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DEPARTMENT OF REVENUE

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June 15, 2015

Jacqueline Cook, Chairperson
Board of Finance and Revenue
Suite 400
1101 South Front Street
Harrisburg, PA 17104-2539

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JUN 15 2015
BOARD OF FINANCE
AND REVENUE

Attention: Public Comment

Re: Board of Finance and Revenue Proposed Regulation
Regulation #64-5 (45 Pa.B. 2362)

Dear Chairperson Cook:

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."

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 though out 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."

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.

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.

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.

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.

(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?

(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.

(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.

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.

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.

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.

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 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.

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

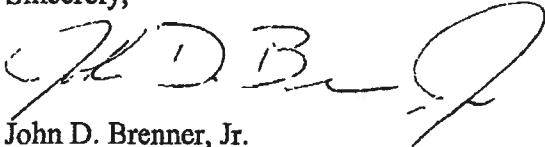
702.2 specifically provides that the rules are to be liberally construed, and that they can be waived as long as the substantive rights of a party are not affected. Further, Section 702.7 provides that the formal rules of evidence do not apply. And, there is no section discussing the consequences of 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.

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 appreciates the opportunity to comment on the Board's regulatory package. The Department hopes the Board finds these comments helpful in preparing its final regulatory package.

Sincerely,



John D. Brenner, Jr.
Deputy Chief Counsel

Enclosure

cc: Independent Regulatory Review Commission

#59102

EXHIBIT A

PROPOSED RULEMAKING

BOARD OF FINANCE AND REVENUE

[61 PA. CODE CHS. 701—703]

General Provisions; Tax and Other Appeal Proceedings

[45 Pa.B. 2362]

[Saturday, May 16, 2015]

The Board of Finance and Revenue (Board), under the general authority in section 2703.1(m) of the Tax Reform Code of 1971 (72 P. S. § 9703.1(m)), proposes to rescind Chapter 701 (relating to special rules of administrative practice and procedure) and add Chapters 702 and 703 (relating to general provisions; and tax and other appeal proceedings) to read as set forth in Annex A.

Purpose of the Proposed Rulemaking

The purpose of this proposed rulemaking is to add 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. Proposed Chapters 702 and 703 include the following: an extensive definition section; filing procedures and deadlines; processes for representation by third parties before the Board, ex parte communications and petitioning the Board; compromise settlement procedures; procedures for the hearing process; and request for reconsideration.

Chapter 702. General provisions

Proposed Chapter 702 contains the following sub- chapters.

Subchapter A (relating to overview) provides the scope of Chapter 702 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 do not apply to Board matters; and the Board has no subpoena or deposition power.

Subchapter B (relating to time) contains 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 (relating to representation before the Board) contains provisions for who may represent petitioners before the Board and the Board's criteria for limiting a person's right to practice before the Board.

Subchapter D (relating to ex parte communications) contains a definition 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

Proposed Chapter 703 contains the following subchapters.

Subchapter A (relating to submissions) contains the general requirements for what information a Petition for Relief must contain at a minimum. Additionally, under this subchapter, the Board must acknowledge the receipt of the petition. This subchapter also contains the following requirements: Board-requested additional submissions from parties; consolidation of petitions; timeliness of submissions; and withdrawal or termination of appeals.

Subchapter B (relating to compromise procedures) sets forth the rules for compromise settlements before the Board. More specifically, the subchapter contains the rules for compromise settlements generally between the parties including time deadlines and waivers.

Subchapter C (relating to prehearing conferences) sets forth the procedure for requesting a prehearing conference, scheduling prehearing conferences and non-participation of one party.

Subchapter D (relating to hearings) sets forth the following: how to request a hearing; notice of proceedings will be in accordance with 65 Pa.C.S. Chapter 7 (relating to Sunshine Act); scheduling of hearings; hearing procedures; and a party's failure to appear.

Subchapter E (relating to request for reconsideration) sets forth the procedures for a party requesting reconsideration to object to a Board order including the following: the basis of the request for reconsideration; the time period for filing a request for reconsideration and extension; and the contents of the request. This subchapter also details how the Board will respond to requests for reconsideration and provides the party's appeal rights.

Subchapter F (relating to publication of orders) sets forth that the Board will publish on the Board's web site each final order, along with dissenting opinions, that grants or denies in whole or in part the petition. The subchapter also sets forth the timing of publication. Additionally, the subchapter sets forth what constitutes confidential information the Board will automatically redact and procedures for a petitioner to request additional redactions under the definition of "trade secret" or "confidential proprietary information" in section 102 of the Right-to-Know Law (65 P. S. § 67.102).

Contact Person

The contact person for this proposed rulemaking is Jennifer Langan, Deputy Chief Counsel, Treasury Department, (717) 787-9738.

Affected Parties

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

Fiscal Impact

The Board has determined that the proposed rulemaking will not have fiscal impact on the Commonwealth.

Effective Date

The proposed rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*.

Public Comments

Interested persons are invited to submit in writing comments, suggestions or objections regarding the proposed rulemaking within 30 days after publication in the *Pennsylvania Bulletin* to Jacqueline Cook, Chairperson, Board of Finance and Revenue, 1101 South Front Street, Suite 400, Harrisburg, PA 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 is available on the Board's web site at www.patreasury.gov/bfr/.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

JACQUELINE COOK,
Chairperson

Fiscal Note: 64-5. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 61. REVENUE

PART IV. 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).

(Editor's Note: Chapters 702 and 703 are new and printed in regular type to enhance readability.)

CHAPTER 702. GENERAL PROVISIONS

Subchap.

A. OVERVIEW

B. TIME

C. REPRESENTATION BEFORE THE BOARD

D. EX PARTE COMMUNICATIONS

Subchapter A. OVERVIEW

Sec.

702.1. Scope.

702.2. Liberal construction.

702.3. Definitions.

702.4. Filing generally.

702.5. Board office hours.

702.6. Oaths.

702.7. Formal rules of evidence do not apply.

702.8. Subpoenas and depositions.

§ 702.1. Scope.

(a) This ~~chapter~~ Part establishes the practice and procedure before the Board.

(b) This chapter Part supersedes 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) to the extent inconsistent therewith.

~~—(c) Subsection (a) supersedes 1 Pa. Code §§ 31.1 and 31.6 (relating to scope of part; and amendments to rules).~~

§ 702.2. Liberal construction.

(a) This 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) and (b) supersede 1 Pa. Code § 31.2 (relating to liberal construction).~~

§ 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.

Business day—A day on which the Board's office is scheduled to be open weekday excluding Saturdays, Sundays or and 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 by electronic means such as e-mail, 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—

(i) A person who appears in a proceeding before the Board. **[COMMENT: This definition would suggest that an attorney (or other representative) or a witness could be a party. The**

Department does not believe this is the intent of the definition. The definition should be clarified.]

(ii) The term includes the following:

(A) A taxpayer.

(B) The Department.

(C) The claimant and the opposing governmental agency in appeals filed under section 503 of The Fiscal Code (72 P. S. § 503).

Personal financial information—The term means any of the following:

(i) Personal credit, charge or debit card information.

(ii) Bank account information.

(iii) Bank, credit or financial statements.

(iv) Account or PIN numbers.

(v) Other information regarding an individual's personal finances.

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

Petitioner—A taxpayer or other claimant.

Proceeding—A matter before the Board, including a petition, hearing or claim.

Secretary—The secretary of the Board. This individual is the Board officer with whom documents are filed and by whom official records are kept.

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

Trade secret—The term as defined in section 102 of the Right-to-Know Law.

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

§ 702.4. Filing generally.

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

(1) In person or by mail at 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 petitioner bears 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.

~~(d) Subsections (a)–(c) supersede 1 Pa. Code §§ 31.4, 31.5 and 33.61 (relating to information and special instructions; communications and filings generally; and applications for waiver of formal requirements).~~

§ 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).~~

§ 702.6. Oaths.

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

~~(b) Subsection (a) supersedes 1 Pa. Code § 35.148 (relating to officer before whom deposition is taken).~~

§ 702.7. Formal rules of evidence do not apply.

(a) Formal rules of evidence do not apply to matters before the Board. [COMMENT: It would be helpful to add a caveat that the Board has the authority to consider the weight and sufficiency of the evidence and may take the rules of evidence into consideration.]

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

§ 702.8. Subpoenas and depositions.

(a) The Board does not possess the power to issue subpoenas or to take depositions.

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

Subchapter B. TIME

Sec.

702.11. Date of filing.

702.12. Computation of 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)~~ as shown on the delivery receipt attached to or included within the envelope containing the document.

(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 is submitted by means of electronic delivery on a day other than a business day, the document 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).~~

§ 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. [COMMENT: Is this section intended to be a mere re-wording of 1 Pa. Code § 31.12? Why not just use the language from § 31.12?]

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

Subchapter C. REPRESENTATION BEFORE THE BOARD

Sec.

702.21. Representation.

702.22. Limited practice 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 a proceeding that a~~ A power of attorney or similar authorization, signed and executed by the petitioner, must be filed with the Board before recognizing a ~~the Board will recognize the person 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, the petitioner's representative. Unless another method is prescribed, the Department will be deemed to be served electronically when the Board docketed the case onto the Department's appeal system. A petitioner shall identify his representative on the petition form as required under § 703.2(a)(2).~~

(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.

(f) *Change in address.* A change in address that occurs during the course of a proceeding shall be reported promptly to the secretary.

(g) *Withdrawal of representative.* Representation continues until a petitioner or the petitioner's representative notifies the secretary in writing that the designation of representation is rescinded. [COMMENT: Does this mean that representation continues indefinitely without a written rescission? Does representation end after the Board issues its decision and order and no appeal is filed?]

(h) ~~*Supersession.* Subsections (a)–(g) supersede 1 Pa. Code §§ 31.21–31.26.~~

§ 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 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

Sec.

702.31. Definitions.

702.32. General rules.

§ 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 merits of a petition, outside of a public hearing with proper notice to all parties, by one party with the Board or the staff not in the presence of the other party. **[COMMENT: The term “merits” should be clarified to include both substantive and procedural merits.]**

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 the communication. The waiver must be in a format designated by the Board and published on the Board's web site.

§ 702.32. General rules.

(a) *Communication with Board members.* Board members may not participate in an ex parte communication.

(b) *Communication with staff* The staff may not participate in an ex parte communication, except in either of the following situations:

(1) A party provides a waiver.

(2) 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~~ indicates that it will not participate in the meeting.

(c) *Written and electronic submission.* A written or electronic ~~submission~~ communication provided to the Board or staff by a party shall be promptly contemporaneously provided to the other party.

(d) *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. The Board may take reasonable measures deemed necessary to remedy an ex parte communication.

CHAPTER 703. TAX AND OTHER APPEAL PROCEEDINGS

Subchap.

A. SUBMISSIONS

B. COMPROMISE PROCEDURES

C. PREHEARING CONFERENCES

D. HEARINGS

E. REQUEST FOR RECONSIDERATION

F. PUBLICATION OF ORDERS

Subchapter A. SUBMISSIONS

Sec.

703.1. Petitions generally.

703.2. Petition content.

703.3. Board acknowledgment.

703.4. Other submissions.

703.5. Service.

703.6. Consolidation.

703.7. Timeliness of submissions.

703.8. Withdrawal or termination of appeal.

§ 703.1. Petitions generally.

(a) *General requirements.* Petitions for ~~relief~~ review 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 shall be filed using the Board's designated petition form or otherwise conform to the format of the Board's designated form on the Board's web site.

[COMMENT: Does the Board expect the Department to file a written response to every petition? If not, it would be helpful to include a subsection that states that the Department may but is not required to file an answer or written response to a petition.]

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

§ 703.2. Petition content.

(a) *General.* A petition must include the following, as applicable:

- (1) The petitioner's name, address, telephone number and e-mail address.
- (2) The name, address, telephone number and e-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 account or box number.
- (5) The appeal type and relevant periods for review.
- (6) The amount of tax or other amounts the 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.

(b) *Accuracy of address for Board correspondence* The Board is permitted to rely upon the accuracy of the physical or e-mail address provided by the petitioner. It is the duty of the petitioner to notify the Board when 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 the petitioner.

[COMMENT: What happens if a petition fails to comply with the above requirements? Does it mean that the petition is defective? Will it be accepted by the Board? Does a defective petition toll the statute of limitations for the appeal period?]

~~(d) *Supersession.* Subsections (a)–(c) supersede 1 Pa. Code §§ 31.11–31.15, 33.1–33.4, 35.18–35.20, 35.23, 35.24, 35.27–35.32, 35.35–35.41 and 35.48–35.51, 35.54 and 35.55.~~

§ 703.3. Board acknowledgment.

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

§ 703.4. Other submissions.

(a) *Information requests.* The Board may request a party petitioner to furnish additional information in a format designated by the Board. The Board may deny the petitioner's requested relief for failure to furnish the additional information. The Board may also request the Department to provide additional information not available to the Board.

(b) *Submissions.* Submissions filed subsequent to the petition must include the petitioner's name and the docket number.

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

(d) *Copies.* Petitioners are required to file one copy of a document either in hard copy or electronically at the time of filing. In 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 and, when feasible, its attachments are capable of being printed and copied without restriction, and may not require a password to view the contents.*

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

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

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

~~(g) *Supersession* Subsections (a) – (e) supersedes 1 Pa. Code §§ 33.1 – 33.4, 33.11, 33.12, 33.15, 33.21 – 33.23, 33.31 – 33.37, 33.41, 35.1, 35.2, 35.5 – 35.7, 35.9 – 35.11, 35.14, 35.191 – 35.193, 35.201 – 35.207, 35.211 – 35.214 and 35.221.~~

§ 703.5. Service.

(a) A party shall contemporaneously serve the other party with each submission.
[COMMENT: What is the proper manner of service?]

~~(b) The Board will publish on its web site instructions regarding service.~~

~~(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 33.31 – 33.37 (relating to service of documents).~~

§ 703.6. Consolidation.

(a) The Board 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) Subsection (a) is identical to 1 Pa. Code §§ 35.45 and 35.122 (relating to consolidation; and consolidation of formal proceedings).~~

§ 703.7. Timeliness of submissions evidence.

(a) *Time* Unless a different time is prescribed by the Board or staff, submissions a petitioner shall be submitted submit evidence to support its petition no later than 60 days after the filing date of the petition. The Board will provide the ~~opposing party~~ Department 30 days to respond to the submission of evidence. The Board will not consider Evidence filed after the prescribed deadlines may not be reviewed by the Board. [OR IN THE ALTERNATIVE: THE BOARD WILL ESTABLISH A SCHEDULE FOR THE SUBMISSION OF EVIDENCE AND LEGAL ARGUMENTS AFTER A PETITION IS FILED AND PROVIDE THE SCHEDULE TO THE PARTIES. THE BOARD WILL NOT CONSIDER EVIDENCE AND LEGAL ARGUMENTS SUBMITTED AFTER THE SCHEDULED DEADLINES.]

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

§ 703.8. Withdrawal or termination of appeal.

(a) A petitioner that wishes to terminate an appeal before final decision by the Board shall submit to the Board a written request to withdraw the appeal.

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

Subchapter B. COMPROMISE PROCEDURES

Sec.

703.11. Compromise generally.

§ 703.11. Compromise generally.

- (a) A compromise settlement will be ordered by the Board only with the agreement of the parties.
- (b) A petitioner offering a compromise shall submit ~~to the Board and the compromise request~~ to the Department ~~a completed Board of Finance and Revenue Request for Compromise Form, which is posted on the Board's web site, with a petition or within 30 days from the petition filing date.~~
- (c) Negotiations of a compromise will take place between the petitioner and the Department.
- (d) ~~The timely submission of a completed Board of Finance and Revenue Request for Compromise Form~~ The parties shall notify the Board if the parties are attempting to negotiate a compromise. Notice to the Board is required for the Board to grant a continuance for the purpose of pursuing a potential compromise.
- ~~(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).~~

Subchapter C. PREHEARING CONFERENCES

Sec.

703.21. Prehearing conference.

§ 703.21. Prehearing conference.

(a) *Request for a prehearing conference.* A party may request a prehearing conference with the staff. The staff may will conduct a prehearing conference in response to a party's request or when the Board or staff deems necessary.

(b) *Scheduling prehearing conferences* Staff will notify the parties 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).~~

Subchapter D. HEARINGS

Sec.

703.31. Disposition of petitions.

703.32. Notice of proceeding.

703.33. Scheduling of hearing.

703.34. Hearing procedure.

703.35. Failure to appear at hearing.

§ 703.31. Disposition of petitions.

(a) Petitions filed with the Board will be resolved by a written decision and order of the majority of the Board based on the submissions and information available to the Board. The Board's order will contain the findings of fact and conclusions of law that serve as the basis for the Board's decision and order.

~~(b) A petitioner who wishes a hearing shall request it on the petition form or subsequently, in writing. The parties shall notify the Board, as part of a petition or subsequently in writing, as to whether a petition shall be disposed of with or without a public hearing. A public hearing will be held if any party requests one.~~

~~(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 31.13, 35.101 and 35.121–35.128 (relating to issuance of agency orders; waiver of hearing; and hearing).~~

§ 703.32. Notice of proceeding.

(a) When notice of hearings is required, publication will be in accordance with 65 Pa.C.S. Chapter 7 (relating to Sunshine Act).

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

§ 703.33. Scheduling of public hearings before the Board members.

(a) The secretary will schedule public hearings before the Board members and maintain a hearing calendar of the petitions scheduled for public 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 public hearings and, if feasible, will grant these requests.

(d) The secretary or the Board in the exercise of discretion, or upon application for cause, may reschedule a public hearing.

~~(e) Subsections (a)–(d) supersede 1 Pa. Code §§ 31.15, 35.102—35.106 and 35.121.~~

§ 703.34. Public Hearing procedure.

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

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

(c) Public hearings before the Board shall be limited to a presentation of a summary of the case and legal arguments. Public hearings are not evidentiary hearings. All testimony and other evidence must be presented to the Board in advance of a public hearing. The Board will not accept testimony and other evidence at a public hearing.

~~(e) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.123, 35.125, 35.127, 35.128, 35.131—35.133, 35.137—35.139, 35.173, 35.177—35.180, 35.185—35.190 and 35.201.~~

§ 703.35. Failure to appear at public hearing.

(a) If a party requests a public hearing and thereafter withdraws its request or fails to appear at the scheduled hearing, the opposing party may present its case to the Board at the scheduled hearing.

~~(b) Subsection (a) supersedes 1 Pa. Code §§ 35.124 and 35.126 (relating to appearances; and presentation by the parties).~~

[COMMENT: It would be helpful if the Board would add an additional section or sections into its regulations to address the current practices outlined in its hearing notice cover letter, such as: (1) the deadline to respond to hearing notices, (2) the prohibition against “walk-ins,” and (3) continuance request timeframes.]

Subchapter E. REQUEST FOR RECONSIDERATION

Sec.

703.41. Request for reconsideration.

703.42. Time for filing request for reconsideration and extension.

703.43. Filing a request for reconsideration.

703.44. Board's response to request for reconsideration.

703.45. Appeal rights.

§ 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 that was not previously submitted. [COMMENT: Is insufficiency of the evidence / failure to carry burden of proof a basis for reconsideration? These arguments would seem to fall under errors of law or fact, or a hybrid of the two. It would be helpful to indicate if insufficiency of the evidence / failure to carry burden of proof are legitimate reasons for reconsideration.]

~~(b) *Supersession.* Subsection (a) supersedes 1 Pa. Code §§ 35.231, 35.233 and 35.241 (relating to reopening and rehearing).~~

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

(a) A request for reconsideration shall 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 bfir@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, Pennsylvania 17104-2539~~

[COMMENT: Section 702.4 already addresses where to send Board filings. It seems redundant to address it here.]

(c) *Notice to the other party.* If the Department files a request for reconsideration, the Department will provide the petitioner, or the petitioner's representative, with a copy of the request for reconsideration at the same time the Department files the request. The notice must be made to the address in the Board's order or by electronic delivery to an e-mail address provided by the petitioner. If the petitioner files a request for reconsideration, a copy of the request for reconsideration shall be provided to the Department electronically at RA-RVOCCBFRNOTIF@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, Pennsylvania 17128-1061~~

Attn: Request for BF&R Reconsideration
Pennsylvania Department of Revenue
Office of Chief Counsel
327 Walnut Street, Floor 10
PO Box 281061
Harrisburg PA 17128-1061

~~(d) *Supersession.* Subsections (a) — (e) 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 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) (relating to determinations of the Board of Finance and Review). When the Board grants a request for reconsideration and issues a reconsidered order, the reconsidered order will be a "final order" appealable to Court within the time specified by Pennsylvania Rule of Appellate Procedure 1571(b). [COMMENT: Technically, when the Board issues a decision on a request for reconsideration, that decision is an "order" of the Board. The Department does not believe that the order denying the request for reconsideration is the order that becomes the "final order" as stated above. However, someone could misinterpret the above language to mean that the order denying the request for reconsideration is the "final order" that is appealable to the Commonwealth Court, or at a minimum, that the denial is the order that begins the running of the statute of limitations for filing an appeal with the Commonwealth Court. This should be clarified in the final regulation. The Department agrees with another commentators suggestion that the word "original" should be inserted before the word "order" as indicated above.]

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

Subchapter F. PUBLICATION OF ORDERS

Sec.

703.51. Publication of orders.

703.52. Redaction.

§ 703.51. Publication of orders.

(a) *General rule.* The Board will publish 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 web site maintained by the Board and accessible through the Board's web site.

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

§ 703.52. Redaction.

(a) *Redaction of confidential information.* Prior to publication of an order, the Board will 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 and 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 the 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 a trade secret or confidential proprietary information that the petitioner does not want to be published. The notification must clearly identify the language in the order that should be redacted and the reason for the requested redaction.

(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.

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