the merits of any tax appeal pending before the board." The General Assembly did not provide a definition of "ex parte communications."

The Board initially took a very strict interpretation of the statutory ex parte prohibition and

the Chair of the Tax Section of the Philadelphia Bar Association, the Chair of the State Taxation Committee of the Pennsylvania Institute of CPAs and the Chair of the Tax Committee of the Pennsylvania Chamber of Business and Industry, the same parties who assisted in the development of Act 52 of 2013, jointly sent a letter to the board members asking them to outline a procedure allowing the parties to waive their rights to participate in an otherwise ex parte communication. The letter correctly pointed out that the statutory language does not prohibit either party from waiving their rights to participate in a communication.

The chief counsel of the Department of Revenue sent a letter to the Board attempting to wholesale waive its right to participate in ex parte communications with the condition that the Department reserves the right to provide specific notice to the Board's Secretary that the Department does not waive its rights with respect to a certain petition and the condition that the Board's members/staff must document communications on the merits of petitions on the computerized docket of the appeal, and such documentation must be available for Department access and review. Since the ex parte prohibition is against the Board, the majority of the Board did not believe that a wholesale waiver with substantial conditions for any future appeals that may be filed was adequate.

In addition, there are a large number of taxpayers who come before the Board without representation and an overly narrow definition of ex parte will serve as a detriment to their ability to resolve the issues at the administrative level without the need to hire a representative. As such, the Board believes that the proper solution is to define ex parte communications consistent with the spirit, and not contrary to the letter, of the law and establish written procedures for the parties to waive their right to participate in otherwise ex parte communications. The Board notes that several Commonwealth tribunals have defined ex parte communications in their regulations, See, 237 Pa. Code Rule 1136 and Rule 136 (PaRJCP 1136, 136) and 207 Pa. Code Rule 2.9:

Rule 1136. Ex Parte Communication.

A) Unless otherwise authorized by law, no person shall communicate with the court in any way regarding matters pending before the court unless all parties:

1) are present or have been copied if the communication is written or in electronic form; or

2) have waived their presence or right to receive the communication.

B) If the court receives any ex parte communication, the court shall inform all parties of the communication and its content.

Comment

No ex parte communications with the court are to occur. Communications should include all parties, such as the filing of a motion, or conducting a conference or a hearing.

Attorneys are bound by the Rules of Professional Conduct. See Rules of Professional Conduct Rule 3.5(b). Judges are bound by the Code of Judicial Conduct. See Code of Judicial Conduct Canon 3(A)(4).

Attorneys and judges understand the impropriety of ex parte communications regarding matters pending before the court but many participants are not attorneys or judges. This rule ensures that all parties have received the same information that is being presented to the court so that it may be challenged or supplemented.

Administrative matters are not considered ex parte communications.

Subsection (d) requires Board staff to notify a party of an ex parte communication. How must the notification be made? The Board should specify the notification method in the final-form rulemaking.

Subsection (d) of the final-form rulemaking has been amended to specify the notification method.

CHAPTER 703. TAX AND OTHER APPEAL PROCEEDINGS

13. Section 703.2. Petition content. - Consistency with statute.

This section lists the items that must be included with a petition. Section 2704(d) of the Tax Reform Code also requires that a petition be supported by an affidavit of the petitioner or the petitioner's authorized representative. 71 P.S. § 9704(d). The Board should include this requirement in the final-form regulation.

Section 703.2 of the final-form rulemaking has been amended to add the requirement that a petition must be supported by an affidavit.

Subsection (b) requires the petitioner to notify the Board when there is a change in address. The Board should specify the reporting method in the final-form rulemaking.

Subsection (b) of the final-form rulemaking has been amended to specify the reporting method.

14. Section 703.5. Service. - Clarity. (New Section 703.6. Service)

Subsection (b) states that the Board will publish service instructions on its website. Regulations have the full force and effect of law and establish binding norms. We recommend that any service requirements that parties must abide by, including timelines, be promulgated as a regulation.

Subsection (b) of the final-form rulemaking has been amended to include required service requirements, including timeliness.

15. Section 703.6. Consolidation. - Implementation procedures; Clarity. (New Section 703.7. Consolidation)

This section provides that the Board may consolidate "petitions, issues or proceedings" for the same petitioner, and "may structure a proceeding to avoid unnecessary costs or delay." What happens if one or both parties object to a consolidation? What does it mean to structure a proceeding? Would this be a process outside of this rulemaking? We ask the Board to clarify how this provision will be implemented in the final-form rulemaking.

Section 703.7 of the final-form rulemaking has been amended to clarify consolidation before the Board. The Board may, at its own discretion, consolidate appeals when they emanate from the same taxpayer. This generally entails combining several docket numbers, usually appeals for different tax periods for the same taxpayer and the same issue, in one Order. Each issue and each tax period is specifically addressed, it is just done so in one document as opposed to a separate order. However, when different taxpayers are involved, the Board will only consolidate for the limited purpose of hearings upon the approval of the taxpayer because the taxpayers may share a similar representative who may want to present oral argument for all taxpayers at the same time. However, the Board will issue separate Orders for each taxpayer to protect potentially confidential taxpayer information, help ensure the Order is posted properly at Revenue, and for the efficiency of one of the related taxpayers to appeal to Commonwealth Court.

16. Section 703.8. Withdrawal or termination of appeal. - Implementation procedures; Clarity. (New Section 703.9 Withdrawal or termination of an appeal)

Under this provision, a petitioner that wishes to terminate an appeal before a final decision is issued by the Board must submit a written request to withdraw the appeal. If a petitioner submits a request to terminate or withdraw an appeal, does the termination or withdrawal become effective only after the Board rules on the request or immediately upon submission of the request by the petitioner? We ask the Board to explain how this provision will be implemented.

Section 703.9. Withdrawal or termination of appeal, has been amended in final-form regulations to replace "request to withdraw" to a "notice to withdraw."

17. Section 703.11. Compromise generally. - Clarity.

Subsection (b) references the Board's website but does not provide the

address. This reference also appears in § 703.51(b) (Publication of orders). The Board should either provide the address in those sections or add a definition for the Board's website.

Pursuant to IRRC recommendation, the final-form rulemaking has been amended to include a definition of the Board's website in Section 702.3. Definitions.

Subsection (d) requires the "timely submission" of a completed Board Request for Compromise Form. What constitutes a timely submission? We recommend that the final-form regulation specify what is considered a timely submission.

The final-form regulations have been amended to include the requirements of a timely submission in Subsection 703.11(b).

18. Section 703.21. Prehearing conference. - Implementation procedures; Clarity.

Subsection (b) provides that Board staff will provide notice of a prehearing conference by telephone or electronic method. Would notice ever be made by a mail delivery service? Notice requirements should be consistently specified throughout the final-form rulemaking.

Subsection 703.21(b) of the final-form regulations have been amended to include the notice requirements, which are consistently specified throughout.

19. Section 703.31. Disposition of petitions. - Implementation procedures; Clarity.

Subsection (a) states that the petitions filed with the Board will be resolved by a written order of the majority of the Board. The proposed regulation does not specify time frames for when an order must be issued by the Board. If the Board decides to not adopt our second comment relating to providing a more detailed and complete regulatory package, we suggest that, at a minimum, the final regulation include time frames associated with the disposition of petitions.

The Board has adopted IRRC's recommendation and amended the final-form rulemaking to provide a more detailed and complete regulatory package. In doing so, it has amended Subsection (a) to include the time frames associated with the disposition of petitions.

Subsection (b) provides that a petitioner may request a hearing on the petition form "or subsequently, in writing." Is there a deadline for when a petitioner must submit a subsequent request for a hearing? If there is a deadline, we recommend that it be included in the final-form regulation.

Subsection (b) of the final-form rulemaking has been amended to the method and deadline for requesting a hearing.

20. Section 703.35. Failure to appear at hearing. - Clarity.

Under Subsection (a), if a party requests a hearing and fails to appear at the scheduled hearing, the opposing party may present its case to the Board at the scheduled hearing. It is unclear what procedures will be followed by the Board after such a hearing takes place. Would the Board issue an order in absence of hearing from the other party? We recommend that the Board include more detail on how petitions will be administered if a hearing takes place under the conditions of Subsection (a).

Subsection (a) of the final-form rulemaking has been amended to explain that the Board will issue an order when a hearing is scheduled and one or both parties fail to appear.

21. Section 703.43. Filing a request for consideration. - Implementation procedures; Clarity.

Subsection (b) provides that requests for reconsideration must be submitted electronically or by facsimile. Can a request be filed in person or by any form of mail delivery service as is permitted for other documents referenced in Section 702.4? The Board should make filing and submission methods consistent throughout the final-form rulemaking.

Subsection (b) of the final-form rulemaking has been amended to set forth filing and submissions methods which are consistent throughout.

22. Section 703.45. Appeal Rights. - Clarity.

When a request for reconsideration is made, is the time period for filing an appeal stayed? How the time period is calculated when a request for reconsideration is denied?

Section 703.45 of the final-form rulemaking is amended to explain that a request for reconsideration, alone, does not stay the period for filing an appeal. It is only when the Board grants a request for reconsideration that the appeal period is stayed. If the Board denies a request for reconsideration, the original order is the final order and an appeal to Commonwealth Court begins to run from the mailing date on the original Order.

23. Miscellaneous clarity.

There is a typographical error in the first sentence of § 703.52 (a)(3): "Information identified by the petitioner as and that meets" This should be corrected in the final-form regulation.

The first sentence of Section 703.52(a)(3) has been corrected in the final-form rulemaking.

Commentator - McNeese

I write to personally comment on the Board's proposed regulations, published in the May 16, 2015, Pennsylvania Bulletin. I have had input into the comments submitted by PICPA and the Pennsylvania Chamber and by the PBA Tax Section and wholeheartedly join in those comments. However, I write separately to emphasize the necessity of additional guidance concerning the unauthorized practice of law prohibition in Section 702.21.

As you know, I have been involved with Pennsylvania tax appeals for many years. It seems to me that there is no question that representation of taxpayers in these matters often requires the presentation of legal arguments and urging one interpretation of the law over another. Many appeals require the application of case law to the facts of the instant case and often require the parsing of cases potentially pro and con. Statutory interpretation arguments abound in these cases and constitutional principles are asserted frequently. Although infrequently granted, requests invoking the Board's equitable powers also are frequently made and must be analyzed under the court cases granting and denying equitable remedies. No citation should be required to establish that presenting such cases involves the practice of law.

Furthermore, the case law clearly treats the negotiation of a settlement as the practice of law. Dauphin County Bar Association v. Mazzacaro, 465 Pa. 545, 351 A.2d 229 (1976).

In addition, failure to properly raise and preserve a legal issue in a petition to the Board deprives the petitioner of the right to pursue the issue upon appeal to court - a serious consequence for any taxpayer. As we all know, there are many folks who seem to think that because these cases involve "tax," the rule prohibiting unauthorized practice of law does not apply.

To make clear to the practitioner community the bounds of unauthorized practice and to protect taxpayers from representation by unqualified representatives, it is very important that the Board add to the regulations several examples of the types of arguments, the presentation of which will be considered to constitute the practice of law. Furthermore, the regulations should make clear that negotiation of compromises, under the case law, involves the practice of law.

The Preamble has been amended to explain that the Pennsylvania Supreme Court

administers what constitutes the unauthorized practice of law. The Court has not defined what constitutes the unauthorized practice of law regarding non-attorneys representing a petitioner before the Board of Finance and Revenue. The board has not experienced problems regarding this matter and has determined that the statute stands on its face.

Commentator – PICPA

On behalf of the Pennsylvania Institute of Certified Public Accountants (PICPA) and the Pennsylvania Chamber of Business and Industry, we offer the following comments regarding the Board of Finance and Revenue's proposed rulemaking, 61 PA. Code Chs. 701—703, General Provisions; Tax and Other Appeal Proceedings, published in the May 16, 2015, Pennsylvania Bulletin.

Pennsylvania Act 52 of 2013 made significant changes to the organizational structure and representation procedures of the Board of Finance and Revenue ("BF&R"). The legislation was drafted in response to years of public criticism regarding the BF&R's lack of independence from the Pennsylvania Department of Revenue ("DOR"), whose decisions were the subject of the appeal. Treasury worked in a bipartisan fashion with leaders of the business, legal and tax accounting communities throughout the lawmaking process.

Accountants' representation of taxpayers before various taxing authorities is well grounded in statutory and regulatory authority both at the state and federal levels. The Internal Revenue Service and other jurisdictions permit accountants to represent taxpayers in practice before the IRS and the Tax Court (upon successfully passing the Tax Court Exam). 5 U.S.C. § 500(c); T.C. Rule 201(a)(3). Additional guidance is found in IRS Circular 230, which also permits practice before the Internal Revenue Service by attorneys, Certified Public Accountants, and enrolled agents.

Section 10.3(b) of Circular 230 states that a "certified public accountant who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that the certified public accountant is currently qualified as a certified public accountant and is authorized to represent the party or parties."

Importantly, "practice before the Internal Revenue Service" is a defined term which "comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing documents; filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings." See IRS Cir. 230 Sec. 10.2.

Act 52 does not limit the scope of accountants' representation before BF&R nor do the BFR's proposed regulations or interim operating rules. Specific commentary in response to the BF&R's proposed regulations suggests that certain practices by accountants before the BF&R may constitute the unauthorized practice of law. Additionally, certain comments suggest that the final regulations should limit the scope of representation by accountants before the BF&R. The enactment of Act 52 should not affect the scope of accountants' representation and it would not be within the scope of the BF&R's authority to limit such representation within their own regulations.

The Preamble has been amended to explain that the Pennsylvania Supreme Court administers what constitutes the unauthorized practice of law. The Court has not defined what constitutes the unauthorized practice of law regarding non-attorneys representing a petitioner before the Board of Finance and Revenue. The board has not experienced problems regarding this matter and has determined that the statute stands on its face.

Commentator – Pennsylvania Bankers Association

On behalf of the Pennsylvania Bankers Association which represents 150 banks, savings banks and trust companies in the Commonwealth, we recommend the following additions to the proposed regulations published in the Pennsylvania Bulletin on May 16, 2015.

Notice of Objections to Petitions By Department of Revenue

We recommend adding to the proposed regulations requirements that in order for the Department of Revenue or any other governmental agency to offer evidence or legal arguments to the board regarding a petition, the agency must, at least 30 days prior to a meeting of the board at which the petition will be considered, (1) give written notice to the petitioner, the board, and any other party to the proceeding; (2) file and serve upon the board and all parties to a proceeding a response to the petition setting forth the legal or factual basis for any objections the agency intends to raise to the petition or the relief requested by the petitioner; and (3) present any documentary evidence the agency wishes the board to consider, or disclose the identity of any witnesses it intends to present testimony to the board and describe the testimony that will be offered. In the absence of such a notice and written response to a petition, should be barred from participating in the proceeding or communicating to the board any objections to a petition, and from offering any evidence to the board.

The Board has developed comprehensive and adequate regulations in Chapter 703, specifically, which set forth the requirements for filing and service of submissions by both parties and hearing procedures, which address this recommendation.

Response to Requests for Information

If the board asks a party furnish additional evidence, legal argument or other information to the board, the information should be supplied to any opposing party at the same time it is provided to the board, and the opposing party should be given the right to within ten days to submit a response to the additional information supplied to the board.

The Board has developed comprehensive and adequate regulations in Chapter 703, specifically, which set forth the requirements for filing and service of submissions by both parties and hearing procedures, which addresses the recommendation.

Publication of Orders and Decisions

In addition to being indexed, we recommend that the regulations require decisions and orders of the board published on the board's web site to be made available in a format that allows searching the full text of the orders for specified words and phrases and using conditional logic that allows searching combinations of words and phrases based upon their proximity and relationship to other words and phrases and should provide users of the website the capacity to download the full text of its orders and decisions. We also recommend that a reading room be made available at which the text of the board's decisions and orders are available for review together with a party and issue index regarding the orders and decisions.

Searching by full text of the orders for specified words and phrases is currently available through the board's searchable online database. The Board does not have the resources to establish a reading room available at which the text of the board's decisions and orders are available for review together with a party.

Annual Report

We also recommend that in addition to publishing the text its decisions and orders, the regulations should require the board to publish an annual report disclosing information regarding the number and types of petitions considered during the prior year; the aggregate amounts of reassessments or resettlements or refunds awarded by the board, and to disaggregate such information by the type tax or other matter, the major issues for which orders and decisions were issued by the board, and tax years involved.

The Board of Finance and Revenue is required by the Fiscal Code to fix the rate of interest every six months which each state depository is required to pay the Commonwealth for funds deposited in its financial institution. Accordingly, the Board hosts semi-annual public meetings to set the interest rates and conduct the general business of the Board. The Board produces semi-annual reports for those meetings and the reports are available upon request.

Commentator – Pennsylvania Department of Revenue

The following are the Department of Revenue's comments to the Board of Finance and Revenue's proposed regulatory package referenced above. These comments are made in two parts. The first part, which is included in this correspondence, contains general comments that apply to the regulatory package as a whole. The second part contains suggested changes to specific sections of the regulation. A copy of the Board's proposed regulatory package is attached as Exhibit A and contains the Department's proposed changes.

General Comments

Comment #1: One of the Department's most significant concerns is the use of the terms "submission," "document," and "evidence" throughout the regulation. These terms are not defined and seem to be used interchangeably. For example, in Section 702.11, the regulation uses both terms "submission" and "document." In Section 703.7, the regulation uses both terms "submission" and "evidence." The Department would request that these terms be defined separately if they are to have different meanings. If the Board considers these terms to be interchangeable, a consistent term should be used to alleviate confusion. The Department suggests that these terms have different meanings and should be defined separately. The term "submission" is particularly important to the Department in light of Section 703.5, which provides that every submission must be served on the opposing party. The Department has a vested interest in being provided copies of items that are submitted to the Board. The Department believes that all pleadings (petitions), evidence, briefs or legal arguments, and any communication with the Board regarding the substantive or procedural merits of proceeding before the Board should be included in the term "submission."

See amendments to final-form regulations, Section 702.3 Definitions.

Further, in the context of the person filing a "submission," "document" or "evidence," the regulation uses the terms "petitioner," "Department," or "party." The Board should review its use of these terms throughout the regulation to make sure the applicable person is identified. For example, in Section 703.4 (related to other submissions), the term "petitioner" is frequently used. However, the rules in this section could be just as applicable to submissions supplied by the Department. The Department is not included in the term "petitioner."

Per the Department's suggestion, the Board has reviewed the use of, and where necessary changed, the terms "petitioner," "Department," and "party."

Comment #2: The Department has concerns that taxpayers and practitioners are misinterpreting the ex parte communication rule and also confusing that rule with the rules related to providing copies of submissions to opposing parties in general. The statutory ex parte rule provides that a "communication" with the

Board “regarding the merits of any tax appeal pending before the board” cannot be made without the knowledge of, notice to or participation of the opposing party. 72 P.S. § 9704. The Department has noticed that taxpayers and practitioners are interpreting the ex parte rule to mean that only communications regarding “substantive” issues or facts need to be shared with the Department. As a consequence, the Department is not receiving many procedural communications transmitted to the Board, such as requests to remove appeals from pending litigation, requests to extend a deadline, or requests to deviate from the Board’s rules. These types of procedural matters affect the Department’s substantive rights. The Department, therefore, requests that the Board make clear in its regulation that communications regarding procedural matters affecting the substantive rights of the opposing party must be provided to the opposing party.

Insofar as there is no statutory definition of the “ex parte communication rule,” the Board is defining it in Sections 702.31 and 702.32 of the final-form rulemaking. The Board has amended the definition of “ex parte communication” in Section 702.31 to clarify that the merits refer to the substantive merits. The Department is made aware of procedural submissions when the Board updates the submissions onto the Department’s RAPS system.

Comment #3: The Department requests that the Board clarify the service requirements for petitions and attached exhibits. Sections 702.32(c) and 703.5(a) require all “submissions” to be served on the other party. Presumably, this requirement will apply to petitions. However, this isn’t clear given current practice and contrary instructions on the Board’s website. Section 703.5(b) provides that the Board will publish instructions regarding service on its website. Currently, those instructions indicate that a petition does not have to be served on the Department and neither does any evidence submission of less than 20 pages, which presumably applies to exhibits attached to the petition. Evidentiary submissions of greater than 20 pages must be served on the Department. In the Department’s experience, taxpayers routinely fail to submit evidence that is attached to a petition to the Department (this is probably because the taxpayer considers the exhibits a part of the petition and follows the Board’s instructions not to serve the Department). Therefore, evidence is being submitted to the Board and not provided to the Department.

The Board has amended the relevant sections of the final-form regulations to clarify the service requirements and to ensure they are consistent and not contradictory.

Comment #4: Another comment that the Department would like the Board to consider involves Board hearings. The Department believes that it would be beneficial (for all parties) for all submissions, testimony, evidence and legal arguments to be submitted to the Board in advance either via mail or pre-hearing conferences. Then, the monthly public hearings before the Board members can be used as an opportunity for the parties to provide a summary of the case and oral legal arguments. The Department believes this type of process will provide an orderly method for the appeals to be prepared and presented to the Board

members without the monthly hearings turning into evidentiary hearings.

The requirements for submissions and hearings are set forth in Chapter 703 of the final-form regulations. Insofar as all submissions are required to be submitted long before the hearings, it is the intent of the Board that the purpose of the hearings is to provide a summary and highlight of the salient points of the appeal.

Comment #5: (a) Compromises are another area of concern for the Department. The proposed regulation requires that a taxpayer must submit a compromise request to the Board within 30 days of filing the petition. There is a two-fold problem with this rule. First, a compromise is made between the taxpayer and the Department. The Board only issues an order to approve a compromise upon agreement of the taxpayer and the Department. Consequently, it is unclear why a compromise request must be submitted to the Board unless a compromise is reached between the parties. It is quite possible that the parties may wish compromise negotiations and their terms to remain confidential until a compromise is reached. Second, the rule creates the impression that a compromise request cannot be made after 30 days. In practice, the Department entertains compromise requests throughout the appeal process. The Department would suggest that all compromise requests and negotiations be made strictly between the parties. If the Board, for purposes of efficiently administering its docket, would like to know if the parties contemplate a compromise of an appeal, the petition form could provide for a section where the taxpayer indicates whether or not the taxpayer intends to submit a compromise to the Department. The Board could also require the parties to provide notice to the Board if the parties are attempting to negotiate a compromise.

The Board needs know if the parties are engaging in compromise negotiations for the proper disposition of an appeal and to provide adequate time for the parties to reach a compromise. The Board does not need to know the details of the negotiation until such time as the parties reach a compromise. Insofar as the Board's general deadline to dispose of each case is within 6 months of the filing date, it is essential that the parties start the negotiation process early – 30 days from the filing date. The Board encourages compromises but also needs adequate time to brief and list the case for a hearing and allow for a reconsideration, if necessary. As such, the parties should aim at completing a compromise within the first 4 months after an appeal is filed.

(b) The Department would find it helpful if the Board's regulations could address if the Board will consider "partial compromises." In other words, if the parties are willing to compromise certain issues and the related liability but are unable to compromise other issues, will the Board be willing to issue a compromise order and a decision and order on the merits of the uncompromised issues and liability?

Similar to the Board of Appeals, the Board of Finance and Revenue will not consider "partial compromises."

(c) Taxpayers and practitioners also seem to be under the impression that if they submit a compromise to the Board or the Department, the Department must entertain compromise negotiations. While the Department reviews and considers all compromise requests, the Department is under no obligation to enter into compromise negotiations. Although this may be more of a Department issue than an issue with the Board's proposed regulations, it would be helpful to the Department if the Board's regulations make clear that no party is under any compulsion to attempt to negotiate a compromise.

Section 703.11(d) of the final-form rulemaking is amended to add the following:
"Negotiations of a compromise are voluntary and shall take place between the petitioner and the Department."

(d) Another concern regarding compromises is the situation where a party (either the taxpayer or the Department) fails to comply with a compromise order. Clearly, the compromise provisions provide that a taxpayer waives its right to appeal a compromise order, but what happens if the Department agrees to reduce a liability and the taxpayer fails to pay the remaining liability? Does the Department have the right to file a motion with the Board to strike the compromise so that that original assessment is reinstated? Conversely, if the Department fails to comply with the terms of a compromise order, can the taxpayer file a motion to have the compromise stricken and proceed with the appeal or petition for refund as originally filed? It would be helpful if the Board procedures could address these situations.

The Board does not possess the jurisdiction to demand specific performance if a party refuses to comply with a Board's Order. Such an action would have to be initiated in the appropriate tribunal. Moreover, the Board's jurisdiction by which to dispose of a case would likely have expired in the described scenario.

Comment #6: Petitions that are filed with the Board often lack specificity as to the facts and legal issues on appeal. The Department sees boiler-plate petitions in which the taxpayer raises all possible claims and tax exemptions without any further development. Although the Department does not want to restrict a taxpayer's ability to raise all legitimate claims, the Department submits that the Board should not accept boiler-plate petitions which are devoid of specificity or the Department should be permitted to request that such petitions be dismissed for lack of specificity.

The Board understands the Department's position; however, it does not impact the final form rulemaking.

Comment #7: The request for reconsideration process that is provided for in the Board's interim operating procedures seems to have worked well from the Department's perspective. That process is carried forward into the proposed regulation. One issue that the Department has found with the process, however, involves correcting computational errors in Board orders. The proposed

regulation provides that a request for reconsideration is to be used to correct a number of issues including computational errors. Unfortunately, the Department does not uncover many of these errors until the Department attempts to process a Board order. Although the Department attempts to process Board orders as quickly as possible, many times the time period for a request for reconsideration has passed by the time the Department processes the Board's order. The Department would like to work with the Board between now and the submission of its final regulatory package to try to come up with a way to address this issue.

The Board understands the Department's position; however, it does not impact the final form rulemaking.

Comment #8: The Board, throughout its regulation, has indicated that its rules of practice and procedure supersede the General Rules of Administrative Practice and Procedure (contained in 1 Pa. Code, Part II). In fact, every section of the Board's regulation contains a specific subsection addressing the General Rule(s) that the Board's rule supersedes. The Department does not believe that it is necessary to include such a subsection in every section of the regulation. 1 Pa. Code § 31.1 already provides that an agency's regulations supersede the general rules. It would be sufficient for the Board to indicate in Section 702.1 that Part IV of Title 61 of the Pa. Code establishes practice and procedure before the Board and that the rules in Part IV supersede the General Rules of Administrative Practice and Procedure.

The Department is referred to the answer to part 2 of question 1 from IRRC, and as clarified in the Preamble to the final-form rulemaking.

As a note, the current Section 702.1 states that this "chapter" establishes the practice and procedure before the Board and that the "chapter" supersedes the General Rules of Administrative Practice and Procedure. The use of the term "chapter" was appropriate when all the Board rules were under the prior Chapter 701. However, in this regulatory package, the Board has deleted Chapter 701 and replaced it with Chapters 702 and 703. Consequently, using the term "chapter" limits the applicability of Section 702.1 to Chapter 702. It would not apply to Chapter 703, when clearly Chapter 703 also establishes additional practices and procedures before the Board. Further, Section 702.2(a) also uses the term "chapter." Consequently, the liberal construction rule applies only to Chapter 702. It would not apply to chapter 703.

The Department is referred to the answer to part 1 of question 1 from IRRC, and as clarified in the Preamble to the final-form rulemaking.

The Department also agrees with the comments of other commentators that General Rules of Administrative Practice and Procedure do not apply to proceedings before the Board related to tax matters. 2 Pa.C.S. § 501(b)(1). Consequently, there is no need to reference them in Chapter 703, which relates mostly to tax matters.

The Department is referred to the answer to part 2 of question 2 from IRRC, and as clarified in the Preamble to the final-form rulemaking.

Comment #9: It is unclear to the Department what binding authority will be given to the Board's rules and procedures and what sanctions or remedies exist if someone violates them. Section 702.2 specifically provides that the rules are to be liberally construed, and that they can be waived as long as the substantive rights of a party are not affected. Further, Section 702.7 provides that the formal rules of evidence to not apply. And, there is no section discussing the consequences of failing to comply with the rules. It would be helpful to know which rules will be enforced and what the penalties are for violating the rules. It is not clear how the liberal construction and rules of evidence issues relate to the principle point regarding enforcement of the rules and remedies. The Department would like to see this issue clarified or further developed.

Each section of the final-form rulemaking expressly or impliedly sets forth the consequence for failure to comply with that specific rule. The Department is referred to the amended final-form rulemaking for the relevant changes to each section.

Suggested Changes to the Regulation

Attached, as Exhibit A, is a reproduced copy of the Board's proposed regulation. The Department has provided suggested changes to specific sections of the regulation in the Exhibit. Deletions are shown with a strikethrough (~~deletion~~), and insertions are underlined (insertion). Also, a few comments are provided to specific sections of the regulations. The comments are provided in brackets and are bolded ([COMMENT:]). The attached revisions attempt to address some of the general comments provided above. However, the Department has not tried to revise the regulation to fully address the issues raised in its general comments. The Department is willing to meet with the Board to discuss the general comments provided above.

The Department is referred to the amended final-form rulemaking for the relevant changes to each section.

BOARD OF FINANCE AND REVENUE
[61 PA. CODE CHS. 701—703]
General Provisions; Tax and Other Appeal Proceedings

The Board of Finance and Revenue (“Board”), under the general authority set forth in Section 2703.1(m) of the Tax Reform Code of 1971 (72 P.S. § 9703.1), proposes to rescind current regulations Chapter 701, which appear in 61 Pa. Code 701.1 – 701.7, serial pages (265847) – (26849) and to create new regulations Chapters 702 and 703.

Purpose of the Proposed Rulemaking

The purpose of the rulemaking is to create new regulations consistent with the act of July 9, 2013 (P.L. 270, No. 52), which reorganized the Board and instituted new procedures for practicing before the Board. There are only two chapters of regulations to be implemented including *General Provisions* and *Tax and Other Appeal Proceedings*. The regulations include: an extensive definition section; filing procedures and deadlines; processes for representation by third parties before the Board, ex parte communications, petitioning the Board; compromise settlement procedures; procedures for the hearing process; and, to request reconsideration. The rules shall be liberally construed.

This final-form rulemaking will supersede the General Rules of Administrative Practice and Procedure (“GRAPP”) as noted in the regulations. The Board expressly cited the supersession in each regulation because Commonwealth Court ruled in *Eugene F. Ciavarra v. Commonwealth of Pennsylvania*, 970 A.2d 500 (2009), in footnote 5 that:

The GRAPP governs the practice and procedure before agencies of the Commonwealth, except where a statute or regulation sets forth inconsistent rules on the same subject. 1 Pa. Code §31.1. If an agency intends that its own regulation supersede the GRAPP, the superseded provision must be expressly cited, along with a statement that the cited provision is not applicable to proceedings before the agency. 1 Pa. Code §13.38. There is no other statute or regulation governing a request for reconsideration before the Board; thus, we conclude that the GRAPP governs such requests.

Chapter 702. General Provisions

Subchapter A – Overview proposes the scope of the regulations and for the liberal construction of the regulations so long as it does not affect the substantive rights of the parties. This subchapter also provides an extensive definition section. Additionally, the subchapter sets forth the following: the procedure on filing generally; the Board’s office hours; administration of oaths; formal rules of evidence does not apply to Board matters; and, the Board has no subpoena or deposition power.

Subchapter B – Time proposes the procedures for the date of filing a Party’s submission as well as how the Board will compute time for a submission.

Subchapter C - Representation before the board contains the requirements for what forms must be completed in order for a Petitioner to identify any individual that may be representing them before the Board. Non-attorneys have always been permitted to represent Petitioners before the Board so long as that representation does not constitute the unauthorized practice of law as defined by Supreme Court of the Pennsylvania. The Board has not experienced problems regarding non-attorney representatives.

In this subchapter, the Board also establishes notification procedures regarding changing a representative, an address, or a withdrawal representation.

Subchapter D - Ex Parte Communications contains a definitional section and the general rules for ex parte communication between a Board member or staff and a party.

Chapter 703. Tax and Other Appeal Proceedings

Subchapter A – Submissions propose the minimum general requirements for what information a Petition for Relief must contain. Additionally, under this subchapter the Board must acknowledge the receipt of the Petition. This subchapter also contains regulations regarding the following: the Department of Revenue filing a submission in response to a Petition; Board requested additional submissions from Petitioners; service requirements; consolidation of Petitions; timeliness of submissions; and, withdrawal or termination of appeals.

Subchapter B – Compromise Procedures sets forth the rules for compromise settlements before the Board. More specifically, the subchapter proposes the rules for compromise settlements generally between the parties including time deadlines and waivers. Compromises are voluntary and negotiations only take place between the parties.

Subchapter C – Prehearing Conferences sets forth the procedure for requesting a prehearing conference, scheduling prehearing conferences, and nonparticipation of one party.

Subchapter D – Hearings sets forth the following: deadlines; how to request a hearing; notice of proceedings will be in accordance with the Sunshine Act; scheduling of hearings; hearing procedures; and, a party’s failure to appear.

Subchapter E – Request for Reconsideration sets forth the procedures for a party requesting reconsideration to object to a Board order including: the basis of the request for reconsideration; time period for filing a request for reconsideration and extension; and the contents of the request. This subchapter also details how the Board shall respond to requests for reconsideration and provides the party’s appeal rights.

Subchapter F – Publication of Orders sets forth that the Board shall publish on the Board’s website each final order, along with dissenting opinions, that grants or denies in whole or in part of the Petition. The subchapter also sets forth the timing of such publication. Additionally, the subchapter sets forth what constitutes confidential information the Board will automatically redact and procedures for a Petitioner to request additional redactions pursuant to Pennsylvania’s Right-to-Know Law’s definitions of confidential and proprietary information.

Contact Person

The Contact person for these regulations is Jennifer Langan, Deputy Chief Counsel, Pennsylvania Treasury Department, (717.787.9738).

Affected Parties

Taxpayers and representatives of taxpayers seeking relief in the administrative appeal process may be affected by this amendment.

Fiscal Impact

The Board has determined that the proposed amendment will have no fiscal impact on the Commonwealth.

Effectiveness

The amendment will become effective upon final form publication in the Pennsylvania Bulletin.

Public Comments

Interested persons are invited to submit in writing any comments, suggestions, or objections regarding the proposed rulemaking within 30 days after the date of the publication of this notice in the Pennsylvania Bulletin to Jacqueline Cook, Chairman, Board of Finance and Revenue, 1101 South Front Street, Suite 400, Harrisburg, Pennsylvania 17104-2539, Attention: Public Comment.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on March 10, 2015, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Finance and the Senate Committee on Finance. A copy of this material is available to the public upon request and its available on the Board’s website at www.patreasury.gov/BF&R.

The Committees may, at any time prior to submittal of the final-form regulation, convey to the agency and the Commission, their comments, recommendations and

objections to the proposed regulation. The Independent Regulatory Review Commission may, within 30 days of the close of the public comment period, submit to the agency and Committees any comments, recommendations and objections to the proposed regulation. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review of objections raised, prior to final publication of the amendments, by the Board, the General Assembly and the Governor.

JACQUELINE COOK
CHAIRMAN OF THE BOARD OF
FINANCE AND REVENUE

TITLE 61. REVENUE

PART VI. BOARD OF FINANCE AND REVENUE

CHAPTER 701. [SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE] (Reserved)

(Editor's Note: As part of this proposed rulemaking, the Board is proposing to rescind Chapter 701 which appears in 61 Pa. Code pages 701-1—701-3, serial pages (265847)—(265849).)

§§ 701.1—701.7. (Reserved).

CHAPTER 702. GENERAL PROVISIONS

Subchapter A. OVERVIEW

§ 702.1. Scope.

- (a) This part [chapter] establishes the practice and procedure before the Board.
- (b) This part [chapter] supersedes 1 Pa. Code Part II (relating to General Rules Of Administrative Practice and Procedure) to the extent GRAPP is applicable to the practice and procedure before the Board.
- (c) Subsection (a) and (b) supersede 1 Pa. Code §§ 31.1 and 31.6 (relating to scope of part; and amendments to rules).

Statutory reference – 72 P.S. § 9703.1(m).

§ 702.2. Liberal construction.

- (a) This part [chapter] shall be liberally construed to secure the just, speedy and inexpensive determination of every proceeding before the Board. The Board, at any stage of a proceeding, may disregard an error or defect of procedure that does not affect the substantive rights of the parties.
- (b) The Board, at any stage of a proceeding, may waive a requirement of this chapter, including a deadline, when necessary or appropriate, if the waiver does not adversely affect a substantive right of either party.
- (c) Subsections (a)—(b) supersede 1 Pa. Code § 31.2 (relating to liberal construction).

Statutory reference – 72 P.S. § 9703.1.

§ 702.3. Definitions.

(a) The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

Board - The Board of Finance and Revenue.

Board's website – www.patreasury.gov/brf.

Business day – A day on which the Board's office is [scheduled to be] open excluding Saturdays, Sundays, or legal holidays.

Chairperson – The State Treasurer or the State Treasurer's designee.

Confidential proprietary information – The term as defined in section 102 of the Right-to-Know Law [65 P.S. § 67.102].

Department – The Department of Revenue of the Commonwealth.

Electronic delivery—A method of dispatching or receiving a submittal via electronic means such as email, facsimile, or the Board's electronic filing system.

Order—A decision by the Board that becomes final unless a timely request for reconsideration is filed by a party and is timely granted by the Board.

Party—A [person who appears in a proceeding before the Board] petitioner seeking relief or a remedy before the Board and the Commonwealth of Pennsylvania agency against whom the petitioner seeks relief or a remedy. [The term includes both a taxpayer and the Department, or in appeals filed under section 503 of The Fiscal Code (72 P.S. § 503), the claimant and the opposing governmental agency.]

Personal financial information – [An individual's personal credit, charge or debit card information; bank account information; bank, credit or financial statements; account or PIN numbers and other information related to an individual's personal finances.] The term as defined in section 102 of the Right-to-Know Law.

Petition – An application to the Board in which petitioner seeks relief or remedy.

Petitioner — A taxpayer or other claimant.

Proceeding – Any matter before the Board, including a petition, hearing or claim.

Right-to-Know Law - 65 P.S. §§ 67.101 *et seq.*

Secretary —The secretary of the Board of Finance and Revenue, who is the Board officer with whom submissions [documents] are filed and by whom official records are

kept.

Staff—The attorneys, non-attorney tax petition reviewers and administrative personnel employed to support the Board in the performance of its duties and responsibilities.

Submission - A document or evidence submitted to the Board by a party to support its claim.

Trade secret— The term as defined in section 102 of the Right-to-Know Law [(65 P.S. § 67.102)].

(b) Subsection (a) supersedes 1 Pa. Code § 31.3 (relating to definitions).

Statutory reference 72 P.S. § 9701.

§ 702.4. Filing generally.

(a) [Documents] Submissions filed with the Board shall [should] be submitted in one of the following manners:

(1) In person or by mail to the following address:

Secretary of the Board
Pennsylvania Board of Finance and Revenue
1101 South Front Street, Suite 400
Harrisburg, Pennsylvania 17104-2539

(2) Electronically at bfr@patreasury.gov

(3) By facsimile at (717) 783-4499

(b) When [the Board is of the opinion that] a submission for filing does not sufficiently set forth required material or is otherwise insufficient, the Board may accept it for filing and advise the person submitting it of the deficiency and require that the deficiency be corrected.

(c) The parties [petitioner] bear[s] the [responsibility for the readability of documents filed with the Board. The petitioner accepts the risk that delay, disruption or interruption of a document filed with the Board by electronic delivery may cause the document to not be properly or timely filed] burden of proving timely submission of an electronic petition or submission for which there was a delay due to transmittal issues.

(d) Submissions served on the Department shall be submitted in one of the following manners:

(1) In person or by mail to the following address:

Pennsylvania Department of Revenue
Attn: BFR Matter
Office of Chief Counsel
327 Walnut Street
10th Floor, PO Box 281061
Harrisburg, PA 17128-1061

(2) Electronically at RA-RVOCCBFRNOTIF@pa.gov

(e) Submissions served on the petitioner shall be submitted in one of the following manners:

(1) In person or by mail to the address on the petition; or

(2) Electronically to petitioner's email address provided on the petition.

(f) Subsections (a)—[(c)] (e) supersede 1 Pa. Code §§ 31.4, 31.5 and 33.61 (relating to information and special instructions; communications and filings generally; and application for waiver of formal requirements).

Statutory reference – 72 P.S. § 9704(c).

[§ 702.5. Board office hours.

(a) Unless otherwise directed by the chairperson, the Board offices will be scheduled to be open from 8 a.m. until 4:30 p.m. on Business Days.

(b) Subsection (a) supersedes 1 Pa. Code § 31.5 (relating to communications and filings generally).]

§ 702.5. Oaths.

(a) A Board member or the secretary will have the power to administer oaths or affirmations with respect to any proceeding.

(b) Subsection (a) supersedes 1 Pa. Code § 35.148.

§ 702.6. Formal rules of evidence [do not apply].

(a) [Formal rules of evidence do not apply to matters before the] The Board [has the authority to consider the weight and sufficiency of submissions and to] may consider the rules of evidence as it deems appropriate.

(b) Subsection (a) supersedes 1 Pa. Code §§ 35.161—35.169 and 35.173 (relating to evidence; and official notice of facts).

[§ 702.8. Subpoena and depositions.

(a) The Board does not possess the power to issue subpoenas nor take depositions.

(b) Subsection (a) supersedes 1 Pa. Code §§ 35.142 and 35.145-35.152 (relating to subpoenas; and depositions).]

Subchapter B. TIME

§ 702.11. Date of filing.

(a) Whenever a party's submission is required or permitted to be filed, it will be deemed to be filed on the earliest of the following dates:

(1) On the date actually received by the Board.

(2) On the date deposited with an IRS-designated private delivery service [(as set forth in an IRS Notice – currently 2004-83)], as shown on the delivery receipt attached to or included within the envelope containing the [document] submission.

(3) On the date deposited in the United States mail as shown by the United States Postal Service stamp on the envelope or noted on a United States Postal Service Form 3817 certificate of mailing. A mailing envelope stamped by an in-house postage meter is insufficient proof of the date of mailing.

(4) When a [document] submission is submitted by means of electronic delivery on a day other than a business day, the [document] submission will be deemed to be filed on the next business day.

(b) Subsection (a) supersedes 1 Pa. Code § 31.11 (relating to timely filing required).

Statutory reference – 72 P.S. § 9704(a) and (b).

§ 702.12. Computation of time.

(a) Except as otherwise provided by statute, in computing a period of time prescribed by law, the day of the act, event or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is not a business day, in which event the period runs until the end of the next business day.

(b) Subsection (a) supersedes 1 Pa. Code § 31.12 (relating to computation of time).

Statutory reference – 72 P.S. § 9704(a) and (b).

Subchapter C. REPRESENTATION BEFORE THE BOARD

§ 702.21. Representation.

(a) *Representative.* Appearances in proceedings before the Board may be by the petitioner or by an attorney, accountant or other representative provided the representation does not constitute the unauthorized practice of law as administered by the Pennsylvania Supreme Court.

(b) *Power of attorney.* The Board may require in any proceeding that a power of attorney, signed and executed by the petitioner, be filed with the Board before recognizing any person or persons as representing the petitioner.

(c) *Notice of petitioner's representative.* A petitioner [or his designated representative shall file with the secretary a petition that includes the name of the petitioner, and if applicable, petitioner's representative. Unless another method is prescribed, the Department will be deemed to be served electronically when the Board docket the case onto the Department's appeal system] shall identify his representative on a petition form as required under section 703.2(a)(2) of chapter 703.

(d) *Designated representative after petition filed.* If a petitioner authorizes a representative after the petition is filed, the petitioner shall file with the secretary a form prescribed by the Board or a letter on the petitioner's letterhead naming the representative.

(e) *Change in representative.* A change in representative that occurs during the course of a proceeding shall be reported promptly to the secretary by a method set forth in section 702.4 of this chapter.

(f) *Change in address.* A change in address that occurs during the course of a proceeding shall be reported promptly to the secretary by a method set forth in section 702.4 of this chapter.

(g) *Withdrawal of representative.* Representation before the Board continues until a petitioner or petitioner's representative notifies the secretary in writing by a method set forth in section 702.4 of this chapter that the designation of representation is rescinded or until final disposition of the petition by the Board.

(h) [*Supersession.*] Subsections (a)—(g) supersede 1 Pa. Code §§ 31.21-31.26 (relating to representation before any agency).

Statutory reference – 72 P.S. § 9704(d) and (d.1).

§ 702.22. Limited practice before the Board.

(a) The Board may deny, temporarily or permanently, the privilege of representing a party before it in any way to a person who is found by the Board, after notice and opportunity for hearing in the matter, to have done one or more of the following:

- (1) Lacked the [requisite qualifications] competency to represent others.
- (2) Engaged in unethical, contemptuous or improper conduct with respect to any matter before the Board.
- (3) Repeatedly failed to follow Board directives.

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.27 and 31.28 (relating to contemptuous conduct; and suspension and disbarment).

Subchapter D. EX PARTE COMMUNICATIONS

§ 702.31. Definitions.

The following words and terms, when used in this subchapter, have the following meaning, unless the context clearly indicates otherwise:

Communication – A verbal, written or electronic correspondence.

Ex parte communication – A communication regarding the substantive merits of a petition, outside of a public hearing [, by one party with the Board or the staff not in the

presence of the other party, regarding the substantive merits of a petition] and without notice and opportunity for the other party to participate.

Waiver – An acknowledgement to the staff by a party or its representative that the party chooses not to participate in a communication between the staff and the other party and agrees not to thereafter object to such communication. [The waiver shall be in a format as designated by the Board and published on the Board's website.]

Statutory reference – 72 P.S. § 9704(d) and (d.3).

§ 702.32. General rules.

(a) *Communication with Board Members and Staff.* Neither t[T]he Board members nor the staff may [not] participate in an ex parte communication.

[(b) *Communication with Staff.* The staff may not participate in an ex parte communication, except when:

- (i) A party provides a waiver; or
- (ii) The staff provides a party or its representative with 10 days written notice of a meeting at which a communication will occur and the party or its representative fails to participate in the meeting.]

(b) *Written and electronic submission.* A written or electronic submission provided to the Board or staff by a party must be promptly provided to the other [P]party, consistent with Section 703.6. Service.

(c) *Notification.* The staff will make every reasonable effort to avoid an ex parte communication. Upon discovery of an ex parte communication, the staff will promptly notify the other party in writing by way of electronic transmittal, when available, and if not, in writing via mail as set forth in section 702.4 of this chapter. The Board may take any reasonable measures deemed necessary to remedy an ex parte communication.

Statutory reference – 72 P.S. § 9704(d) and (d.3).

CHAPTER 703. TAX AND OTHER APPEAL PROCEEDINGS

Subchapter A. SUBMISSIONS.

§ 703.1. Petitions generally.

(a) *General requirements.* Petitions [for relief] must be in writing, state clearly and concisely the interest of the petitioner in the subject matter, the facts and the basis for the relief sought.

(b) *Petition form.* A petition must be filed using the Board's designated petition form or otherwise conform to the format of the Board's designated form located on the Board's website.

(c) [*Supersession.*] Subsections (a) and (b) supersede 1 Pa. Code § 35.17 (relating to petitions generally).

Statutory reference – 72 P.S. § 9704(a) and (c).

§ 703.2. Petition content.

(a) *General.* To constitute a properly filed petition, [A] a petition must include, at a minimum, the following, as applicable:

(1) The petitioner's name, address, telephone number and electronic mail address.

(2) The name, address, telephone number and electronic mail address of the petitioner's representative.

(3) The Board of Appeals docket number.

(4) The petitioner's appropriate identifying designation, such as license number, Social Security number, claim number, file number or corporate box number.

(5) The appeal type and relevant periods for review.

(6) The amount of tax or other amounts petitioner claims to have been erroneously assessed or to have been overpaid.

(7) The basis upon which the petitioner claims that an assessment is erroneous or a refund is due.

(8) A statement of the relevant facts.

(9) A statement indicating whether a hearing before the Board is requested.

(10) A statement indicating whether the Petitioner will submit a compromise offer to the Department within 30 days of filing the Petition.

(11) An affidavit of the petitioner or the petitioner's authorized representative that the petition is not made for the purpose of delay and that the facts set forth in the petition are true.

(b) *Accuracy of address for Board correspondence.* The Board is permitted to rely upon the accuracy of the physical or electronic mail address provided by the petitioner. It is the duty of the petitioner to notify the Board by a method prescribed in section 702.4 when [if] there is a change in an address provided to the Board.

(c) *Signature.* The petitioner or the petitioner's authorized representative shall sign a petition. The Board may require evidence that the signatory has authority to sign on behalf of petitioner.

(d) Petitions not properly filed. The Board will provide petitioners an opportunity to correct a petition that does not comply with Section 703.1 or 703.2. The Board may dismiss petitions which are not properly filed.

(e) [*Supersession.*] Subsections (a) — (d) [(c)] supersede 1 Pa. Code §§ 31.11-31.15, 33.1-33.4, 35.18-35.41 and 35.48-35.55.

Statutory reference – 72 P.S. § 9704(c).

§ 703.3. Board acknowledgment.

The Board will acknowledge receipt of petitions. The acknowledgement will set forth deadlines for subsequent submissions.

§ 703.4. Department submissions.

The Department may file a submission in a manner set forth in section 702.4 in response to the petition.

§ 703.5. Other submissions.

(a) [*Information*] Submission requests. The Board may request a party to [furnish] provide additional [information] submissions in a format designated by the Board. [The Board may deny the requested relief for failure to furnish the additional information.]

(b) [*Submissions*] Requirements. Submissions filed subsequent to the petition shall include the petitioner's name and the docket number.

(c) *Legibility.* Submissions made with the Board must be legible.

(d) *Copies.* Parties [Petitioners] are required to file with the Board one copy of a [document] submission either in hard copy or electronically at the time of filing. At its sole discretion, the Board may require additional copies of submissions.

(e) *Electronic submissions.*

(1) An electronic submission made with the Board must be:

(i) In a format so that the [document] submission and, when feasible, its attachments, shall be capable of being printed and copied without restriction [, and may not require a password to view the contents]. If the Board is unable to access an electronic submission due to a security restriction of the party, the submission will not be considered.

(ii) Filed in accordance with the instructions regarding electronic submissions, if any, made available on the Board's website.

(2) Parties [Petitioners] may file one electronic copy at the electronic mail address provided. Paper copies are not required unless the submission [document] is too large to transmit by means of electronic delivery.

(f) [*Evidence*] Submissions will not be returned. [*Evidence*] Submissions submitted to the Board will not be returned.

(g) [*Supersession.*] Subsections (a)—(f) [(e)] supersede 1 Pa. Code §§ 33.1-33.41, 35.1-35.14 and 35.191-35.221 (relating to general requirements, filing generally, execution, verification, copies, fees, service, amendments and briefs).

Statutory reference – 72 P.S. 9704(c) and (d).

§ 703.6. Service.

(a) A party must serve the other party with each submission.

(b) Section 703.6(a) does not apply to the petition form and the first twenty pages of a submission filed with the petition which the Board will docket onto the Department's appeal system. [The Board shall publish on its website instructions regarding service.]

(c) The Department will be deemed to be served electronically when the Board docket the petition onto the Department's appeal system.

(d) The preferred method of service is electronic. If electronic service is not available, service shall be by mail or in person using a method prescribed in section 702.4.

(e) Subsection (a) – [(c)] (d) supersedes 1 Pa. Code § 33.31 -33.37 (relating to service).

§ 703.7. Consolidation.

(a) Same petitioners. The Board, in its own discretion, may consolidate petitions, issues or proceedings involving a common question of law or fact for the same petitioner. [The Board may structure a proceeding to avoid unnecessary costs or delay.]

(b) Different petitioners. The Board may consolidate proceedings of different petitioners for the limited purpose of hearings with the consent of the parties.

(c) Subsection (a)-(b) supersedes [is identical to] 1 Pa. Code §§ 35.45 and 35.122 (relating to consolidation; and consolidation of formal proceedings).

§ 703.8. Timeliness of submissions.

(a) *Time.* Unless a different time is prescribed by the Board or staff, a party shall file submissions [shall be submitted] no later than 60 days after the filing date of the petition. The Board shall provide the opposing party 30 days to respond to the submission. [Evidence] Submissions filed after the prescribed deadlines may [will not] be reviewed by the Board upon good cause shown.

(b) [*Supersession.*] Subsection (a) supersedes 1 Pa. Code §§ 35.35 (relating to answers to complaints and petitions).

§ 703.9. Withdrawal or termination of appeal.

(a) A petitioner that desires to terminate an appeal before final decision by the Board shall submit to the Board a written [request] notice to withdraw the appeal by a method prescribed in section 702.4.

(b) Subsection (a) supersedes 1 Pa. Code §§ 33.42 and 35.51 (relating to withdrawal or termination).

Subchapter B. COMPROMISE PROCEDURES

§ 703.11. Compromise generally.

(a) A compromise settlement shall be ordered by the Board only with the agreement of the parties.

(b) A party [petitioner] offering a compromise shall submit to the Board and to the [Department] other party, a completed Board of Finance and Revenue Request for Compromise Form [, which is posted on the Board's webpage, with a petition or] within 30 days from the petition filing date. The submission of a request for compromise shall extend the time under section 2704(f)(1) of the Tax Reform Code of 1971. A blank compromise form may be obtained from the Board and will be posted on the Board's website address as defined in section 702.3.

[(c) Negotiations of a compromise shall take place between the petitioner and the Department.]

(c) The [timely] submission of a completed Board of Finance and Revenue Request for Compromise Form is required for the Board to grant a continuance for the purpose of pursuing a potential compromise.

(d) Negotiations of a compromise are voluntary and shall take place between the petitioner and the Department.

(e) If the parties fail to agree to a compromise within 90 days from the petition filing date, the Board will schedule the petition for a hearing, if requested, and for a decision on the merits.

(f) If the Board issues a compromise order, the parties agree, as a condition of the compromise to waive any right to:

(1) Appeal the compromise order.

(2) Claim a refund of money paid pursuant to the compromise order.

(3) File a petition or appeal that raises the same issues of the tax period and liability addressed in the compromise order.

(g) Subsections (a)—(f) supersede 1 Pa. Code § 35.115 (relating to offers of settlement, stipulations).

Statutory reference – 72 P.S. § 9704(d) and (d.7).

Subchapter C. PREHEARING CONFERENCES

§ 703.21. Prehearing conference.

(a) *Request for a prehearing conference.* A party may request a prehearing conference with the staff by a method prescribed in section 702.4. The staff may conduct a prehearing conference in response to a request or when the Board or staff deem necessary.

(b) *Scheduling prehearing conferences.* Staff will notify the parties, by a method prescribed in section 702.4, of a prehearing conference date and time, which may be in the Board's office, by telephone or by another agreed-upon electronic method.

(c) *Nonparticipation of one party.* A party may choose not to participate in the prehearing conference upon the submission of a waiver consistent with Chapter 702, Subchapter D (relating to ex parte communications) or by failing to participate in the prehearing conference after being provided notice and an opportunity to attend.

(d) [*Supersession.*] Subsections (a)—(c) supersede 1 Pa. Code § 35.111—35.116 (relating to prehearing conferences).

Statutory reference – 72 P.S. § 9704(d), (d.5) and (d.6).

Subchapter D. HEARINGS

§ 703.31. Disposition of petitions.

(a) Petitions filed with the Board shall be resolved within six months after the receipt of the petition unless the deadline has been extended consistent with section 7204(f)(2) and (3) of the Tax Reform Code of 1971 (72 P.S. § 9704(f)(1)(2) or (3), by a written order of the majority of the Board based on the submissions and information available to the Board.

(b) [A petitioner who desires a hearing shall request it on the petition form or subsequently, in writing.] The parties shall notify the Board, as part of the petition or subsequently in writing, utilizing a method set forth in section 702.4 as to whether a petition shall be disposed of with or without a public hearing. A public hearing will be scheduled if any party requests one.

(c) The Board will notify the parties who requested a public hearing of the date of the scheduled hearing. The petitioner must notify the Board as to whether it intends to attend the hearing by filing a Hearing Reply Form with the Board at least ten days prior to the scheduled hearing.

(d) Failure to timely reply. If a party fails to file a hearing reply at least ten days prior to the scheduled hearing, the party may only present an oral argument with the consent of the Board.

(e) Subsections (a) [and] - [(b)] (d) supersede 1 Pa. Code §§ 31.13, 35.101, 35.121-35.128.

Statutory reference – 72 P.S. § 9704(d), (d.5) and (e).

§ 703.32. Notice of proceeding.

(a) When notice of hearings is required, publication will be in accordance with 65 Pa. Code Chapter 701 (relating to Sunshine Act).

(b) Subsection (a) supersedes 1 Pa. Code §§ 33.51 and 35.103—35.106 (relating to docket; and notice of hearings).

Statutory reference – 72 P.S. § 9704(d), (d.5) and (d.6).

§ 703.33. Scheduling of hearing.

(a) The secretary will schedule public hearings and maintain a hearing calendar of all petitions scheduled for hearing.

(b) Public hearings of the Board ordinarily will be held in the hearing room in the Riverfront Office Center, 1101 South Front Street, Suite 400, Harrisburg, Pennsylvania 17104-2539.

(c) The Board will consider requests for remote access to hearings and, if feasible, will grant these requests.

(d) The secretary or the Board in the exercise of discretion, or upon application for good cause, may reschedule a hearing. Requests to reschedule a hearing must be filed ten days prior to the scheduled hearing.

(e) If at the time of the filing of a petition proceedings are pending in a court of competent jurisdiction in which any claim made in the petition may be established, the Board, upon the written request of the petitioner, may defer consideration of the petition until the final judgment determining the question or questions involved in the petition has been decided. If consideration of the petition is deferred, the Board shall issue a decision and order disposing of the petition within six months after final judgment.

(f) If a matter pending before the Board would be materially affected by an audit or other proceeding before the Internal Revenue Service or by an audit or other proceeding conducted by another state, the Board, upon the written request of the petitioner, may defer consideration of the petition until such time as the other audit or proceeding is complete. If consideration of the petition is deferred, the board shall issue a decision and order disposing of the petition within six months after the audit or other proceeding is final.

(g) The submission of a request to reschedule a hearing shall extend the time under 2704(f)(1) of the Tax Reform Code of 1971 (72 P.S. §9704(f)(1)).

(h) Subsections (a)—(g) [(d)] supersede 1 Pa. Code §§ 31.15, 35.102-35.106 and 35.121.

Statutory reference – 72 P.S. § 9704(d), (d.5) and (d.6).

§ 703.34. Hearing procedure.

(a) At the hearing, the petitioner shall present its case first. If the Department responds, the petitioner shall be provided an opportunity to respond.

(b) The order of presentation set forth in subsection (a) may be varied by the Board.

127. 35.123. (c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.123, 35.125, 35.127, 35.128, 35.131-35.139, 35.171-35.190, 35.201.

Statutory reference – 72 P.S. § 9704(d), (d.5) and (d.6).

§ 703.35. Failure to appear at hearing.

(a) If a party requests a hearing and thereafter fails to appear at the scheduled hearing, the opposing party may present its case to the Board at the scheduled hearing, after which the Board will render its decision.

(b) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.124 and 35.126 (relating to appearances; and presentation of the parties).

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.231-35.241 (relating to application for rehearing or reconsideration).

Subchapter E. REQUEST FOR RECONSIDERATION

§ 703.41. Request for reconsideration.

(a) *Basis of request for reconsideration.* A request for reconsideration may be filed by a party to object to a Board order due to the Board's alleged failure to address an issue raised in the appeal, error of law or fact, or computational error. A request for reconsideration will not be granted to review issues or arguments not raised before the Board or to review [evidence] a submission that was not previously submitted. Neither the sufficiency of the submission nor a determination as to whether a party satisfied its burden of proof is a basis for a reconsideration.

(b) [*Supersession.*] Subsection (a) supersedes 1 Pa. Code § 35.231-35.241 (relating to application for rehearing or reconsideration).

§ 703.42. Time for filing request for reconsideration and extension.

(a) A request for reconsideration must be filed by a party and provided to the other party within 15 days from the mailing date indicated on the order. When necessary, a request for reconsideration will serve as an automatic request for an extension of time under section 2704(f)(1) of the Tax Reform Code of 1971 (72 P.S. § 9704(f)(1)).

(b) Subsection (a) supersedes 1 Pa. Code § 35.241 (relating to application for rehearing or reconsideration).

§ 703.43. Filing a request for reconsideration.

(a) *Request for reconsideration.* A request for reconsideration must be concise and identify the alleged error.

(b) *Manner of filing.* A request for reconsideration must be submitted to the Board [electronically at bfr@patreasury.gov, by facsimile at 717-783-4499 or at the following address:

Board of Finance and Revenue
Riverfront Office Center
1101 South Front St., Suite 400
Harrisburg, PA 17104-2539]

and the opposing party utilizing a method set forth in section 702.4.

[(c) *Notice to the Other Party.* If the Department files a request for reconsideration, the Department will provide the petitioner, or petitioner's representative, with a copy of the request for reconsideration at the same time the Department files the request. The notice shall be made to the address in the Board's order or by electronic delivery to an

electronic mail address provided by petitioner. If the petitioner files a request for reconsideration, a copy of the request for reconsideration must be provided to the Department electronically at RA-RCVOCCBFRNOTIF@pa.gov or at the following address:

Pennsylvania Department of Revenue
Office of Chief Counsel
Attn: Request for BF&R Reconsideration
10th Floor, Strawberry Square
Harrisburg, PA 17128-1061]

(c) *[Supersession.]* Subsections (a) and (b) [(c)] supersede 1 Pa. Code § 35.241 (relating to application for rehearing or reconsideration).

§ 703.44. Board's response to request for reconsideration.

The Board will respond to all requests for reconsideration either granting or denying the request. If the Board grants a request for reconsideration the Board will issue a letter to both parties setting forth any future applicable deadlines. In all cases for which a reconsideration request is granted, the Board will subsequently issue a reconsidered order.

§ 703.45. Appeal rights.

(a) *Appeal rights.* A request for reconsideration is not a substitute for a court appeal. When the Board denies the request for reconsideration the Board's original order is a "final order" for purposes of appeal to Commonwealth Court within the time specified by Pennsylvania Rule of Appellate Procedure 1571(b). When the Board grants a request for reconsideration the time period for filing an appeal is stayed until the Board [and] issues a reconsidered order[,t]. The reconsidered order will [be] replace the original order and will be a "final order" appealable to Court within the time specified by Pennsylvania Rule of Appellate Procedure 1571(b).

(b) *[Supersession.]* Subsection (a) supersedes 1 Pa. Code §§ 31.14, 35.190, 35.225, 35.226 and 35.251.

Statutory reference – 72 P.S. § 9704(i).

Subchapter F. PUBLICATION OF ORDERS

§ 703.51. Publication of orders.

(a) *General rule.* The Board will publish a redacted version of each final order, along with any dissenting opinion, that grants or denies in whole or in part a petition.

(b) *Location of order publication.* Published orders will be indexed and published on a publicly accessible website maintained by the Board and accessible through the Board's website.

(c) *Timing of publication.* The Board will not publish an order for at least 30 days after the order's mailing date to enable petitioner time to identify any trade secret or confidential proprietary information that needs to be redacted from the order.

Statutory reference – 72 P.S. § 9704(h).

§ 703.52. Redaction.

(a) *Redaction of confidential information.* Prior to publication of an order the Board shall edit the order to redact the following:

(1) An individual's Social Security number, home address, driver's license number, personal financial information [as defined in section 102 of the Right-to-Know Law (65 P.S. § 67.102)], home cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number and a record identifying the name, home address or date of birth of a child 17 years of age or younger.

(2) Specific dollar amounts of tax.

(3) Information identified by petitioner [as and] that meets the definition of a trade secret or confidential proprietary information [as defined in section 102 of the Right-to-Know Law]. The petitioner is responsible for notifying the Board within 30 days of the mailing date of the order of any trade secret or confidential proprietary information that petitioner does not want to be published. The notification must clearly identify the language contained in the order that should be redacted, and the reason for the requested redaction.

(4) Such other information determined by the Board to be confidential under state or federal law.

(b) *Confidential information in a published order.* If, after an order is published, it is discovered that the published order contains confidential information that should not have been published, the Board should be notified as soon as possible and it will make every reasonable effort to redact the confidential information promptly.

Statutory reference – 72 P.S. § 9704(h)(2) and (h)(3).

Commentators on Proposed Regulation of Pennsylvania Treasury
Department 64/5

Please note the following individuals were commentators on the proposed regulations and were sent via email the same regulatory packet delivered to IRRC.

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**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 64-5

SUBJECT: General: Provisions and Tax and other Appeal Proceedings

AGENCY: Pennsylvania Treasury Department for the Board of
Finance and Revenue





TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - With Revisions Without Revisions

2016 JAN 14 AM 10:56

RECEIVED
IRRC

FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
		<u>HOUSE COMMITTEE - Finance Committee</u>
1/14/16		MAJORITY CHAIR <u>Bernie O'Neil</u>
1/14/16		MINORITY CHAIR <u>Jake Wheatley</u>
		<u>SENATE COMMITTEE - Committee on Finance</u>
1/14/16		MAJORITY CHAIR <u>John Eichelberger</u>
1/14/16		MINORITY CHAIR <u>John Blake</u>
1/14/16		<u>INDEPENDENT REGULATORY REVIEW COMMISSION</u>
_____	_____	<u>ATTORNEY GENERAL (for Final Omitted only)</u>
_____	_____	<u>LEGISLATIVE REFERENCE BUREAU (for Proposed only)</u>