

**AMENDED AGENDA  
FLORIDA DEPARTMENT OF REVENUE**

**MEMBERS**

Governor Charlie Crist  
Attorney General Bill McCollum  
Chief Financial Officer Alex Sink  
Commissioner Charles Bronson

**July 28, 2009**

**Contact: Jeff Kielbasa  
(850-922-5201)**

9:00 A.M.  
LL-03, The Capitol  
Tallahassee, Florida

<b>ITEM</b>	<b>SUBJECT</b>	<b>RECOMMENDATION</b>
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|----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------|
| 1. | Respectfully request approval of the minutes of April 28, 2009.<br><br><b>(ATTACHMENT 1)</b>                                                                                                                                                                                                                                                                                             | <b>RECOMMEND APPROVAL</b> |
| 2. | Respectfully request approval and authority to publish a Notice of Intended Action in the Florida Administrative Weekly to: <ul style="list-style-type: none"><li>• Establish new procedures for adjusting the distribution of communication services tax proceeds to local governments (<i>Rule 12A-19.080, Florida Administrative Code/F.A.C.</i>).</li></ul><br><b>(ATTACHMENT 2)</b> | <b>RECOMMEND APPROVAL</b> |
| 3. | Respectfully request adoption and approval to file and certify with the Secretary of State under Chapter 120, Florida Statutes, amendments to state tax rules and forms to administer implementation of recent legislative changes and to clarify and simplify Department administrative procedures for better taxpayer understanding and compliance.                                    |                           |

Proposed Rules on State and Local Sales and Use Tax

- Groceries, food, and beverage sales: help businesses understand the tax status of these sales by providing revisions that simplify, clarify, and combine existing rules (*Rules 12A-1.011 and 12A-1.0115, F.A.C.*); (Withdrawing these rules from this Agenda; see attachment 3 note below)
- Sales for resale: allow businesses to document a tax-exempt wholesale-level transaction by getting a resale authorization number before or at the time of a sale (*Rule 12A-1.039, F.A.C.*);
- Exemption certificates: clarify instructions on forms used by businesses to:
  - Get the Enterprise Zone job credit;
  - Use the special estimating tax provisions for boat, motor vehicles, and aircraft;
  - Verify if someone is authorized to make purchases of items for resale to someone else; (*Rules 12A-1.038 and 12A-1.097, F.A.C.*).

- State and local tax rate tables: update information on how to get these tables (*Rule 12A-1.004, F.A.C.*);
- Transient rental accommodations: revising information on how businesses can register multiple accommodations (*Rules 12A-1.060 and 12A-1.061, F.A.C.*);
- Direct pay permits: removes obsolete provisions, since these procedures are now governed by rules adopted by the Administration Commission (*obsolete Revenue Rule 12A-1.0911, F.A.C./ Administration Commission Rule Chapter 28-106, F.A.C.*).

#### Proposed Insurance Premium Tax Rules

- Administratively implement s. 14 of Ch. 2007-1, L.O.F. and s. 4 of Ch. 2008-220, Laws of Florida, which statutorily apply this tax to the self-insurance funds of:
  - Not for profit corporations; and,
  - Public housing authorities.
- Administratively implement recent litigation which provided that the dividends a policyholder uses to buy more paid-up insurance is not taxable as additional gross receipts of the insurance company;
- Administratively implement the statutory criteria taxpayers must meet to use the exceptions granted by law for the standard insurance premium tax salary credit;
- Add information about statutory credits associated with the Florida Life and Health Insurance Guaranty Association refund to the Department of Revenue;
- Explain that Florida law holds open the statute of limitations on insurance premium tax returns when there are subsequent changes to:
  - Assessments paid for unemployment compensation; and/or,
  - Corporate income taxes paid.
 (*Rule 12B-8.001, F.A.C.*).

#### Proposed Corporate Income Tax Rules

- Changes to Rule 12C-1.0222, F.A.C.:
  - Conform Florida's procedures to a recent change in the federal Internal Revenue Code that reduced from six to five months the extension period for filing a partnership return;
  - Administratively implement the Department of Revenue's statutory authority to require the electronic filing of Florida corporate income tax returns (*Rule 12C-1.0222, F.A.C.*);
  - Add provisions regarding the requirement to pay tentative corporate income tax—these provisions are transferred from Rule 12C-1.032, F.A.C.
- Repeal of Rule 12C-1.032, F.A.C.: is necessary due to the transfer of this rule's provisions to Rule 12C-1.0222, F.A.C., as discussed in the bullet directly above.

**(ATTACHMENT 3)**

**RECOMMEND APPROVAL AND REQUEST WITHDRAWAL  
FROM THIS AGENDA THE GROCERIES, FOOD, AND  
BEVERAGE SALES RULES**

# MEETING OF THE GOVERNOR AND CABINET AS HEAD OF THE DEPARTMENT OF REVENUE

April 28, 2009

## MINUTES

With Governor Crist presiding and all members present, the Department of Revenue was convened in LL-03, The Capitol

The following official actions were taken.

- ITEM 1.** Approved the minutes of March 10, 2009.
- ITEM 2.** Approved and granted authority to publish a Notice of Intended Action relating to insurance premium tax in the Florida Administrative Weekly to:
- administer implementation of recent legislation (Section 14 of Chapter 2007-1, and Section 4 of Chapter 2008-220, Laws of Florida);
  - make revisions identified during recent litigation; and,
  - make technical changes such as corrections to statute references and the removal of obsolete provisions
- ITEM 3.** Approved and granted authority to adopt, file and certify with the Secretary of State under Chapter 120, Florida Statutes, amendments to state tax rules and forms to administer implementation of recent legislative changes and to clarify and simplify Department administrative procedures for better taxpayer understanding and compliance.

### Proposed Rules on State and Local Sales and Use Tax/ Secondhand Dealers or Secondary Metals Recycler

- Clarify that dealers do not pay sales tax when they buy "one-time use" items that accompany products they sell (*Rules 12A-1.029, 12A-1.036, 12A-1.040, and 12A-1.075, Florida Administrative Code/F.A.C.*);
- Update the effective local sales surtax rates the Department provides to operators of amusement and vending machines, concession stand dealers, and dealers of alcoholic beverages (*Rules 12A-15.002, 12A-15.010, 12A-15.011, and 12A-15.012, F.A.C.*);
- Conform the rules to recent legislation allowing the Department to release the name and address of any registered secondary metals recycler when requested by a law enforcement official with jurisdiction. (*Rule 12A-17.003, F.A.C.*).

**ATTACHMENT #1**

### Proposed Fuel and Pollutant Tax Rules

Proposed revisions to rules to update provisions regarding:

- When an ethanol-product that is blended with gasoline is considered a fuel subject to Florida fuel taxes;
- Clarifying refunds of fuel taxes paid on motor fuel used in aviation ground support vehicles or equipment (Sections 1 and 2, Chapter 2007-31, L.O.F.);
- Issuing temporary fuel and pollutant licenses during a declared state of emergency to expand the number of dealers from which the public and dealers in other states can get fuel (Sections 15-17, Chapter 2007-106, L.O.F.) (*Rules 12B-5.020, 12B-5.121, 12B-5.130, 12B-5.150, and 12B-5.401, F.A.C.*)

### Proposed Insurance Premium Tax Rule

Update provisions concerning the computation of the part of the Florida Insurance Guaranty Association assessment that should be included in section 624.5091, F.S. Florida's retaliatory tax (*Rule 12B-8.016, F.A.C.*)

### Proposed Tax Reward Program Rules

Clarify what taxes, surtaxes, surcharges, and fees are eligible for the statutory reward program. This program offers compensation to the public for information on tax violations (*Rules 12-18.001, 12-18.002, 12-18.004, and 12-18.008, F.A.C.*);

### Proposed Rules on Clerks of the Court Remittance Requirements

Incorporate improvements to the Clerk of the Court electronic remittance system. These improvements updated and simplified the system (*Rules 12-14.003 and 12-14.005, F.A.C.; and, Rules 12-28.001, 12-28.002, 12-28.003, 12-28.004, 12-28.005, 12-28.006, 12-28.007, 12-28.008, and 12-28.009, F.A.C.*)

### Proposed Rules on Electronic Funds Transfer and Return Submission

- Administer implementation of recent legislation and update the procedures taxpayers use to electronically remit taxes and electronically submit associated tax returns. The statutes apply these electronic remittance and submission to most taxpayers who annually pay \$20,000 or more in taxes (*Rules 12-24.001, 12-24.002, 12-24.003, 12-24.004, 12-24.005, 12-24.007, 12-24.008, 12-24.009, 12-24.010, and 12-24.011, F.A.C.*);
- Update the method used by fuel dealers to electronically submit information to the Department for tracking the movement of fuel products as required by Florida law (*Rules 12B-5.030, 12B-5.040, 12B-5.050, 12B-5.060, 12B-5.070, 12B-5.080, 12B-5.090, 12B-5.100, 12B-5.110, 12B-5.150, and 12B-5.400, F.A.C.*)

July 17, 2009

**MEMORANDUM**

**TO:** The Honorable Charlie Crist, Governor  
Attention: Pat Gleason, Director of Cabinet Affairs

The Honorable Bill McCollum, Attorney General  
Attention: Rob Johnson, Cabinet Affairs

The Honorable Alex Sink, Chief Financial Officer  
Attention: Robert Tornillo, Chief Cabinet Aide  
Amber Hughes, Cabinet Aide

The Honorable Charles Bronson, Agriculture Commissioner  
Attention: Jim Boxold, Chief Cabinet Aide  
Cathy Giordano, Cabinet Aide

**FROM:** Jeff Kielbasa, Deputy Executive Director

**SUBJECT:** Requesting Approval to Hold a Public Hearing on a New Communications Services Tax Rule

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**What the Department is requesting:** Approval to publish a Notice of Proposed Rule to schedule a public rule hearing at the next stage of rulemaking on a proposed new rule for communication services tax.

**Why the creation of this communication services tax rule is necessary:**

- To administratively implement Section 202.18(3)(c), Florida Statutes, relating to distribution adjustments resulting from misallocation of tax;
- To establish procedures, scheduling, and review under Section 202.18(3)(c), Florida Statutes, for distributing adjustments to local governments resulting from misallocation errors.

**ATTACHMENT #2**

**What this new rule does:**

- Defines key terms;
- Explains that distribution adjustments can be required due to misallocations to any of the following components of this tax:
  - State portion;
  - Gross receipts tax portion;
  - Local portion.
- Establishes calculations to determine when the Department will make adjustments, based on specific factors, and give examples of how these determinations will be made;
- Enables local governments to request a review of the Department's documentation regarding distribution adjustments; and,
- Provides an annual schedule for these adjustments, and procedures for notifying affected local governments about adjustments to their distributions.

**Were comments received from external parties:** The Department held a rule development workshop on April 1, 2009. Comments were received from the public and changes were made to the proposed rule:

- The annual adjustment cycle was changed to run from February 1<sup>st</sup> through January 31<sup>st</sup>;
- Distribution adjustments will be combined into one electronic file on February 1<sup>st</sup>, instead of April 1<sup>st</sup>;
- General questions from affected parties concerning distribution adjustments must be received by the Department by March 1<sup>st</sup>, instead of May 1<sup>st</sup>, for each annual cycle; and,
- A final adjustment file will be posted by the Department on April 1<sup>st</sup>, instead of June 1<sup>st</sup>.

**Major administrative issues in this rule:** Establishes uniform procedures, scheduling, and review for making statutory adjustments to local government communications services tax distributions.

Attached are copies of:

- Summary of proposed rule
- Statement of facts and circumstances justifying the rule
- Federal relation statement
- Summary of workshop
- Proposed Notice of Intended Action with proposed rule text

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12A-19, FLORIDA ADMINISTRATIVE CODE  
COMMUNICATIONS SERVICES TAX  
CREATING RULE 12A-19.080

SUMMARY OF PROPOSED RULE

Proposed new Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax), provides local governments and other affected parties a process and timeline on what and how to expect distribution adjustments resulting from misallocation of tax to or between local governments and component parts of the communications services tax.

FACTS AND CIRCUMSTANCES JUSTIFYING PROPOSED RULE

The proposed Rule Chapter 12A-19.080, F.A.C. (Communications Services Tax), is necessary to establish and memorialize the process and procedures the Department will employ when making adjustments to and between the component parts of communications services tax so local governments and other affected parties have this to rely upon.

FEDERAL COMPARISON STATEMENT

The provisions contained in this rule do not conflict with comparable federal laws, policies, or standards.

SUMMARY OF RULE DEVELOPMENT WORKSHOP

HELD ON APRIL 1, 2009

The proposed creation of Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax), was noticed in the Florida Administrative Weekly on March 6, 2009 (Vol. 35, No. 9, pp. 1052). A rule development workshop was held on April 1, 2009, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, FL, to allow members of the public to ask questions and make comments concerning the proposed rule. No written comments have been received by the Department.

**PARTIES ATTENDING**

For the Department of  
Revenue

JEFF KIELBASA, Deputy Director  
LARRY GREEN, Workshop Moderator  
VINCE ALDRIDGE, Deputy Director, Technical Assistance and  
Dispute Resolution  
GRACE REEVES, Revenue Program Administrator  
CARLA BRUCE, Tax Law Specialist

From the Public

SCOTT ROBIN, Weiss Serota Helfman Pastoriza Cole  
& Boniske, P.L.  
DAVID A. FRYE, Florida Association of Telecommunications  
Officer & Advisors  
SHARON FOX, City of Tampa  
MICHAEL MEERS, City of Tallahassee  
BETH BRIER, City of Tallahassee

WRITTEN COMMENTS    None

Ms. Carla Bruce, Department of Review, presented an overview of the timeline for the distribution of communications services reflected in proposed Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax). Mr. Vince Aldridge, Department of Revenue, provided background information regarding the requirements imposed on the Department by the law and reflected in the proposed rule. Ms. Bruce followed with a presentation of the provisions of the proposed rule.

Mr. Scott Robin, Weiss, Serota & Helfman, requested information regarding how the Department selects and performs audits of dealers of communications services. Mr. David Frye, Florida Association of Telecommunications Officer & Advisors, asked how the Department handled the misappropriation of the tax. Mr. Jeff Kielbasa, Department of Revenue, responded, clarifying that what is at issue is a misallocation of the tax, not a misappropriation.

The discussion continued regarding the Department's audit process, how taxpayers are selected for an audit, what is the audit frequency, how audits are conducted to account for local rates, and whether penalties are imposed for incorrect local situsing.

Ms. Sharon Fox, City of Tampa, requested that the Department consider changing the date the final distribution adjustment spreadsheet is posted on the local government website from July 1 of each year to April 1. The timeline proposed in the rule puts the final distribution file available as of July 1, a time beyond what is needed for final information for budgeting purposes on an annual basis. The final information is really needed by April 1 to accommodate the budgeting process and would be more advantageous to the local governments. Mr. Meers, City of Tallahassee, agreed with the proposal to change the date to April 1.

#### **CHANGES TO PROPOSED RULE 12A-19.080, F.A.C.:**

In response to public comments received at the rule development, the following changes were made to proposed new Rule 12A-19.080, F.A.C.:

- Subsection (1) has been changed to provide that the adjustment cycle will run from February 1 through January 31 of the subsequent year
- Paragraph (4)(a) has been changed to provide that the distribution adjustments will be combined into one electronic file on February 1, rather than April 1, and that all general

- Paragraph (4)(c) has been revised to provide that a final adjustments file will be posted on April 1, rather than June 1

## NOTICE OF PROPOSED RULE

DEPARTMENT OF REVENUE

COMMUNICATIONS SERVICES TAX

RULE NO.    RULE TITLE:

12A-19.080    Distribution Adjustments Resulting From Misallocation of Tax

PURPOSE AND EFFECT: Section 202.18(3)(c), F.S., requires the Department to make any adjustments to the distribution of proceeds of the local communications services tax that are necessary to reflect the proper amounts due to individual jurisdictions.

The purpose of the creation of Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax), is to develop procedures that will be used by the Department for determining when misallocations of communications services tax have occurred, for notifying the affected jurisdictions of the misallocations, and how distribution adjustments will be made.

SUMMARY: The proposed creation of Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax), provides local governments and other affected parties a process and timeline on what and how to expect distribution adjustments resulting from misallocation of tax to or between local governments and component parts of the communications services tax.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COST: No statement of estimated regulatory costs has been prepared. Any person who wishes to provide information regarding regulatory costs, or to provide a proposal for a lower cost regulatory alternative, must do so in writing within 21 days of this notice.

SPECIFIC AUTHORITY: 202.26(3)(a) FS.

LAW IMPLEMENTED: 202.18(3)(c), 202.22(5), 202.231, 202.35(3) FS.

A HEARING WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW:

DATE AND TIME: [To be determined upon approval.]

PLACE: Room 118, Carlton Building, 501 South Calhoun Street, Tallahassee, Florida.

NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT: Any person requiring special accommodations to participate in any rulemaking proceeding before the Technical Assistance and Dispute Resolution Office is asked to advise the Department at least 48 hours before such proceeding by contacting Larry Green at (850)922-4830. Persons with hearing or speech impairments may contact the Department by using the Florida Relay Service, which can be reached at (800)955-8770 (Voice) and (800)955-8771 (TDD).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Carla Bruce, Tax Law Specialist, Technical Assistance and Dispute Resolution, Department of Revenue, P.O. Box 7443, Tallahassee, Florida 32314-7443, telephone (850)922-4839.

THE FULL TEXT OF THE PROPOSED RULE IS:

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12A-19, FLORIDA ADMINISTRATIVE CODE  
COMMUNICATIONS SERVICES TAX  
CREATING RULE 12A-19.080

12A-19.080 Distribution Adjustments Resulting From Misallocation of Tax.

(1) The purpose of this rule is to establish procedures when the Department determines that misallocations of communications services taxes require adjustments to distributions of the taxes. This determination will occur annually, with the adjustment cycle running from February 1 through January 31 of the subsequent year.

(2) DEFINITIONS: For purposes of this rule, the following terms are defined:

(a) “Distribution adjustments” are the reallocation of tax between local taxing jurisdictions or reallocation of tax distributed incorrectly to either the state, gross receipts or local portion of Communications Services Tax. This reallocation may be the result of incorrect local jurisdictional situsing, misapplication of tax on the return, or other filing errors causing tax misallocation.

(b) “Situsing” is the assignment of a service address to a local taxing jurisdiction.

(c) A “completed audit” is as an audit that has been paid and all formal or informal protest rights have been exercised or expired.

(3) DISTRIBUTION THRESHOLDS

(a) The Department’s determination will occur annually on or about November 15 and notice of this determination will be mailed to each affected local jurisdiction.

1. When the distribution adjustment is less than ninety percent (90%) of the average monthly distributions to the affected jurisdiction for the immediately preceding six months, the Department will make such adjustments in the month immediately following the Department's determination that misallocations occurred.

2.a. When the distribution adjustment is equal to or exceeds ninety percent (90%) of the average monthly distributions to the affected jurisdiction for the immediately preceding six months, the Department will make such adjustments beginning with the March distribution, unless affected jurisdictions seek another form of reallocation as described in sub-subparagraph

2.b. The adjustments will be made over a time period that equals the time period that the misallocations occurred.

b. Affected jurisdictions may seek another form of reallocation of proceeds other than by monthly Department distributions. The affected jurisdictions may execute a written agreement specifying a method of adjustment. A copy of the written agreement must be provided to the Department no later than the first day of the month following 90 days after the date the Department transmits notice of the misallocation.

(b) Example: A jurisdiction's average monthly distribution is \$10,000. The jurisdiction's sum total of adjustments for the adjustment cycle is (\$9,000). All adjustments are from audits with a 36-month audit period. The (\$9,000) will be allocated equally over a 36-month period with a monthly adjustment of (\$250). [(\$9000) / 36 months = (\$250)].

(c) Example: A jurisdiction's average monthly distribution is \$10,000. The jurisdiction's sum total of adjustments for the adjustment cycle is (\$8,000.00). The (\$8,000) adjustment will be made to the jurisdiction's December distribution.

#### (4) DISTRIBUTION ADJUSTMENT TIMELINE.

(a) On February 1, distribution adjustments will be combined into one electronic file organized by county and then jurisdiction within the county. For each local jurisdiction, the file will identify the taxpayer names, federal identification numbers, and the amount of the distribution adjustment. The file will be posted to the Local Government Communications Services Tax Information Sharing System. All local jurisdictions will have 30 days to review and make general inquiries regarding their proposed distribution adjustment. A local jurisdiction may make the inquiry to the Florida Department of Revenue, Local Government Unit, by mail at 5050 W. Tennessee St., Tallahassee, FL 32399-0100, or by e-mail to local-govt-unit@dor.state.fl.us, or by phone to (850)921-9181. All general inquiries regarding proposed distribution adjustments must be postmarked or otherwise time stamped or received by March 1.

(b) At any time, a local government may request to review adjustment documentation. Local governments who seek to review the documentation regarding their distribution adjustment(s) must submit a written letter specifying which adjustment(s) the local jurisdiction wishes to review. The letter must include:

1. The name of the local government;
2. The requestor's name, mailing address, phone number and email address;
3. The requestor's signature; and
4. Specification of which adjustment(s) by taxpayer name and federal identification number the local government is requesting to review. The federal identification number can be found in the Adjustment Distribution File or Distribution Data Download file posted on the Local Government Communications Services Tax Information Sharing System. The letter should be sent to the Florida Department of Revenue, Security and Disclosure Officer, P.O. Box 37372, Tallahassee, FL 32315-7372.

(c) On April 1, a final adjustments file will be posted to the Local Government Communications Services Tax Information Sharing System.

(d) On or about November 15, if the Department determines that misallocations have occurred, it will mail notification of this determination to each affected local jurisdiction.

(e) The December distribution of communications services tax will include adjustments for those jurisdictions whose net adjustments are less than ninety percent (90%) of the average monthly distributions to the affected jurisdiction for the six months immediately proceeding November 1.

(f) March Distribution of the subsequent year: For those jurisdictions whose net adjustments are equal to or in excess of the ninety percent (90%) of the average monthly distributions to the affected jurisdiction for the six months immediately preceding November 1, the first distribution adjustments will occur in March, unless the Department has received a written agreement specifying a different method of adjustment from affected jurisdictions by March 1.

(g) If any date specified above falls on a Saturday, Sunday, or federal or state legal holiday, the specific action will occur on the next succeeding workday.

(5) All information posted to the Local Government Communications Services Tax Information Sharing System for all jurisdictions to review is confidential taxpayer information pursuant to Section 213.053, F.S. This information shall not be distributed by the local government, except for use(s) as described in Section 213.053(8)(v), F.S.

Specific Authority 202.26(3)(a) FS. Law Implemented 202.18(3)(c), 202.22(5), 202.231, 202.35(3) FS. History–New \_\_\_\_\_.

NAME OF PERSON ORIGINATING PROPOSED RULE: Carla Bruce, Tax Law Specialist,  
Technical Assistance and Dispute Resolution, Department of Revenue, P.O. Box 7443,  
Tallahassee, Florida 32314-7443, telephone (850)922-4839.

NAME OF SUPERVISOR OR PERSON WHO APPROVED THE PROPOSED RULE: [To be  
inserted upon approval by the Governor and Cabinet of Florida.]

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: [To be determined upon  
approval.]

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAW: The  
proposed creation of Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From  
Misallocation of Tax), was noticed in the Florida Administrative Weekly on March 6, 2009 (Vol.  
35, No. 9, p. 1052). A rule development workshop was held on April 1, 2009, in Room 118,  
Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida, to allow members of the public to  
ask questions and make comments concerning the proposed rule. In response, changes were  
made to proposed subsection (1) and proposed paragraphs (4)(a) and (c) of the proposed rule.

July 17, 2009

**MEMORANDUM**

**TO:** The Honorable Charlie Crist, Governor  
Attention: Pat Gleason, Director of Cabinet Affairs

The Honorable Bill McCollum, Attorney General  
Attention: Rob Johnson, Cabinet Affairs

The Honorable Alex Sink, Chief Financial Officer  
Attention: Robert Tornillo, Chief Cabinet Aide  
Amber Hughes, Cabinet Aide

The Honorable Charles Bronson, Agriculture Commissioner  
Attention: Jim Boxold, Chief Cabinet Aide  
Cathy Giordano, Cabinet Aide

**FROM:** Jeff Kielbasa, Deputy Executive Director

**SUBJECT:** Rulemaking—Requesting Final Adoption and Approval to File and  
Certify With the Secretary of State Proposed Rules

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**What the Department is requesting:** Final adoption of these proposed rules, and approval to file and certify them with the Secretary of State under Chapter 120, Florida Statutes.

**Why these proposed rule changes are necessary:**

- Sales and use tax status of groceries, food, and beverages—to update and clarify the rules;
- Other sales and use tax rules—to help taxpayers comply with sales and use tax laws by clarifying provisions concerning documenting exempt sales, revising instructions for forms, and updating explanations on how taxpayers get and submit certain tax information;
- Insurance premium tax—to administer implementation of recent legislation (Section 14 of Chapter 2007-001, and Section 4 of Chapter 2008-220, Laws of Florida), and to make revisions identified during recent litigation;
- Corporate income tax—to streamline the submission of tax returns through electronic filing, explain the requirements for timely filing of electronic and paper returns, incorporate a recent federal change, and repeal redundant rule provisions.

**ATTACHMENT #3**

**What these rules do:**

Proposed Rules on the Sales Tax Status of Groceries, Food, and Beverages

To simply and clarify the sales and use tax status of these transactions, the Department combined and/or revised provisions from several rules into an existing rule dealing with sales of groceries and beverages (Rule 12A-1.011, F.A.C.) and a new rule on food products prepared, served, or sold by restaurants, caterers, hotels, taverns and similar businesses (Rule 12A-1.0115, F.A.C.).

The proposed changes to Rule 12A-1.011, F.A.C. (Groceries):

- Provide a list of exempt food products;
- Clarify the tax status of items sold in bakeries, pastry shops, and similar businesses;
- Discuss examples of taxable food products and beverages, and provide relevant cross-references;
- Clarify the tax status of bottled water and ice;
- Explain the exemption for complimentary and donated food products;
- Minor clarifications to conform to current law include:
  - Sales of food products when the purchaser uses food stamps or "Special Supplemental Nutrition Program for Women, Infants, and Children" vouchers.

Proposed new Rule 12A-1.0115, F.A.C. (Prepared foods):

- Provides examples of taxable food products sold by restaurants, cafeterias, caterers, hotels, taverns, and similar businesses;
- Clarifies the tax status of food products consumed in places where an admission is charged;
- Adds a cross-reference to Rule 12A-1.044, F.A.C., for vending machine sales;
- Minor clarifications to conform to current law include:
  - Coupons, discounts, and donated food products;
  - Food products sold or given to employees; and,
  - Transportation companies;
  - Day nurseries;
  - Custodial camps and labor camps;
  - Meals furnished by hospitals and homes for the aged;
  - Food products sold to or by social clubs; and,
  - Food products prepared, served, or sold by nonprofit organizations.
- Explains the tax status of sales of food products by caterers;
- Discusses the tax status of gratuities; and,
- Clarifies the tax status of food products furnished with living and sleeping accommodations.

### Proposed Rules on Other Sales and Use Tax Issues

- Clarify provisions on how businesses document exempt sales (Rule 12A-1.039, F.A.C.);
- Revise instructions on forms taxpayers use:
  - for the enterprise zone jobs credit;
  - to apply for special tax estimating procedures; and,
  - for verifying that customers can buy items for resale on a tax-exempt basis (Rules 12A-1.038 and 12A-1.097, F.A.C.).
- Update explanations on how taxpayers get tax rate tables (Rule 12A-1.004, F.A.C.), and on the information that must be submitted to register multiple transient rental facilities (Rules 12A-1.060 and 12A-1.061, F.A.C.); and,
- Repeal obsolete provisions about revoking direct pay permits (Rule 12A-1.0911, F.A.C.).

### Proposed Rule on Insurance Premium Tax

- Make technical changes updating statute references, expiration dates, and other references, plus, removes obsolete language;
- Administratively implement Section 14 of Chapter 2007-001, and Section 4 of Chapter 2008-220, Laws of Florida which applied the 1.6% insurance premium tax to:
  - corporation not for profit self-insurance funds; and,
  - public housing authorities self-insurance funds.
- Administratively implement recent litigation (Northwestern Mutual Life Ins. Co. v. Florida Department of Revenue) which determined that dividends a policyholder uses to purchase more paid-up insurance are not taxable as additional gross receipts of the insurer;
- Add information about statutory credits associated with the Florida Life and Health Insurance Guaranty Association Assessment;
- Explain that Florida law holds open the statute of limitations on insurance premium tax returns in instances where there are subsequent changes to assessments paid under Chapter 440, F.S. (worker's compensation) or corporate income taxes paid; and,
- Provide that taxpayers must meet the specific criteria enumerated in the statutes to use the exceptions granted by law for the standard insurance premium tax salary credit. (Rule 12B-8.001, F.A.C.)

### Proposed Rules on Corporate Income Tax

- Amended Rule 12C-1.0222 and repealed Rule 12C-1.032, F.A.C.:
  - Adds provisions about the electronic submission of returns and the timely filing of electronic and paper returns;

- Conforms the Department's rules to a recent federal reduction in the extension period for filing partnership returns (Florida's corporate income tax "piggybacks" the federal tax); (Rule 12C-1.0222, F.A.C.); and,
- Repeals rule Rule 12C-1.032, F.A.C., since its contents are moved to amended Rule 12C-1.0222, F.A.C., as explained above.

**Were comments received from external parties:** Yes.

#### Proposed Rules on the Sales Tax Status of Groceries, Food, and Beverages

The Department held rule development workshops on March 29, 2005 and April 18, 2007. Comments were received at both workshops and a number of changes were made. Changes that were significant include:

- Clarifying that water is exempt if it has only been enhanced by the addition of minerals, as long as it doesn't contain added carbonation or flavorings;
- Explaining how a business can determine if their food products are sold for consumption "on-the premises" or "off-the-premises";
- Adding a description of the term "eating facility";
- Providing examples of fruit and vegetable products that are exempt, and those that are taxable due to preparation into salads and similar food products;
- Removing provisions concerning the tax status of packaging materials, which will instead be dealt with in future rulemaking;

The Department subsequently held public hearings on these proposed rules on November 5, 2007 and February 23, 2009. Comments were received at the November 5<sup>th</sup> public hearing, but not at the February 23<sup>rd</sup> hearing. A change was made to the proposed rules based on a comment from the Joint Administrative Procedures Committee that the Department should incorporate by reference the appropriate provisions from the Federal Food and Drug Act concerning fruit and vegetable juices.

In addition, a Notice of Change will be published in the July 31, 2009 edition of the Florida Administrative Weekly removing a provision concerning the taxable status of food and beverages provided free of charge as part of a taxable admission for further review.

#### Other Proposed Sales Tax Rules in This Package

No one submitted comments on the other proposed sales tax rules (the non-food rules).

Proposed Rules on Insurance Premium Tax

- 1) The Department held a rule development workshop on December 9, 2008. Requests were received that provisions be added to the proposed rule that allow:
  - a carry forward of unused Florida Life and Health Insurance Guaranty Association credits (corporate income tax or insurance premium tax credits); and,
  - the transfer of unused corporate income tax or insurance premium tax credits to a surviving insurer during a merger or acquisition.

Although, current law provides for accelerated use of these credits by the company that earned the credit, it does not provide for any carry forward or transfer of credits.

- 2) The Department held a public hearing on these proposed rules on June 29, 2009, and did not receive any comments at the hearing. Subsequently, the Joint Administrative Procedures Committee submitted written comments, and the proposed rules were changed to clarify that insurers who have paid an assessment to the Florida Life and Health Insurance Guaranty Association can claim a credit for such assessment as provided by law.

Proposed Rules on Corporate Income Tax

The Department received written comments from the Joint Administrative Procedures Committee, and made the following changes:

- Removed references to federal case law and Internal Revenue Service announcements that are used to determine “good cause” for granting extensions of time to file Florida returns; and,
- Explained that specific forms are incorporated by reference in Rule 12C-1.051, F.A.C.

**Major administrative issues in these rules:** None.

Attached are copies of:

- Summaries of proposed rules
- Statements of facts and circumstances justifying the rules
- Federal relation statements
- Summaries of workshops and hearings
- Proposed rule text

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12A-1, FLORIDA ADMINISTRATIVE CODE  
SALES AND USE TAX  
AMENDING RULES 12A-1.011, 12A-1.071, AND 12A-1.097  
CREATING RULE 12A-1.0115

SUMMARY OF PROPOSED RULES

The proposed amendments to Rule 12A-1.0011, F.A.C. (Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations), include meals or other prepared food products as examples of items sold for fundraising purposes.

The proposed amendments to Rule 12A-1.005, F.A.C., provide that fees charged for entrance to a restaurant, tavern, night club, or similar place of business are subject to tax.

The proposed substantial rewording of Rule 12A-1.011, F.A.C. (Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice), clarifies the application of tax on the sale of food products generally sold by grocery stores, convenience stores, supermarkets, bakeries, fish markets, produce markets, and other like places of business and on the sale of bakery products by bakeries, pastry shops, or like establishments. The provisions regarding the application of tax on food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business will be removed from the current rule and will be provided in Rule 12A-1.0115, F.A.C., as created. The current provisions of Rule 12A-1.011, F.A.C., are included in the substantial

rewording of Rule 12A-1.011, F.A.C., or the creation of Rule 12A-1.0115, F.A.C., and, when necessary, are updated to be consistent with the provisions of Section 212.08(1), F.S., as amended by Chapter 98-408, L.O.F., regarding the taxability of food products.

The substantial rewording of Rule 12A-1.011, F.A.C., provides for the application of sales or use tax for the following: (1) examples of exempt food products for human consumption; (2) the exemption provided for food products prepared off the seller's premises when sold in the original sealed container or sliced into smaller portions; (3) bakery products when sold by bakeries, pastry shops, or like establishments that do not have eating facilities and bakery products when sold by such establishments that have eating facilities; (4) candy, gum, mints, and similar products; (5) food prepared on the seller's premises and sold for immediate consumption; (6) hot prepared food products; (7) sandwiches sold ready for immediate consumption; (8) novelty items and frozen dairy or nondairy products; (9) soft drinks, including nonalcoholic beverages, noncarbonated beverages made from milk derivatives, and beverages containing fruit or vegetable juices labeled under federal standards as containing less than 100% juice; (10) tea sold in liquid form; (11) drinking water, ice, and additives; (12) the exemption provided for samples or donated food products; and (13) food stamps or vouchers issued under authority of federal law.

The creation of Rule 12A-1.0115, F.A.C. (Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies), provides for the application of sales or use tax for the following: (1) food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business; (2) food products when sold by such establishments that also maintain a separate department that

includes groceries; (3) sales of meal tickets or coupon books and coupons or discounts for food products; (4) the exemption provided for donated food products; (5) when tax is due on complimentary food products; (6) food products sold or furnished by employers to employees; (7) food products sold by airlines, railroads (except Amtrak), vessels, or other transportation companies to their passengers while in Florida; (8) food products served, prepared, or sold by caterers and event planners; (9) purchases, leases, and rentals by caterers or event planners; (10) gratuities consistent with the guidelines established by the court in Green v. Surf Club, Inc., 136 So.2d 354 (Fla. 3rd DCA 1961), cert. den., 139 So.2d 694 (Fla. 1962); (11) fees for preparing or serving food products; (12) food products when furnished with living or sleeping accommodations at colleges or other institutions of higher learning; (13) the exemption provided for certain complimentary food and drinks provided by public lodging establishments; (14) food products when furnished with housing at labor camps or public housing quarters; (15) food products furnished at day care facilities, day camps, or other custodial camps; (16) the exemption provided to hospital patients and inmates or to residents of homes for the aged; (17) food products sold to or prepared and served by social clubs, civic clubs, or fraternal organizations; and (18) food products sold to or by nonprofit organizations, religious institutions, and organizations sponsoring a fundraising event.

The proposed amendments to Rule 12A-1.071, F.A.C. (Rentals, Leases, or License to Use Tangible Personal Property): (1) remove provisions regarding sales by caterers that will be provided in Rule 12A-1.0115, F.A.C., as created; and (2) remove provisions regarding water softening services that will be provided in Rule 12A-1.011, F.A.C., as substantially reworded.

The proposed amendments to Rule 12A-1.097, F.A.C. (Public Use Forms), remove obsolete Form DR-46B (Examples of Nonalcoholic Preparations, Beverages and Drinks when Sold in Grocery Stores and Similar Establishments), which is no longer used by the Department.

### JUSTIFICATION OF PROPOSED RULES

The proposed changes to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), are necessary to update, consistent with current statutory provisions: (1) the application of tax on the sale of food products generally sold by grocery stores, convenience stores, supermarkets, bakeries, fish markets, produce markets, and other like places of business; (2) the application of tax on bakery products sold by bakeries, pastry shops, and like establishments; (3) the application of tax on the sale of water or ice; and (4) the application of tax on the sale of food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business.

When adopted, these rules will provide for the administration of sales tax relevant to grocery stores, supermarkets, convenience stores, and others that generally sell grocery items for the following:

- Sales of grocery items, both taxable and exempt
- Sales of bakery products for consumption on the premises and those sold for consumption off the premises
- Sales of taxable soft drinks and other beverages and tax-exempt 100% juice
- Sales of hot prepared food items sold by grocery stores

These proposed rules, when adopted, will also provide for the administration of sales and use tax relevant to restaurants, lunch counters, cafeterias, hotels, taverns, caterers, transportation

companies, tax-exempt organizations, or other places that generally prepare, serve, or sell prepared food items for the following:

- Meals, drinks, and food items that are taxable when prepared, served, or sold in such places of business
- How to tax meals and food items purchased with coupons or other discounts
- When gratuities are subject to tax
- The exemption for food donated to a food bank or to organizations exempt from federal tax
- The exemption from use tax on food or drinks furnished as part of a room package by hotels and other public lodging establishments

#### FEDERAL COMPARISON STATEMENT

The provisions contained in these rules do not conflict with comparable federal laws, policies, or standards.

#### SUMMARY OF RULE DEVELOPMENT WORKSHOP

##### HELD ON MARCH 29, 2005

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were noticed for a rule development workshop in the Florida Administrative Weekly on March 11, 2005 (Vol. 31, No. 10, pp. 931-946). A rule development workshop was held on March 29, 2005, in Room 116, Larson Building, 200 E. Gaines Street, Tallahassee, Florida, commencing at 2:00 p.m., to allow members of the public to ask questions and make comments regarding the proposed changes to this rule chapter for the following rule sections:

- 12A-1.0011 Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations
- 12A-1.002 Practitioners of the Healing Arts
- 12A-1.011 Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops or Like Establishments; Drinking Water; Ice
- 12A-1.0115 Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies
- 12A-1.015 Industrial Gases
- 12A-1.020 Licensed Practitioners; Drugs, Medical Products and Supplies, and Prosthetic and Orthopedic Appliances
- 12A-1.021 Veterinary Sales and Services
- 12A-1.040 Sales of Containers, Wrapping and Packing Materials and Related Products
- 12A-1.071 Rentals, Leases, or License to Use Tangible Personal Property
- 12A-1.097 Public Use Forms

**PARTIES ATTENDING**

For the Department  
of Revenue

MARK ZYCH, Deputy Director, Technical Assistance and  
Dispute Resolution  
GARY GRAY, Revenue Program Administrator, Technical  
Assistance and Dispute Resolution  
RICHARD PARSONS, Tax Law Specialist, Technical Assistance  
and Dispute Resolution  
JONATHAN SWIFT, Tax Law Specialist, Technical Assistance  
and Dispute Resolution

From the Public

JIM ERVIN, Holland & Knight  
GLENN BEDONIE, C.P.A., P.A.  
DON DAVIS, Florida Dental Association  
MICHELE HOLCOMB, Florida Coca-Cola Bottling Company

Written Comments

DOUGLAS S. BELL., Pennington Moore Wilkinson Bell &  
Dunbar  
GLENN A. BEDONIE, C.P.A., P.A.

**COMMENTS RECEIVED AT THE RULE DEVELOPMENT WORKSHOP AND  
WRITTEN COMMENTS MADE A PART OF THE PROCEEDING:**

The Department will be engaging in a separate rulemaking proceeding for the following  
proposed rule sections:

- 12A-1.002 Practitioners of the Healing Arts

12A-1.015	Industrial Gases
12A-1.020	Licensed Practitioners; Drugs, Medical Products and Supplies, and Prosthetic and Orthopedic Appliances
12A-1.021	Veterinary Sales and Services
12A-1.097(15)(b)	Public Use Forms

Proposed Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice

Subsection (5) provides that the sale of drinking water in bottles, cans, or other containers is exempt, except when carbonation or flavorings have been added. Written comments were submitted by Mr. Douglas S. Bell, Pennington Moore Wilkinson Bell & Dunbar, dated March 29, 2005. Mr. Bell provides that this proposed subsection is inconsistent with Section 212.08(4)(a)1., F.S., which provides that “[w]ater that has been enhanced by the addition of minerals and that does not contain any added carbonation or flavorings is also exempt.” Mr. Bell requests that the proposed rule changes include provisions that “water in bottles, cans, and other containers, even when enhanced by the addition of minerals, is exempt, except when carbonation or flavorings have been added,” or, as alternative, “which has been enhanced by the addition of minerals, is exempt, except where carbonation or flavorings have been added.”

The Department concurs with the comment received and will incorporate the provisions of Section 212.08(4)(a)1., F.S., in proposed paragraph (5)(a) of Rule 12A-1.011, F.A.C., and in subsection (3) of Rule 12A-1.0115, F.A.C.

Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies

Subsection (4), Restaurants and Bakeries with Seating Facilities which Sell Food Products, provides guidelines for restaurants and bakeries with eating facilities that sell food products. Mr. Jim Ervin, Holland & Knight, acknowledges that he has sought advice on behalf of

a client with a bakery that sells baked products where there is an issue whether the products are sold for on-premises consumption or off-premises consumption. Mr. Ervin requests that the Department provide some level of guidance on how to determine whether a food product is for on- or off-premises consumption and how the facility might document the determination. The definition of the term “premises” does not adequately address the issue. When the vendor’s premises adjoin a food court area, a determination would have to be made whether the adjoining food court area is a part of the vendor’s premises. When the premises clearly provide eating facilities, the issue would be determining whether that person intends to eat the product right there or take it elsewhere to eat; however, that is not the factor that determines whether the food product is taxable. Some guidance in this area would be helpful. Mr. Zych requested that Mr. Ervin provide written comment regarding this issue.

Provisions have been established in paragraph (2)(c) of Rule 12A-1.011, F.A.C., and in subsection (4) of Rule 12A-1.0115, F.A.C., to provide guidance regarding sales of food products by bakeries, pastry shops, or similar establishments without eating facilities and guidance for sales of food products by establishments with eating facilities that are sold for consumption off the seller’s premises.

Subsection (5), Theaters, Arenas, Rinks, Stadiums, and Facilities that Charge for Admission, clarifies the statutory definition of theaters, arenas, rinks, stadiums, and facilities that charge admission. This subsection also provides the definition of the term “premises” to include the lobby, aisle, or auditorium of a theatre; the seating, aisle, or parking area of an arena, rink, or stadium; or the parking area of a drive-in or outdoor theatre. Mr. Glenn Bedonie commented that the proposed rule should provide clarification regarding the provision of Section 212.08(1)(c)5., F.S., which provides “the exemption provided by this subsection does not apply when the food

products are sold ready for immediate consumption within a place, the entrance to which is subject to admission charge.” Mr. Bedonie’s position is that this statutory exemption would apply to all food products provided without charge when there is a taxable admission. Further, when you pay tax on the admission charge, the food products, unless they are sold, are exempt as “accompanying that taxable admission.” Mr. Bedonie submitted written comments dated March 30, 2005, reiterating this position.

**CHANGES TO THE PROPOSED RULE TEXT OF RULES 12A-1.011 AND 12A-1.0115, F.A.C.:**

In addition to changes made in response to the comments received at the rule development workshop held on March 29, 2005, and to written comments submitted to the Department, the following additional changes were made after further review by the Department:

*Proposed Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice*

- The scope of proposed Rule 12A-1.011, F.A.C., was changed to provide that the rule is intended to clarify the application of tax on the sale of bakery products by bakeries, pastry shops, or like establishments;
- Cookies, including chocolate-covered or cream-filled, were added to the list of tax-exempt food products;
- For fruit juices and vegetable juices, the federal citations to the Food and Drug Act were updated and “cranberry drink” was changed to “cranberry juice cocktail”;
- Changes were made to clarify when food products prepared off the seller’s premises were tax-exempt food products;
- Guidelines on how to obtain information from the Department regarding a tax-exempt food product were moved from subsection (9) to subsection (2);

- New subsection (3) was added to provide guidelines on the taxability of bakery products to bakeries, pastry shops, and other like establishments that have eating facilities and those that do not have such facilities (subsequent subsections were renumbered), including provisions on how to determine whether such facilities have eating facilities and how to separately account for tax-exempt sales of bakery products for consumption off the premises;
- Technical corrections were made to provide that dealers who sell food products at retail are not subject to sales or use tax on any food products donated to a food bank or to an organization determined to be currently exempt from federal income tax pursuant to s. 501(c) of the Internal Revenue Code of 1986, as amended; and
- The unnecessary incorporation in subsection (9), by reference, of general grocery items contained on Form DR-46NT, Nontaxable Medical and General Grocery List, was removed.

*Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies*

- The title and the scope of proposed Rule 12A-1.0115, F.A.C., were changed to provide that the rule is intended to clarify the application of tax on food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business;
- Subsection (2) was amended and combined with the provisions of subsection (4) to provide guidelines for food products served, prepared, or sold in or by restaurants or similar places of business, and the guidelines for the sale of bakery products by bakeries, pastry shops, or similar establishments with eating facilities were revised and moved to proposed Rule 12A-1.011, F.A.C. (subsequent subsections were renumbered);

- Changes were made to provide that restaurants, lunch counters, cafeterias, hotels, taverns, or other like places of business that make sales of food products consistent with those of a grocery store must separately account for the tax-exempt sales;
- Subsection (5) was renumbered subsection (4) and amended to provide for the taxability of food products consumed in places where an admission is charged;
- Technical corrections were made to provide that dealers who sell food products at retail are not subject to sales or use tax on any food products donated to a food bank or to an organization determined to be currently exempt from federal income tax pursuant to s. 501(c) of the Internal Revenue Code of 1986, as amended; and
- Provisions were added to clarify that organizations that hold a valid Consumer's Certificate of Exemption may extend a copy of their certificate to caterers to purchase food products tax-exempt;
- Provisions were added to provide that public lodging establishments that are not required to pay tax on complimentary food and drink may extend a copy of their Annual Resale Certificate to purchase such items tax-exempt;
- New subsection (12) was added to provide guidelines to day nurseries and custodial camps regarding food products provided to students or campers; and
- Technical corrections were made to the titles of subsection (14), Meals Furnished by Hospitals and Homes for the Aged, and subsection (16), Food Products Served, Prepared, or Sold by Nonprofit Organizations.

*Proposed Rule 12A-1.005, F.A.C., Admissions*

- Amendments to Subsection (3), Taxable Admissions and Participation Fees, of Rule 12A-1.005, F.A.C., were added to provide that fees charged for entrance, such as cover charges made by a restaurant, tavern, night club, or other like places of business, are subject to tax. This provision is currently found in the rule regarding sales of food products.

SUMMARY OF RULE DEVELOPMENT WORKSHOP

HELD ON APRIL 18, 2007

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were noticed for a rule development workshop in the Florida Administrative Weekly on March 23, 2007 (Vol. 33, No. 12, pp. 1372-1384). A rule development workshop was held on April 18, 2007, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida, commencing at 1:30 p.m. and concluding at 3:20 p.m.

The Department presented the following rule sections of Rule Chapter 12A-1, F.A.C., at this rulemaking proceeding to allow members of the public to ask questions and make comments regarding the proposed changes to this rule chapter:

- |                  |                                                                                                                                                                                                       |
|------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 12A-1.0011       | Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations                                                                                                   |
| 12A-1.005        | Admissions                                                                                                                                                                                            |
| 12A-1.011        | Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice |
| 12A-1.0115       | Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies        |
| 12A-1.040        | Sales of Containers, Wrapping and Packing Materials and Related Products                                                                                                                              |
| 12A-1.071        | Rentals, Leases, or License to Use Tangible Personal Property                                                                                                                                         |
| 12A-1.097(15)(a) | Public Use Forms                                                                                                                                                                                      |

**PARTIES ATTENDING**

For the Department	MARK ZYCH, Director, Technical Assistance and Dispute
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of Revenue	Resolution GARY GRAY, Revenue Program Administrator, Technical Assistance and Dispute Resolution RICHARD PARSONS, Tax Law Specialist, Technical Assistance and Dispute Resolution
From the Public	DOUGLAS S. BELL, Coca-Cola Enterprises JIM ERVIN, Holland & Knight BOB MCGEHEE, SuperValu CHRIS MESA, Publix JULIE PENDLETON, Winn-Dixie ERIC SMITH, Publix JIM SMITH, FPMA JESSIE STORNE, Florida Coca-Cola Bottling Company
Written Comments	DOUGLAS S. BELL, Pennington Moore Wilkinson Bell & Dunbar GLENN A. BEDONIE, C.P.A., P.A. JIM ERVIN, Holland & Knight BOB MCGEHEE, SuperValu JULIE PENDLETON, Winn-Dixie

**COMMENTS RECEIVED AT THE RULE DEVELOPMENT WORKSHOP AND WRITTEN COMMENTS MADE A PART OF THE PROCEEDING:**

Rule 12A-1.0011, F.A.C., Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations

No comments or discussion were received regarding the proposed changes to this rule section.

Rule 12A-1.005, F.A.C., Admissions

No comments or discussion were received regarding the proposed changes to this rule section.

Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishment; Drinking Water; Ice

*Subsection (2) - Tax-Exempt Food Products*

Mr. Bob McGehee, SuperValu, questioned whether a specific product was considered a cookie and exempt from tax or considered candy and subject to tax. Is there a reference that a Florida retailer could look at to determine taxability of an item, such a UPC list providing taxability of the product? Mr. Parsons and Mr. Gray responded that the Department does not have a list of taxable and nontaxable products; however, the Department routinely receives questions from retailers regarding the taxability of specific products that it responds to with a determination.

Ms. Julie Pendleton, Winn-Dixie, questioned whether the policy to tax cookies that are chocolate-coated as taxable candy was a current policy. Mr. McGehee stated that the retailers that he represented did not care whether the products were taxable or not. His goal was to try to clarify these rules and regulations to the retailers so that they can abide by them. In written correspondence submitted by Mr. Bob McGehee on June 26, 2007, he also questioned whether the “old rule” for chocolate-covered cookies still applied, questioning whether a specific product was taxable or exempt. Mr. Parsons responded that the position was no longer valid and that he would have to look into whether a specific product was taxable.

Mr. Eric Smith, Publix, questioned the provisions of subparagraph (2)(b)3. which provides that food products that are sold frozen and then heated on the seller’s premises by the customer are exempt. He questioned, if Publix provided the cooking instruments for the customers and the customers steam or heat a product themselves, whether the product would be exempt. Mr. Gray confirmed that the product would be exempt. If Publix heated the same product for the customer, the product is taxable.

Mr. Jim Ervin, Holland & Knight, questioned whether the customer, or the retailer, who

performs the act of preparation, applies to all products, such as peanuts for peanut butter or coffee beans for coffee. It appears that as long as the customer is doing their own preparation, the product remains exempt; however, if the retailer processes the product, the product potentially becomes taxable. Mr. Ervin stated that he was very worried about the peanut butter item.

Changes to Paragraph (4)(b), based on oral comments to Subsection (2), Tax-Exempt Food Products: Provisions which stated that the grinding of peanuts into peanut butter by a grocery store was taxable were removed.

*Subsection (3) - Bakery Products Sold by Bakeries, Pastry Shops, or Like Establishments*

Mr. Smith questioned whether the provisions of paragraphs (3)(a) and (b) pertain to bakeries with eating establishments or apply to Publix which has a bakery, but does not provide an eating establishment. Mr. Parsons confirmed that the provisions applied to bakeries with eating establishments.

Mr. Ervin questioned what it meant to have eating facilities, such as a place in a mall that is adjacent to the mall food court. Would such a facility be considered to have eating facilities? Mr. Parsons confirmed that the common area in a mall is considered premises. Mr. Ervin suggested that simpler and clearer provisions would be better.

Mr. Ervin continued that he is easily confused regarding the provision for five or fewer items. It is difficult to follow the proposed rule provisions in terms of what was intended. In order to be nontaxable, you would need to both have a quantity of six or higher and be packaged in a permanent-type package; or, is it nontaxable if you have one or the other of those? Mr. Bob McGehee provided that he thought that paragraphs (3)(a) and (3)(b) were in conflict.

Mr. Ervin questioned whether the Z tapes from the cash register would be sufficient to support the retailer's treatment of the product as taxable or nontaxable. Are you just going to

trust the retailer that the clerk is punching the separate key at the appropriate time, or are we going to have to go beyond that? If that is the position, it is fine. He expressed his concern of getting into a situation where the retailer did not keep any extra records, and then they are told that they should be keeping extra records.

Mr. McGehee also requested confirmation whether, if a separate key on the register is used that says “to go,” “dine in,” or whatever, the two buttons were sufficient. Mr. Parsons responded that there has to be documentation, such as the Z tapes. The presumption is that anything five or fewer is taxable if you do not have the records. Mr. Ervin then confirmed that if a single cookie sale is keyed in as an order to go and treated as nontaxable, the Department would accept that the sale was nontaxable. Mr. Parsons confirmed that the Department would accept it as a nontaxable sale.

Mr. Ervin suggested that the language under subparagraph (3)(c)2. is confusing. He questioned how the packaging of the item ties into the presumption regarding “five or less presumed to be taxable.” Mr. Parsons responded that it is a two-part test; the first is if you can show that the purchase was for off-premises consumption, and the other test is if it is packaged in a manner that is consistent for to-go orders.

Mr. Ervin also questioned what type of packaging would result in a presumption of taxability. Mr. Parsons provided examples to include a napkin, on a plate, or on a plate with a fork. Paragraph (3)(d) contains provisions regarding the methods to separately account for tax-exempt sales of bakery products for consumption off the premises. Mr. Ervin questioned whether you needed both packaging and accounting methods for documentation as tax-exempt sales. He thought that we had established earlier that if you had the accounting methods, that is all that is needed. Does it have to be both accounting methods and packaging for sufficient

documentation? Mr. Parsons confirmed that an auditor would look behind the Z tapes if the auditor thought they were wrong.

Mr. Ervin provided written comments, dated April 4, 2007, regarding the proposed amendments to proposed subparagraph (3)(c)2., providing that the subparagraph should be revised to read as follows:

2. For the purpose of this paragraph, there shall be a rebuttable presumption that bakery products are not intended by the customer to be consumed off the seller's premises when:

- a. Such bakery products are sold in quantities of 6 or more ~~5 or fewer items~~; and  
~~or~~
- b. The bakery products are not packaged in a manner consistent with an intention by the customer to consume the products off the seller's premises, such as products that are bagged or sold in packaging that is glued, stapled, wrapped, or sealed.

Mr. McGehee provided written comment, dated June 26, 2007, that this provision is difficult to manage and to explain.

*Changes to Subsection (3): Provisions regarding the sale of bakery products by establishments that have eating facilities were revised to include a description of an "eating facility," for purposes of the rule, and to provide examples of those establishments, such as a food court of a mall where tables and chairs are located in the common areas of the food court. Provisions regarding the rebuttable presumption when bakery products sold by establishments with no eating facilities are taxable were clarified.*

#### *Subsection (4) - Taxable Food Products*

In his written comments, Mr. McGehee provide that the provisions regarding candy, chewing bum, bubble gum, breath mints, and any similar product regarded as candy or confection, based on its normal use as indicated on the label or advertising, still seemed open to auditor interpretation.

*No Change in Response: Section 212.08(1)(c)11., F.S., provides that candy and any similar product regarded as candy or confection, based on its normal use, as indicated on the label or advertising thereof, is subject to tax.*

Mr. McGehee questioned why if a store slices the product and puts it in a package for a customer to take home, it is exempt; but if the store puts another product in a smaller package, it is subject to tax. Mr. Parsons responded that the statute was specific on the provisions. In his written comments, Mr. McGehee provides that these provisions are in conflict and should be the same. In written comments, Mr. McGehee questioned how to handle a transaction where the supermarket steams shrimp after the sale is complete.

*No Change in Response: Section 212.08(1)(c)9., F.S., provides that food prepared, whether on or off the premises, and sold for immediate consumption is subject to tax; however, food prepared off the premises and solid in the original sealed container, or the slicing of products into smaller portions, is exempt.*

Ms. Pendleton commented that a Technical Assistance Advisement issued several years ago regarding fresh fruit held that fresh fruit that is sliced or chopped and packaged is not subject to tax. She questioned whether that policy remained the Department's position. Mr. Parsons responded that the Department treats sliced fruit in the same way as sliced meat products. She asked whether the Department could add that as an example, because the issue could become an audit issue.

Mr. Chris Mesa, Publix, continued the discussion, questioning what would happen if you throw in a fork and tape the fork to the package. Mr. Parsons responded that it may be considered a meal. If you throw in some yogurt that you dip the fruit in and a napkin, then it becomes a meal rather than chopped up fruit.

*Changes to Paragraph (4)(b): Examples of when the exemption applies to fruit and vegetable products prepared by a supermarket into salads for sale and when the exemption does not apply to fresh salads prepared by a supermarket and packaged with eating utensils as a meal were added.*

*Subsection (7) - Water and Ice*

Mr. Smith questioned whether water sold in a bottle that contains “enhanced with minerals for a pure fresh taste” was taxable or exempt. Mr. Mark Zych provided that a bottle of water that contains added minerals, such as sodium, for flavoring is an exempt product, opposed to any carbonation or fruit flavoring that would make the product taxable. That is the intent of this provision in the rule. He advised that the Department would try to make the provision clearer. Mr. Zych also confirmed that bottled water containing natural effervescence would be exempt; however, if you add effervescence in the manufacturing process, the product would be taxable.

Mr. McGehee questioned whether the Department’s position was that a bag of ice purchased to cool soda was taxable, while a bag of ice to cool down milk was not subject to tax. Mr. Parsons responded that ice is taxable unless it is used for packaging. Mr. McGehee concluded that in a typical supermarket all ice sold would be taxable. In his written correspondence dated June 26, 2007, Mr. McGehee reiterated that the provision which taxes bottled water enhanced with carbonation or flavorings is difficult to explain to customers, as are the different taxing provisions for ice sold to customers that is taxed differing from the tax-exemption for ice used for packaging products for sale.

Ms. Pendleton questioned whether the cups, the stirrers, the filters, and other items used to provide hot coffee to grocery store shoppers are exempt. Mr. Parsons provided that generally packaging materials are not taxable when they accompany a product for ultimate sale. Mr. Gray responded that he thought those items would be subject to use tax.

Mr. McGehee commented that the word “percent” should be added after the number 25

in subparagraph (10)(b)2. Mr. Parsons confirmed that the suggested change should be made.

Mr. Douglas S. Bell, Pennington Moore Wilkinson Bell & Dunbar, submitted written comments, dated April 9, 2007, on behalf of Coca-Cola Enterprises, providing the following:

Section 212.08(4)(a)1., F.S., provides, in pertinent part that:

This exemption does not apply to the sale of drinking water in bottles, cans, or other containers if carbonation or flavorings, *except those added at a water treatment facility*, have been added. [*emphasis added*]

The draft of proposed Rule 12A-1.011(7)(a)1. states that:

Drinking water, including water enhanced by the addition of minerals, sold in bottles, cans, or other containers is exempt, except when carbonation or flavorings has been added to the water.

Because the draft proposed rule does not provide an exemption for water to which carbonation or flavorings have been added *at a water treatment facility*, the rule may not be consistent with the statute.

*Changes to Subsection (7): Provisions regarding when the exemption applies to drinking water and when it does not apply were clarified.*

#### *Subsection (11) - Items Used to Package Food Products*

Mr. McGehee commented that obviously there are items used in supermarkets that are not listed in examples of packaging items for sale. Basically, the rule is if it leaves with the customer, it is not taxable. Some of the biggest things left out of the list are styrofoam trays, cups, lids, cake boxes, wrap, and produce bags. Ms. Pendleton commented that there are some items listed under the proposed rules for restaurants and in this proposed rule for grocery stores that cross over into both areas. Mr. McGehee, acknowledging that he is not concerned with the restaurant industry, stated that he would recommend that packaging items for the restaurant industry should be provided in proposed Rule 12A-1.011, F.A.C. Mr. Zych confirmed that his request was reasonable.

Ms. Pendleton, Winn-Dixie, provided written comments, dated April 19, 2007, including a list of containers used in grocery stores and an indication whether the items were taxable or exempt from tax. She explained that because her company is unable to distinguish whether napkins and eating utensils are placed on counters for use by customers or are packaged with products for sale, the purchase of these items is taxed. The list is categorized by taxable and nontaxable bakery supplies, deli supplies, meat/seafood supplies, and produce supplies.

*Changes in Response to Oral and Written Comments: Provisions regarding the taxability of packaging materials were removed from proposed Rules 12A-1.011 and 12A-1.0115, F.A.C. These provisions will be included in a separate rulemaking proceeding to propose amendments to Rule 12A-1.040, F.A.C., Containers and Other Packaging Materials; Gift Wrapping (new title to be proposed).*

Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies

*Subsection (1) - Scope*

Mr. Chris Mesa, Publix, commented that it appeared that this proposed rule is not intended to provide guidelines to grocery stores, including those grocery stores that have sit-down seating areas by their delis. He advised that Publix taxed every sale made through the deli register where the sit-down seating is located, because the assumption is that the customer is going to sit down and eat it on the premises. A sign at the register advises that tax will be collected at the register on all sales and that food stamps may not be used to make purchases at the register. He advises that he has always thought of their deli area as a similar place of business as a restaurant licensed by the Division of Hotels and Restaurants, even though they are not licensed as a restaurant. Mr. Parsons advised that the Department looks at how the establishment is licensed, whether by the Division of Hotels and Restaurants or the by Department of Agriculture.

*In Response: No changes were made by the Department.*

*Subsection (3) - Food Products Consumed in Places Where an Admission is Charged*

Mr. Glenn A. Bedonie, C.P.A., P.A., provided written comments, dated April 12, 2007, requesting that the Department include draft language which clearly states that food and drink provided without charge to those who pay a taxable admission are exempt from sales and use tax. This addition will conform the proposed rule to the statute and will resolve an issue which has certain taxpayers unsure of their use tax liability.

*In Response: No changes were made to this subsection prior to the rule hearing held on November 5, 2007; however, this subsection has been withdrawn from the proposed rule for further consideration.*

Rule 12A-1.040, F.A.C., Sales of Containers, Wrapping and Packing Materials and Related Products

The comments and discussion received regarding the proposed changes to subsection 12A-1.011(11), regarding packaging materials, apply to the proposed removal of those provisions from this rule.

12A-1.071, F.A.C., Rentals, Leases, or License to Use Tangible Personal Property

No comments or discussion were received regarding the proposed changes to this rule section.

12A-1.097(15)(a), F.A.C., Public Use Forms

No comments or discussion were received regarding the proposed changes to this rule section.

**SUMMARY OF CHANGES TO THE PROPOSED RULE TEXT OF RULES 12A-1.011 AND 12A-1.0115, F.A.C.:**

After further review by the Department, changes were made to the following proposed text of the following rule sections in response to the comments received at the rule development

workshop held on April 18, 2007, and written comments submitted to the Department:

Proposed Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice

*Subsection (2) - Tax-Exempt Food Products*

- The list of examples of exempt food products has been revised to include fruit that is sliced, chunked, or otherwise cut and prepared by the retailer.
- Herbal supplements and salt tablets were added to the list of tax-exempt food products.

*Subsection (3) - Bakery Products Sold by Bakeries, Pastry Shops, or Like Establishments*

- Amended the provisions of proposed paragraphs (c) and (d) of subsection (3) to clarify when bakery products sold by bakeries, pastry shops, or like establishments that have eating facilities are tax-exempt when sold for consumption off the premises.

*Subsection (4) - Taxable Food Products*

- The example regarding the grinding of peanuts into peanut butter was removed from the example of food prepared for immediate consumption (*Proposed sub-subparagraph (4)(b)2.c.*).
- An example regarding the preparation of fruit or vegetable salads prepared for immediate consumption was added (*Proposed new sub-subparagraph (4)(b)2.e.*).

*Subsection (7) – Water and Ice*

- Provisions regarding the exemption for drinking water were clarified to provide that when carbonation or flavorings are added to the drinking water at a water treatment facility, the sale of the drinking water in bottles, cans, or other containers remains exempt.

- Reference to the provisions of subsection (11) for packaging materials used to package food products for sale was removed.

*Subsection (11) - Items Used to Package Food Products*

- Proposed subsection (11) was removed from the proposed amendments. The Department will include the comments received at this rule development workshop in a separate proceeding to address proposed amendments to Rule 12A-1.040, F.A.C., regarding packaging materials.

Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies

*Subsection (1) - Scope*

- The scope of the rule has been revised to clarify that the rule applies to places of business where food products are sold for immediate consumption on the seller's premises or packaged or wrapped and taken away from the seller's premises.

*Subsection (6) - Food Products Sold or Furnished by Restaurants or Similar Places of Business to Employees*

- Changed the proposed language regarding food or drinks sold or furnished by employers to employees to the current rule text to clarify that there was no change in policy regarding food or drinks sold or furnished by employers to employees

*Subsection (16) - Items Used to Serve Food Products*

- Proposed subsection (16) was removed from the proposed amendments. The Department will include the comments received at this rule development workshop in a separate proceeding to address proposed amendments to Rule 12A-1.040, F.A.C., regarding packaging materials.

Rule 12A-1.040, F.A.C., Sales of Containers, Wrapping and Packing Materials and Related Products

- The proposed amendments to this rule section were removed. The Department will include the comments received at this rule development workshop in a separate proceeding to address proposed amendments to Rule 12A-1.040, F.A.C., regarding packaging materials.

SUMMARY OF RULE HEARING

HELD ON NOVEMBER 5, 2007

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were noticed for a rule hearing in the Florida Administrative Weekly on October 12, 2007 (Vol. 33, No. 41, pp. 4739-4750). A rule hearing was held on November 5, 2007, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida, commencing at 10:00 a.m. and concluding at 10:30 a.m.

**PARTIES ATTENDING**

For the Department of Revenue	MARK ZYCH, Director, Technical Assistance and Dispute Resolution RICHARD PARSONS, Tax Law Specialist, Technical Assistance and Dispute Resolution JANET YOUNG, Tax Law Specialist, Technical Assistance and Dispute Resolution
From the Public	GLENN A. BEDONIE, C.P.A., P.A. DOUGLAS S. BELL, Coca-Cola Enterprises JULIE PENDLETON, Winn-Dixie VICKI WEBER, Hopping Green & Sams, representing Walt Disney World
Written Comments	GLENN A. BEDONIE, C.P.A., P.A. DENNIS MANELLI, Phelps Dunbar, LLP

**COMMENTS RECEIVED AT THE RULE HEARING AND WRITTEN COMMENTS MADE A PART OF THE PROCEEDING:**

Rule 12A-1.0011, F.A.C., Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations

No comments or discussion were received regarding the proposed changes to this rule section.

Rule 12A-1.005, F.A.C., Admissions

No comments or discussion were received regarding the proposed changes to this rule section.

Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishment; Drinking Water; Ice

No comments or discussion were received regarding the proposed changes to this rule section.

Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies

*Subsection (3) - Food Products Consumed in Places Where an Admission is Charged*

Mr. Glenn A. Bedonie, C.P.A., P.A., provided written comments, stating that the statutes provide that food products are not exempt when sold in a place that charges a taxable admission. No one should have an objection to this interpretation, since amounts are collected in addition to the taxable admission. However, when the patron has paid a taxable admission and has full knowledge and expectation that the taxable admission also includes a lunch or dinner and has been put on notice of such expectation, it does not appear that the Department's interpretation has a statutory basis in fact. The Department's interpretation of "sold" within this rule has been expanded to mean "furnished, served, or sold," which we believe expands the meaning of such

term beyond its clear meaning within the statute. By expanding the term “sold” to include these other terms, the Department has clearly determined additional “use” tax is due, which is beyond the statutory authority delegated to the Department within its rulemaking process. Mr. Bedonie requested an additional review of the intention of adopting this provision of the rule, which appears to exceed its statutory authority and causes additional tax burdens for various taxpayers of the state.

In oral comments received at the rule hearing, Mr. Bedonie reiterated his position regarding this rule provision. There is an exemption under Section 212.08, F.S., for “food products which are provided for immediate consumption within a place, the entrance to which is subject to admission charge. It appears that the Department is ignoring the specific language contained in that specific exemption.” In addition, the Department appears to expand the word "sold" to mean furnished, served, prepared or sold and to make the terms “furnished, served, and prepared” synonymous with the word "sold."

Mr. Bedonie continued that it is his understanding of the statute that if you have dinner theaters that charge an amount for admission, as long as that is a taxable admission and the attendees have an expectation or knowledge that they are going to actually receive a dinner as part of that taxable admission and no separate charge for eating meals prepared at the dinner theater is made, those food products should be exempt from the sales and use tax, particularly the use tax. This applies to dinner theaters, as well as to golf courses that have tournaments where a lunch is provided, or when a taxable admission is charged for a New Year's Eve party and food is provided at midnight. It should also apply to hotels that have the same type of New Year's Eve parties.

Mr. Bedonie continued that he is at a loss in terms of why the Department wants to collect tax on a taxable admission and also impose an additional use tax on the food products that are generally expected to be provided within that taxable admission.

Mr. Dennis Manelli provided recommended changes on behalf of StarShip, dated April 8, 2008, to added proposed paragraph (3)(d), offering four alternatives of the suggested language as follows:

(d) When a charge that could be deemed an admission does not separately itemize and price food products that are included in the charge, there is a presumption that the total charge is an admission. The dealer may establish by clear and convincing evidence that the charge primarily represents the cost of furnishing food products to patrons. In this case, the charge shall not be deemed an admission and the food products may be purchased for resale, as provided in Rule 12A-1.039, F.A.C.

(d) When dining privileges are furnished to patrons who have paid a set charge for food products and there is no separately itemized charge to the patron for the dining privileges, the charge shall not be deemed an admission, tax is required to be collected on the sales price of the food products and the food products may be purchased for resale, as provided in Rule 12A-1.039, F.A.C.

(d) When food products are furnished to patrons who have paid a set charge for the privilege of participating in a dining event and the set charge represents the price of food products furnished to the patron and not the price for admitting the patron to the place or for the privilege of entering or staying in the place, the charge shall not be deemed an admission whether or not the charges for food products are separately itemized and said food products may be purchased for resale, as provided in Rule 12A-1.039, F.A.C.

(d) When food products are furnished to patrons on the premises of a place which restricts access to those who have paid a charge and such charge is measured on the price for food products furnished and not the price for admitting the patron to the place or for the privilege of entering or staying in the place, the charge shall not be deemed an admission whether or not the charges for food products are separately itemized and said food products may be purchased for resale, as provided in Rule 12A-1.039, F.A.C.

*In Response: No changes were made to this subsection prior to the rule hearing held on February 23, 2007; however, this subsection has been withdrawn from the proposed rule for further consideration.*

The Joint Administrative Procedures Committee provided written comments, dated November 19, 2007, advising of the need to clarify the provisions of subparagraph 27. of paragraph (a) of subsection (2) of Rule 12A-1.011, F.A.C., and to incorporate by reference the appropriate provisions of the Federal Food and Drug Act cited in that subparagraph. In response, subparagraph 27. of paragraph (a) of section (2) of Rule 12A-1.011, F.A.C., has been changed, so that, when adopted, the subparagraph will read as follows:

27. Natural fruit or vegetable juices or their concentrates or reconstituted natural concentrated fruit juices in any form, whether frozen or unfrozen, aerated, dehydrated, powdered, granulated, sweetened or unsweetened, seasoned with salt or spice, or unseasoned. Only those juices that are permitted by federal law and regulation to be labeled “100 percent juice” or “100 percent juice with added-” “ingredient(s),” “preservative,” or “sweetener” will be considered natural fruit or vegetable juices. [Title 21 (Food and Drug), Chapter 9 (Federal Food, Drug, and Cosmetic Act), Subchapter IV (Food) 21 U.S.C. ss. 341; 343 (January 24, 2002), hereby incorporated by reference]; [21 C.F.R. Ch. 1, ss. 101.30; 102.5; 102.33, 146.114-146.187; 156.3; 156.145 (4-1-06), hereby incorporated by reference].

In addition, technical changes have been made to the law implemented section of Rule 12A-1.0015, F.A.C., to include the following: Sections 212.07(1)(b), 212.08(6), (7), 212.18(3)(c), and 213.37, F.S.

#### **ADDITIONAL CHANGES TO PROPOSED RULE 12A-1.0115, F.A.C.:**

After further review by the Department, proposed Rule 12A-1.0011, F.A.C. (Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations), and proposed Rule 12A-1.005, F.A.C. (Admissions), have been withdrawn.

The following changes were made to the proposed substantial rewording of Rule 12A-

1.011, F.A.C. (Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice):

- Subsection (1) has been titled "SCOPE" and the following unnecessary sentence was removed: "Section 212.08(1), F.S., exempts food products for human consumption, with certain exceptions."
- The phrase "original container" was corrected to read "original sealed container" in subparagraph 2.a. of paragraph (b) of subsection (4)
- The provisions of paragraph (e) of subsection (7) regarding water conditioning (water softening) were clarified

In addition, the following changes were made to proposed new Rule 12A-1.0115, F.A.C. (Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies):

- The following unnecessary sentence was removed from paragraph (a) of subsection (1): "Section 212.08(1), F.S., exempts food products for human consumption, with certain exceptions."
- The term "food products" was changed to read "taxable food products" in paragraphs (b) and (c) of subsection (5). Unnecessary language was also removed.
- Paragraph (d) of subsection (5) has been withdrawn
- Previously numbered paragraph (e) has been renumbered (d), and the term "food product" has been changed to read "food or beverage"

- Paragraph (a) of subsection (6) has been changed to clarify when food products furnished by an employer to its employees are not subject to tax
- The phrase "food products ready for immediate consumption" in paragraph (a) of subsection (7) was corrected
- Paragraphs (a) through (e) of subsection (8) have been changed to clarify when food products furnished or served by caterers are subject to tax, and paragraph (f) has been withdrawn
- Subparagraph 2. of paragraph (a) of subsection (9) has been changed to clarify when gratuities charged to customers are not subject to tax
- Paragraph (d) of subsection (9) has been changed to clarify when the charge for preparing food products furnished by the customer is subject to tax
- The term "food products" in paragraph (a) of subsection (10) has been changed to "food or drinks"
- The terms "food products" and "meals and beverages" in subsection (11) have been changed to "food or drinks"
- The term "food products" in paragraph (d) of subsection (12) has been changed to "meals"
- The title to subsection (13) has been changed to "HOSPITALS AND HOMES FOR THE AGED"
- The provisions of subsections (14) and (15) have been combined into substantially revised subsection (14), "NONPROFIT ORGANIZATIONS; SOCIAL OR CIVIC CLUBS"

### SUMMARY OF RULE HEARING

HELD ON FEBRUARY 23, 2009

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were

noticed for a rule hearing in the Florida Administrative Weekly on January 23, 2009 (Vol. 35, No. 3, pp. 328-336). A rule hearing was held on February 23, 2009, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida. There was one attendee present to observe the proceedings without comment. No written comments have been received by the Department.

### **PARTIES ATTENDING**

For the Department of Revenue	RICHARD PARSONS, Tax Law Specialist, Technical Assistance and Dispute Resolution Resolution JANET YOUNG, Tax Law Specialist, Technical Assistance and Dispute Resolution
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From the Public	EDWIN BODO, Florida Association of Homes and Services for the Aging
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The Joint Administrative Procedures Committee, in written correspondence dated November 19, 2007, requested that the Department identify the specific statutory authority that gives rise to the establishment of 25% of the value of the package as representing a taxable event. Proposed Rule 12A-1.011(10), F.A.C., provides that when the taxable components of a package consisting of taxable items and tax-exempt food items is more than 25% of the value of the package, the package is subject to tax. When the value of the taxable items falls below 25% of the value of the package, the package is not subject to tax.

The 25% value threshold is the Department's long-standing administration of the statutory limitation on taxing packaging materials, provided in Section 212.02(14)(c), F.S. Pursuant to discussions with the Committee on July 17, 2008, the Department was to retain the current language in the proposed rule while the Department seeks statutory clarification from the Legislature during the 2009 regular session of the Legislature.

The Department requested that the 2009 Legislature provide specific authority to support this long-standing position; however, no legislation was enacted. The Department has withdrawn

these provisions from the proposed rule and, when adopted, these provisions will no longer be contained in the Department's rule. A Notice of Change was published in the June 19, 2009, edition of the Florida Administrative Weekly (Vol. 35, No. 24, p. 2959).

In addition, Subsection (3), Food Products Consumed in Places Where an Admission is Charged, of Rule 12A-1.0115, F.A.C., has been withdrawn for further consideration. Proposed subsections (4) through (14) have been renumbered (3) through (13). A Notice of Change has been filed for publication in the July 31, 2009, edition of the Florida Administrative Weekly.

DEPARTMENT OF REVENUE  
CHAPTER 12A-1, FLORIDA ADMINISTRATIVE CODE  
SALES AND USE TAX  
AMENDING RULES 12A-1.011, 12A-1.071, AND 12A-1.097  
CREATING RULE 12A-1.0115

(Substantial Rewording of Rule 12A-1.011 follows. See Florida Administrative Code for present text.)

12A-1.011 Sales of Food Products and Drink for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice Sales of Food or Drinks Served, Cooked, Prepared, or Sold by Restaurants or Other Like Places of Business.

(1) SCOPE.

(a) The purpose of this rule is to clarify the application of tax on the sale of food products generally sold in or by grocery stores, convenience stores, supermarkets, bakeries, fish markets, produce markets, and other like places of business. This rule is also intended to clarify the application of tax on the sale of bakery products by bakeries, pastry shops, or like establishments and on the sale of drinking water or ice.

(b) Rule 12A-1.0115, F.A.C., is intended to clarify the application of tax on food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business.

(2) TAX-EXEMPT FOOD PRODUCTS.

(a) Food products for human consumption, whether processed, cooked, raw, canned, or in any other form that is generally regarded as food, are exempt. The following is a nonexhaustive list of exempt food products:

1. Baby foods and baby formulas;

2. Baked goods and baking mixes, including ready-to-eat and ready-to-bake products;

3. Baking and cooking items advertised and normally sold for use in cooking or baking, such as chocolate morsels, flavored frostings, glazed or candied fruits, marshmallows, powdered sugar, or food items intended for decorating baked goods;

4. Cereals and cereal products, including ready-to-eat, instant, and regular hot cereals;

5. Cheeses, including cured and whey cheese, cream, natural, grating, processed, spread, dip, and other miscellaneous cheeses;

6. Cocoa;

7. Coffee and coffee substitutes;

8. Condiments and relishes, including seasoning sauces and spreads, such as mayonnaise, ketchup, or mustard;

9. Cookies, including chocolate-coated or cream-filled;

10. Dairy products;

11. Dairy substitutes;

12. Dietary supplements (including herbal supplements) and meal replacements, including liquid food supplements and nutrition bars, including those that are candy-coated or chocolate-coated;

13. Eggs and egg products, including liquid, frozen, or dried eggs;

14. Fish, shellfish, and other seafood products, whether fresh or frozen;

15. Food coloring;

16. Frozen dinners and other frozen food products;

17. Fruit (including fruit sliced, chunked, or otherwise cut by the retailer), fruit snacks, fruit roll-ups, and dried fruit, including those sweetened with sugar or other sweeteners;

18. Gelatins, puddings, and fillings, including flavored gelatin desserts, puddings, custards, parfaits, pie fillings, and gelatin base salads;

19. Grain products and pastas, including macaroni and noodle products, and rice and rice dishes;

20. Honey;

21. Ice cream, frozen yogurt, sherbet, and similar frozen dairy or nondairy products sold in units larger than one pint;

22. Jams and jellies;

23. Marshmallows;

24. Meat and meat products;

25. Meat substitutes;

26. Milk, including natural fluid milk, homogenized milk, pasteurized milk, whole milk, chocolate milk, buttermilk, half and half, whipping cream, condensed milk, evaporated milk, powdered milk, or similar milk products, and products intended to be mixed with milk;

27. Natural fruit or vegetable juices or their concentrates or reconstituted natural concentrated fruit juices in any form, whether frozen or unfrozen, aerated, dehydrated, powdered, granulated, sweetened or unsweetened, seasoned with salt or spice, or unseasoned. Only those juices that are permitted by federal law and regulation to be labeled “100 percent juice” or “100 percent juice with added-” “ingredient(s),” “preservative,” or “sweetener” will be

considered natural fruit or vegetable juices. [Title 21 (Food and Drug), Chapter 9 (Federal Food, Drug, and Cosmetic Act), Subchapter IV (Food) 21 U.S.C. ss. 341; 343 (January 24, 2002), hereby incorporated by reference]; [21 C.F.R. Ch. 1, ss. 101.30; 102.5; 102.33, 146.114-146.187; 156.3; 156.145 (4-1-06), hereby incorporated by reference].

28. Peanut butter;

29. Poultry and poultry products;

30. Salad dressings and dressing mixes;

31. Salt, salt tablets, pepper, spices, seeds, herbs, seasonings, blends, extracts, and flavorings, whether natural or artificial;

32. Sandwich spreads;

33. Sauces and gravies;

34. Snack foods, including chips, corn chips, potato chips, cheese puffs and curls, cereal bars, cracker jacks, granola bars, nuts and edible seeds, pork rinds, and pretzels, whether such products are chocolate-coated, honey-coated, or candy-coated.

35. Soups and soup mixes;

36. Sugar, sugar products, and sugar substitutes;

37. Tea (including herbal tea), unless sold in a liquid form;

38. Vegetables and vegetable products;

39. Vegetable oils, lard, olive oil, shortenings, and oleomargarine.

(b) Food products prepared off the seller's premises are exempt when:

1. Sold in the original sealed container;

2. Sliced into smaller portions; or

3. The product is sold frozen and then heated on the seller's premises by the customer.

(c) Taxpayers who have a question regarding the taxable status or exempt status of a food product may submit a written description of the food product and a copy of the food product label to the Department to obtain a determination of the taxability of the product. This request should be addressed to the Florida Department of Revenue, Technical Assistance and Dispute Resolution, P.O. Box 7443, Tallahassee, Florida 32314-7443.

(3) BAKERY PRODUCTS SOLD BY BAKERIES, PASTRY SHOPS, OR LIKE ESTABLISHMENTS.

(a) Bakery products sold by bakeries, pastry shops, or like establishments as hot prepared food products are taxable.

1. Bakery products that are kept warm by a heat source used to maintain them in a heated state, or to reheat them, are hot prepared food products.

2. Bakery products that are sold while still warm from the initial baking are not hot prepared food products.

3. Example: A bakery establishment toasts a bagel for a customer. The sale of the bagel is subject to tax, whether the bakery establishment has eating facilities or does not have eating facilities.

(b)1. Bakery products, excluding bakery products sold for consumption off the premises, sold by bakeries, pastry shops, or like establishments that have eating facilities are subject to tax.

2. For purposes of this subsection, “eating facility” is a place that facilitates the consumption of the bakery products on the seller's premises on items such as benches, chairs, stools, tables, and counters. For example, a pastry shop that has bar stools and a counter where the bakery products and drinks are served to patrons will be considered a pastry shop with eating facilities. A bakery located within the food court of a mall where tables and chairs are located in

the common areas of the food court for patrons to consume food products will be considered a bakery with eating facilities.

(c)1. Bakery products, excluding items sold as hot prepared food products, sold for consumption off the premises are exempt.

2. For the purpose of this paragraph, there shall be a rebuttable presumption that the sale of bakery products by bakeries, pastry shops, or like establishments that have eating facilities are taxable when:

a. Such bakery products are sold in quantities of five (5) or fewer items; or

b. The bakery products sold, regardless of the quantity, are not packaged in a manner consistent with an intention by the customer to consume the products off the seller's premises.

3. Bakery products that are sold, regardless of the quantity, in packaging that is glued, stapled, wrapped, or sealed are examples of packaging consistent with an intention by the customer to consume products off the seller's premises.

4. Bakeries, pastry shops, or like establishments that have eating facilities and make tax-exempt sales of bakery products that are for consumption off the premises are required to separately account for the tax-exempt sales of bakery products for consumption off the premises.

a. Examples of methods to separately account for tax-exempt sales of bakery products for consumption off the premises are: using sales invoices which contain documentation that the sale of the bakery product is for consumption off the premises; using a separate key on a cash register to record tax-exempt sales of bakery products; or using a separate cash register to record tax-exempt sales of bakery products.

b. Example. A bakery operates an establishment with eating facilities. The bakery sells donuts, toasted bagels, and other pastries, as well as coffee and other drinks. The bakery sells

bakery products to patrons who take the products home for consumption in sealed containers. Products sold for consumption on the premises are served to the customers on trays. The bakery uses separate keys on its cash registers to account for the sales of tax-exempt bakery products to patrons who purchase the products for consumption off the premises in sealed containers separately from the accounting for taxable sales of toasted bagels, coffee, other drinks, and bakery products for consumption on the premises. The bakery products sold for consumption off the premises are exempt, because the bakery's packaging and accounting methods overcome the rebuttable presumption that the products are sold for consumption on the premises.

(d) Bakery products, excluding items sold as a hot prepared food products, that are sold by bakeries, pastry shops, or like establishments that do not have eating facilities are exempt.

(4) TAXABLE FOOD PRODUCTS. The exemption for food products for human consumption does not apply to any of the items specified in this subsection.

(a) Candy, chewing gum, bubble gum, breath mints, and any similar product regarded as candy or confection, based on its normal use as indicated on the label or advertising, is subject to tax. The term “candy and similar products” does not include snack foods not regarded as candy or confection, as indicated on the label or advertising of the product.

(b) Food prepared, whether on or off the seller’s premises, and sold for immediate consumption is subject to tax. This does not apply to food prepared off the seller’s premises and sold in the original sealed container, or to the slicing of products into smaller portions.

1. Food prepared for immediate consumption is food prepared to a point generally accepted as ready to be eaten without further preparation and that is sold in a manner that suggests readiness for immediate consumption. In determining whether an item of food is sold for immediate consumption, the customary consumption practices prevailing at the selling

facility shall be considered.

2. Examples:

a. Potato salad is prepared and delivered to a dealer in bulk. The dealer repackages the potato salad into smaller containers. Because the potato salad is not sold in the original sealed container, the sale of the repackaged smaller containers of potato salad is subject to tax.

b. A grocery store buys cold cuts in five-pound packages. The grocery store slices cold cuts for the customer according to the thickness and the amount the customer desires. The food is then packaged for sale to the customer. Because the cold cuts are sliced into smaller portions, the sale of the cold cuts is exempt from tax.

c. A supermarket offers freshly popped popcorn for shoppers for sale. The sale of the popcorn is subject to tax.

d. A supermarket prepares seafood products, such as smoked fish or steamed shrimp, for sale. The sale of the smoked fish or steamed shrimp is subject to tax.

e. A supermarket prepares fruit and vegetable products into various fresh salads for sale. When packaged without eating utensils and sold as a grocery item, the sale of the prepared fresh fruit or vegetable salad is exempt. When the prepared fresh salads are packaged with eating utensils, such as with a fork and a napkin, the salad is a food product prepared and sold for immediate consumption and is subject to tax.

(c)1. Hot prepared food products, whether sold separately or in combination with other food items, when the food is heated by the seller rather than by the customer, is subject to tax.

2. Hot prepared food products are those products, items, or components that have been prepared for sale in a heated condition and sold at any temperature that is higher than the air temperature of the room or place where the products are sold. Preparation of a “hot prepared

food product” includes cooking, microwaving, warming, toasting, or any other method of heating the food. Food products, including bakery products, are considered “hot prepared food products” when a heat source is used to maintain the food product in a heated state or is used to reheat the food product. Bakery products that are sold while still warm from the initial baking are not “hot prepared food products.” Their temperature is a result of the timing of the customer’s purchase rather than an indication of preparation to be sold in a heated condition.

3. When a single price is charged for a combination of hot prepared food products and cold food items or other components, the single price charged for the combination is subject to tax.

4. Examples:

a. A supermarket sells barbecued chicken that is kept hot by a rotisserie to be taken home and eaten. The sale of the chicken is subject to tax.

b. A grocery store bakes bread in an oven. The bread is packaged for sale while it is still warm. A customer purchases a package of the bread while it is still warm. The sale of the warm bread is not subject to tax.

c. A single price is charged for a combination of a hot meal, hot pizza, hot specialty dish, or hot sandwich, with cold components, such as a salad or fruit or other side items, by a convenience store. The single price charged for the combination is subject to tax.

(d) Sandwiches sold ready for immediate consumption, whether refrigerated or heated by the customer or by the retailer, are subject to tax. An example of a sandwich not sold ready for immediate consumption would be a frozen sandwich or a sandwich with a frozen or partially frozen filling.

(e) Meals sold for consumption on or off the seller's premises are subject to tax.

(f) Ice cream, frozen yogurt, and similar frozen dairy or nondairy products in cones, small cups, or pints, and popsicles, frozen fruit bars, or other novelty items, whether sold separately or in multiple units, are subject to tax.

(5) TAXABLE SOFT DRINKS. The exemption for food products for human consumption does not apply to soft drinks. The following sales of soft drinks are subject to tax:

(a) Nonalcoholic beverages, whether carbonated or noncarbonated.

(b) Any noncarbonated beverage made from milk derivatives, such as ice cream sodas, milkshakes, or malts.

(c) Any beverages and preparations commonly referred to as a “soft drink,” such as sodas, soda water, ginger ale, colas, root beer, tonic, fizzes, or cocktail mixes.

(d) Any beverage containing fruit or vegetable juice labeled with the word(s) “ade,” “beverage,” “cocktail,” “drink,” or “fruit or vegetable flavor, flavored, or flavorings.” Federal law and regulations require that any beverage containing more than 0 percent juice, but less than 100 percent fruit or vegetable juice, which represents or suggests by its physical characteristics, name, labeling, ingredient statement, or advertising that it contains fruit or vegetable juice, be labeled in a manner that is appropriate to advise the consumer that the product is less than 100 percent juice. [Title 21 (Food and Drug), Chapter 9 (Federal Food, Drug, and Cosmetic Act), Subchapter IV (Food) 21 U.S.C. ss. 341; 343 (January 24, 2002)]; [21 C.F.R. Ch. 1, ss. 101.30; 102.5; 102.33, 146.114-146.187; 156.3; 156.145 (4-1-06)]. Examples of taxable beverages include: apple blend, cranberry juice cocktail, grape juice beverage, lemonade, limeade, orangeade, raspberry and cranberry flavored drink, fruit drink, fruit punch, diluted fruit juices, and diluted vegetable juices.

(e) Tea sold in a liquid form.

(6) VENDING MACHINES AND MOBILE VENDORS. Food products sold through a vending machine, push cart, motor vehicle, or any other form of vehicle are subject to tax. See Rule 12A-1.044, F.A.C., for sales through vending machines.

(7) WATER AND ICE.

(a) Drinking water, including water enhanced by the addition of minerals, sold in bottles, cans, or other containers is exempt, except when carbonation or flavorings have been added to the water in the manufacturing process. When carbonation or flavorings are added to drinking water at a water treatment facility, the sale of the drinking water in bottles, cans, or other containers remains exempt.

(b) The sale of ice, including dry ice, is subject to tax, except when the ice is purchased for use as a packaging material to package food products for sale. See Rule 12A-1.040, F.A.C., for provisions for packaging materials.

(c) Fluoride used in the treatment of drinking water is exempt.

(d) Germicides (such as chlorine), sodium silicate, activated charcoal, and similar purification agents used in the treatment of drinking water are exempt.

(e) The charge for water conditioning (water softening) is not subject to tax. The sale of salt for use in water softeners to regenerate the minerals required for softening water is not the sale of a purification agent used in the treatment of drinking water and is subject to tax. Dealers must pay tax on items used to provide water conditioning to their customers, such as minerals, tanks, equipment, and other materials.

(8) COMPLIMENTARY AND DONATED FOOD PRODUCTS.

(a)1. Dealers that primarily sell food products at retail are not subject to sales or use tax on any food or drink provided without charge as a sample or for the convenience of customers,

even when cooked or prepared on the dealer's premises. For example, hot coffee provided in a grocery store for shoppers is not subject to sales or use tax.

2. Dealers that primarily sell food products at retail are not subject to sales or use tax on any item given to a customer as part of a price guarantee plan related to point-of-sale errors.

3. The exemption, as provided in this paragraph, does not apply to businesses whose primary activity is to serve prepared meals or alcoholic beverages for immediate consumption.

(b) Dealers that sell food products at retail are not subject to sales or use tax on any food product donated to a food bank or to an organization determined to be currently exempt from federal income tax pursuant to s. 501(c) of the Internal Revenue Code of 1986, as amended.

(9) FOOD STAMPS AND VOUCHERS.

(a) Food products are exempt when purchased with food stamps issued by the United States Department of Agriculture, or with Special Supplemental Food Program for Women, Infants, and Children (WIC) vouchers issued under authority of federal law.

(b) When a purchase of food products is made partly with food stamps or vouchers and partly with cash or manufacturer's coupons, the food stamps or vouchers will first be used to defray the cost of the taxable food and drinks, less the value of any manufacturer's coupons, that can be purchased with the food stamps or vouchers. When the food stamps or vouchers are insufficient to purchase the taxable items, tax is due on the remaining sales price of taxable food and drinks.

Rulemaking Specific Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented

212.02(14)(c), (20), 212.05(1)(a)1.a., 212.06(1)(a), 212.07(2), 212.08(1), (4)(a)1., (7)(oo), (pp);

212.18(2) FS. History-Revised 10-7-68, 6-16-72, 9-28-78, 10-29-81, Formerly 12A-1.11,

Amended 12-8-87, 1-2-89, 8-10-92, 6-19-01, 4-17-03,\_\_\_\_\_.

12A-1.0115 Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies.

(1) SCOPE.

(a) The purpose of this rule is to clarify the application of tax on food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business where food products are sold for immediate consumption on the seller's premises or packaged or wrapped and taken away from the seller's premises.

(b) Rule 12A-1.011, F.A.C., is intended to clarify the application of tax to the sale of food products generally sold by grocery stores, convenience stores, supermarkets, bakeries, fish markets, produce markets, and other like places of business, the sale of bakery products by bakeries, pastry shops, and like establishments, and the sale of drinking water or ice.

(2) FOOD PRODUCTS SERVED, PREPARED, OR SOLD IN OR BY RESTAURANTS OR SIMILAR PLACES OF BUSINESS.

(a) Food products served, prepared, or sold in or by restaurants, lunch counters, cafeterias, hotels, taverns, or other similar places of business are subject to tax.

(b) Food products that are furnished, prepared, or served for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware are subject to tax. The food products are subject to tax, even though the tables, chairs, or counters and the trays, glasses, dishes, and other tableware may be provided by a person with whom the dealer contracts to furnish, prepare, or serve the food products to others.

(c) Food products that are ordinarily sold for immediate consumption on the seller's premises or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the location are subject to tax. The food products remain subject to tax even when the product is sold on a "take out" or "to go" basis and are packaged or wrapped and taken away from the dealer's facility. The customary practices prevailing at the dealer's facility will be used to determine whether a food product is sold for immediate consumption at the selling facility. The premises of a caterer, with respect to catered meals or beverages, is the place where such meals or beverages are served.

(d) Restaurants, lunch counters, cafeterias, hotels, taverns, or other like places of business that also maintain a separate department that includes groceries are not required to collect tax on tax-exempt sales of food products, as provided in Rule 12A-1.011, F.A.C., when separate records are maintained for the separate department; however, food products that are sold as prepared food through a separate department are subject to tax.

(3) VENDING MACHINES AND MOBILE VENDORS. Food products sold through a vending machine, push cart, motor vehicle, or any other form of vehicle are subject to tax. See Rule 12A-1.044, F.A.C., for sales through vending machines.

(4) COUPONS, DISCOUNTS, AND DONATED FOOD PRODUCTS.

(a) When a dealer sells two meals for the price of one meal, the dealer is required to collect tax on the total amount charged. No tax is due on the second meal.

(b) The sale of a meal ticket or coupon book to be redeemed for the purchase of taxable food products is not subject to tax at the time of sale. When the ticket or coupon is redeemed by a customer, the seller is required to collect the tax on the total consideration received, including the value of the ticket or coupon redeemed and any additional compensation received by the

seller.

(c) When the seller provides a customer taxable food products without charge after purchasing a designated number of taxable food products, tax is due on the sales price of the taxable food products sold. No tax is due on the item provided to the customer without charge. For example, a sandwich shop offers customers a coupon that will entitle the customer to receive a free sandwich after purchasing five sandwiches. When the customer's coupon indicates that the customer has purchased five sandwiches, the customer redeems the coupon for the free sandwich. The sandwich shop is required to collect tax on the sale of the first five sandwiches. No tax is due on the sandwich provided, without charge, to the customer, who has purchased the required five sandwiches.

(d) Dealers that sell food products at retail are not subject to tax on any food or beverage donated to a food bank or to an organization determined to be currently exempt from federal income tax pursuant to s. 501(c) of the Internal Revenue Code of 1986, as amended.

(5) FOOD PRODUCTS SOLD OR FURNISHED BY RESTAURANTS OR SIMILAR PLACES OF BUSINESS TO EMPLOYEES.

(a) Food products furnished by an employer to its employees are not subject to tax, provided no cash changes hands as payment for the food products furnished and the assigned value of the food products is not required to be reported as income to the employee for federal income tax purposes.

(b) Food products sold by a restaurant to its employees are subject to tax.

(c) Food products consumed by the owner and his family are not subject to sales tax.

(6) TRANSPORTATION COMPANIES.

(a) Food products sold ready for immediate consumption by airlines, railroads (except Amtrak), vessels, or other transportation companies to their passengers, while within Florida, are subject to tax. A transportation company may extend a copy of its Annual Resale Certificate to the selling dealer instead of paying tax on the purchase of food products ready for immediate consumption for purposes of resale to its passengers.

(b)1. Transportation companies, except Amtrak, are required to pay tax on their purchases of meals and food products ready for immediate consumption when:

a. The food products are delivered to the transportation company in this state, whether consumed in this state or outside this state;

b. The food products are furnished to the passengers; and

c. There is no separately itemized charge to the passenger for the food product.

2. For the partial exemption available to airlines, see Section 212.0598, F.S. For the partial exemption available to vessels engaged in interstate or foreign commerce under Section 212.08(8), F.S., see Rule 12A-1.0641, F.A.C.

(c) The purchase or sale of food products ready for immediate consumption by Amtrak, an instrumentality of the United States government, is not subject to tax.

#### (7) CATERERS.

(a) For purposes of this rule, the term “caterer” means any person engaged in the business of furnishing, cooking, preparing, or serving food or drinks on the premises of the customer, or on premises supplied by the customer, including premises leased by the customer from a person other than the caterer.

(b) The total charge made by caterers for furnishing, cooking, preparing, or serving food

or drinks, whether performed by the caterer, the caterer's employees, or persons contracting with the caterer, is subject to tax. Caterers are considered the ultimate consumer and are liable for the tax on their purchase or lease of items, such as pots, pans, and other dishes, silverware, glasses, chairs, tables, tablecloths, and similar items used to furnish, cook, prepare, or serve food or drinks. Any separately itemized charge by the caterer for the use of these items is considered to be a part of the total charge for furnishing, cooking, preparing, or serving food or drinks and is subject to tax.

(c) Tax applies to charges by a caterer, or any other person, for planning, designing, coordinating, or supervising an event when the charges to the customer are made in connection with furnishing, cooking, preparing, or serving food or drinks at the event. Tax does not apply to charges for services unrelated to furnishing, cooking, preparing, or serving food or drinks, such as entertainment charges, when the charges are separately itemized and separately priced to the customer on the customer's bill, invoice, statement, or other evidence of sale.

(d) When caterers purchase or lease items that are not used to furnish or serve food or drinks, such as tents, decorative props, special lighting, sound or video systems, dance floors, or stages, the caterer may purchase or lease these item(s) for resale or re-lease tax exempt by extending a copy of its Annual Resale Certificate to the selling dealer instead of paying tax when:

1. The property is purchased or leased exclusively for resale or re-lease to the caterer's customer;

2. The charge to the customer for each item is separately itemized and separately priced on the customer's bill, invoice, statement, or other evidence of sale; and

3. The applicable tax is collected from the customer.

(e) When a caterer sells food or drinks, including any service charges, to other caterers or event planners for the purpose of resale, the caterer may accept a copy of the purchaser's Annual Resale Certificate instead of collecting tax from the purchaser. The purchasing caterer or event planner is required to collect the applicable tax from his or her customer on the charge for catering.

(8) GRATUITIES.

(a) Any charge made by a dealer to a customer for gratuities, tips, or similar charges is a part of the taxable sales price of the food or drinks except when:

1. The charge is separately stated as a gratuity, tip, or other charge on the customer's receipt or other tangible evidence of sale; and,

2. The dealer receives no monetary benefit from the gratuity. Money withheld by the dealer for purposes of payment of the employee's share of social security or federal income tax or any fee imposed by a credit card company on the amount of the gratuity, or money withheld pursuant to judicial or administrative orders, is not a monetary benefit for purposes of this rule.

(b) The charge for room service made by hotels for serving meals in guests' rooms is included in the total price of the meal and is subject to tax.

(c) Service charges, minimum charges, corkage fees, setup fees, or similar charges imposed by a restaurant, tavern, nightclub, or other like place of business as part of the charge for furnishing, serving, or preparing food products are subject to tax.

(d) The charge for the preparation of food products furnished by the customer to the preparer is subject to tax, whether prepared for immediate consumption on the preparer's premises or for consumption off the premises.

(9) FOOD OR DRINKS FURNISHED WITH LIVING OR SLEEPING

ACCOMMODATIONS.

(a) Food or drinks served or sold at community colleges, junior colleges, and other institutions of higher learning, or at fraternities and sororities, are subject to tax. If a lump sum amount is charged by the institution for living or sleeping accommodations and meals, a portion of the lump sum amount must be allocated to the sale of food or drinks to reasonably reflect the value of the food or drinks. Tax is due on the portion that is reasonably allocated to the sale of the food or drinks.

(b)1. Public lodging establishments that advertise that they provide complimentary food and drinks are not required to pay sales or use tax on food or drinks when:

a. The food or drinks are furnished as part of a packaged room rate;

b. No separate charge or specific amount is stated to the guest for such food or drinks;

c. The public lodging establishment is licensed with the Division of Hotels and

Restaurants of the Department of Business and Professional Regulation; and

d. The public lodging establishment rents or leases transient accommodations that are subject to sales and use tax.

2. The public lodging establishment may extend a copy of its Annual Resale Certificate to the selling dealer to purchase food and drinks used for this purpose tax-exempt, as provided in Rule 12A-1.039, F.A.C.

(10) DAY NURSERIES AND CUSTODIAL CAMPS. Day care facilities, nurseries, kindergartens, day camps, and custodial camps that primarily provide professional and personal supervisory and instructional services are not required to collect tax on their charges to the students or campers for providing food or drinks as part of their services. However, when the

charges for furnishing food or drinks are separately itemized and separately priced to the student or camper, tax is required to be collected on the sales price of food or drinks.

(11) MEALS SERVED AT LABOR CAMPS.

(a) Labor camps and commercially operated public housing quarters are operated to house and feed workers on a contract basis. The provisions of this subsection are intended to provide the taxability of the housing and meals provided to workers under such contracts.

(b) When the contract provides for meals, and no housing is furnished under the contract, the charge for the meals is subject to tax.

(c)1. When the contract provides for housing and meals for the workers, the charge for meals is subject to tax.

2. When the contract provides for housing for the workers, but the workers buy groceries and prepare their own meals, no tax is due on the prepared meals.

(d) Workers residing in public housing quarters or labor camps may enter into agreements under which one worker is appointed to purchase groceries and prepare all meals. The worker may be selected and directed by the group of workers or may be designated and directed by the employer. The employer may deduct from each employee's wages the pro rata share of the groceries purchased for the group or a contracted charge for the meals prepared and served by the employer's designated cook.

1. When the employees select the designated worker to purchase groceries and prepare meals, no tax is due on the amount deducted by the employer for each employee's pro rata share of the cost of the groceries purchased by the designated worker.

2. When the employer selects the worker to be the designated cook who prepares all meals, tax is due on the amount deducted from the employee's wages by the employer for the meals.

(12) HOSPITALS AND HOMES FOR THE AGED.

(a) Meals furnished to residents of homes for the aged, as defined in Section 212.08(7)(i), F.S., are exempt.

(b) Meals furnished to patients and inmates of any hospital or other institution designed and operated primarily for the care of persons who are ill, aged, infirm, mentally or physically incapacitated, or for any reason dependent upon special care or attention are exempt.

(c) Meals sold and delivered as a charitable function by a nonprofit volunteer organization to handicapped, elderly, or indigent persons at their residences are exempt.

(13) NONPROFIT ORGANIZATIONS; SOCIAL OR CIVIC CLUBS.

(a) Food or drinks sold at fundraisers and similar types of events are subject to tax, unless such sales qualify as occasional sales, as provided in Rule 12A-1.037, F.A.C.

(b) Organizations that hold a valid Florida Consumer's Certificate of Exemption may extend a copy of their certificate to purchase meals and beverages used in the normal nonprofit activities of the organization tax-exempt.

(c) Food or drinks sold by a religious institution that holds a valid Florida Consumer's Certificate of Exemption and has an established physical place for worship at which nonprofit religious services and activities are regularly conducted and carried on are exempt.

(d) Food or drinks served or sold to or by social, civic, and similar organizations are subject to tax.

(e) When charges for meals and beverages to members of an organization are separately itemized and priced from the dues for membership, the charges for meals and beverages are subject to tax. If the organization indicates on its dues invoices, membership billing statements, dues notices, or membership applications that a specified portion of the dues payment is attributed to the furnishing of meals and beverages, the specified portion attributed to the furnishing of the meals and beverages is subject to tax.

Rulemaking Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 212.02(14)(c), (20), 212.05(1)(a)1.a., 212.06(1)(a), 212.07(1)(b), (2), 212.08(1), (4)(a)1., (6), (7), (7)(i), (k), (m), (oo), (pp), 212.18(3)(c), and 213.37 FS. History-New \_\_\_\_\_.

12A-1.071 Rentals, Leases, or License to Use Tangible Personal Property.

(1) through (32) No change.

~~(33) Caterers are required to pay tax on the purchases or rentals of all dishes, tables, chairs, silver, linens, kitchen utensils, artificial palms, and other items used by them in the conduct of their business. The caterer should pay tax to his supplier and should not furnish the supplier with a resale certificate, except in those instances where he is purchasing or renting such items exclusively for rental and for which he makes a separate charge to his customer.~~

(34) through (36) renumbered (33) through (35) No change.

~~(37) The charge for water conditioning (soft water service) is exempt. The dealer shall pay tax on the acquisition of tanks, minerals, and other equipment used in furnishing such service, unless such materials and supplies are actually sold to the customer.~~

(38) through (47) renumbered (36) through (45) No change.

Rulemaking Specific Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 212.02(1), (4), (10)(g), (12), (14)(a), (15)(a), (16), (19), 212.04, 212.05(1)(c), (d), (f), (h), (i), 212.06(1)(a), (2)(e), (8), 212.08(7)(e), (f), (v), (y), 212.11(2), (3), 212.12(9), 212.18(2), 402.61 FS. History-Revised 10-7-68, 1-7-70, 6-16-72, Amended 12-11-74, 12-31-81, 7-20-82, Formerly 12A-1.71, Amended 1-2-89, 10-5-92, 11-16-93, 8-15-94, 10-17-94, 3-20-96, 8-1-02, 6-12-03, 9-28-04,\_\_\_\_\_.

12A-1.097 Public Use Forms.

(1) No change.

Form Number	Title	Effective Date
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(2) through (16) No Change.

(17)(a) <del>DR 46B</del>	<del>Sales Tax Status of Some Nonalcoholic Preparations, Beverages and Drinks When Sold In Grocery Stores and Similar Establishments</del>	<del>(r. 10/89)</del> 08/92
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~~(b)~~ No change.

(18) through (25) No change.

Rulemaking Specific Authority 201.11, 202.17(3)(a), 202.22(6), 202.26(3), 212.0515(7), 212.07(1)(b), 212.08(5)(b)4., (7), 212.11(5)(b), 212.12(1)(b)2., 212.17(6), 212.18(2), (3), 213.06(1), 376.70(6)(b), 376.75(9)(b), 403.718(3)(b), 403.7185(3)(b), 443.171(2), (7) FS. Law Implemented 92.525(1)(b), (3), 95.091, 125.0104, 125.0108, 201.01, 201.08(1)(a), 201.133, 201.17(1)-(5), 202.11(2), (3), (6), (16), (24), 202.17, 202.22(3)-(6), 202.28(1), 203.01, 212.02,

212.03, 212.0305, 212.031, 212.04, 212.05, 212.0501, 212.0515, 212.054, 212.055, 212.06,  
212.0606, 212.07(1), (8), (9), 212.08, 212.084(3), 212.085, 212.09, 212.096, 212.11(1), (4), (5),  
212.12(1), (2), (9), (13), 212.13, 212.14(4), (5), 212.17, 212.18(2), (3), 213.235, 213.29, 213.37,  
219.07, 288.1258, 376.70, 376.75, 403.717, 403.718, 403.7185, 443.036, 443.121(1), (3),  
443.131, 443.1315, 443.1316, 443.171(2), (7) FS. History-New 4-12-84, Formerly 12A-1.97,  
Amended 8-10-92, 11-30-97, 7-1-99, 4-2-00, 6-28-00, 6-19-01, 10-2-01, 10-21-01, 8-1-02, 4-17-  
03, 5-4-03, 6-12-03, 10-1-03, 9-28-04, 6-28-05, 5-1-06, 4-5-07, 1-1-08, 4-1-08, 6-4-08, 1-27-  
09,\_\_\_\_\_.

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12A-1, FLORIDA ADMINISTRATIVE CODE  
SALES AND USE TAX  
AMENDING RULES 12A-1.004, 12A-1.038, 12A-1.039,  
12A-1.060, 12A-1.061, AND 12A-1.097

SUMMARY OF PROPOSED RULES

The proposed amendments to Rule 12A-1.004, F.A.C. (Sales Tax Brackets), update the information on how to obtain copies of tax rate tables from the Department.

The proposed amendments to Rule 12A-1.038, F.A.C. (Consumer's Certificate of Exemption; Exemption Certificates), and Rule 12A-1.039, F.A.C. (Sales for Resale), clarify that a transaction authorization number used by dealers to document tax-exempt sales or sales made for the purposes of resale may be obtained prior to or at the time of sale.

The proposed amendments to subsection (3), Registration of Transient Accommodations, of Rule 12A-1.060, F.A.C. (Registration), and subsection (7), Registration, of Rule 12A-1.061, F.A.C. (Rentals, Leases, and Licenses to Use Transient Accommodations), add the requirement for the taxpayer to provide a federal identification number, social security number, or taxpayer identification number; and provide that the Department uses the social security numbers as unique identifiers for the administration of Florida's taxes, and that they are held confidential by the Department.

The proposed amendments to Rule 12A-1.0911, F.A.C. (Self-Accrual Authorization; Direct Remittance on Behalf of Independent Distributors), remove unnecessary provisions

regarding the revocation of a sales and use direct pay permit. Administrative rules regarding the revocation of a license, which includes a direct pay permit, have been established by the Administration Commission in Rule Chapter 28-106, F.A.C. All agencies must comply with these rules.

The proposed amendments to Rule 12A-1.097, F.A.C. (Public Use Forms): (1) adopt, by reference, changes to forms used by the Department in the administration of sales and use tax for the enterprise zone jobs credit, the special estimation of taxes for boat, motor vehicle, or aircraft dealers, and the verification of customers authorized to purchase for resale; and (2) remove forms previously used for the reporting of sales tax collected by tax collectors and for the reporting regarding interest earned on the investment of funds by county officers that are now reported and remitted by electronic means to the Department.

Specifically, Form DR-15ZC (Application for Florida Enterprise Zone Jobs Credit for Sales Tax) and the instructions on Form DR-15ZCN are being revised to simplify the application and the instructions and provide necessary technical changes.

Form DR-300400 (Boat, Motor Vehicle, or Aircraft Dealer Application for Special Estimation of Taxes), used by the Department in the administration of the estimated sales tax provisions of Section 212.11(1)(d), F.S., is revised to reorganize and simplify the instructions for boat, motor vehicle, and aircraft dealers to submit an application to report estimated tax under that statutory provision. No procedural changes are being implemented with these revisions.

Form DR-600013 (Request for Verification that Customers are Authorized to Purchase for Resale) is revised to provide that a diskette or compact disk (CD) containing specified records must be submitted to verify which customers of a business are authorized to purchase for resale. The Department is no longer able to receive information for verification purposes on

cartridge tapes. Revisions are also made to clarify the instructions regarding the verification process.

### FACTS AND CIRCUMSTANCES JUSTIFYING PROPOSED RULES

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), are necessary to: (1) update information on how to obtain sales tax and discretionary surtax rate tables; (2) clarify that sales tax dealers may obtain a transaction resale authorization number to document tax-exempt sales prior to or at the time of sale; (3) update the information required to register multiple transient accommodations; (4) clarify instructions to forms used by taxpayers to obtain the enterprise zone jobs credit, to utilize the special estimation of taxes available to boat, motor vehicle, or aircraft dealers, and to verify customers that are authorized to purchase for resale; and (5) remove provisions regarding the revocation of a direct pay permit that are governed by the rules of the Administration Commission (Chapter 28-106, F.A.C.).

### FEDERAL COMPARISON STATEMENT

The provisions contained in these rules do not conflict with comparable federal laws, policies, or standards.

### SUMMARY OF RULE DEVELOPMENT WORKSHOP

#### SCHEDULED ON JANUARY 15, 2009

A Notice of Proposed Rule Development Workshop was published in the Florida Administrative Weekly on December 19, 2008 (Vol. 34, No. 51, pp. 6565-6566), regarding the proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax). This notice advised

the public that, if requested, a rule development workshop would be conducted on January 15, 2009. No request was received by the Department. No person appeared to ask questions or make comment regarding these proposed amendments.

SUMMARY OF RULE HEARING

HELD ON MARCH 10, 2009

The Governor and Cabinet, sitting as head of the Department of Revenue, met on March 10, 2009, and approved the publication of the Notice of Proposed Rule for changes to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax). A notice for the public hearing was published in the Florida Administrative Weekly on January 30, 2009 (Vol. 35, No. 4, p. 442).

SUMMARY OF RULE HEARING

HELD ON JUNE 29, 2009

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were noticed in the Florida Administrative Weekly on May 22, 2009 (Vol. 35, No. 20, pp. 2346-2350). A rule hearing was held on June 29, 2009, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida, to allow members of the public to ask questions and make comments concerning these proposed rule amendments. There was one attendee present to observe the proceedings without comment.

**PARTIES ATTENDING**

For the Department of  
Revenue

LARRY GREEN, Hearing Officer  
JANET YOUNG, Tax Law Specialist  
ROBERT DUCASSE, Revenue Program Administrator

From the Public

TREVOR B. MASK, Colodny, Fass, Talenfeld, Karlinsky, Abate

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12A-1, FLORIDA ADMINISTRATIVE CODE  
SALES AND USE TAX  
AMENDING RULES 12A-1.004, 12A-1.038, 12A-1.039,  
12A-1.060, 12A-1.061, AND 12A-1.097

12A-1.004 Sales Tax Brackets. The Department has prepared, for public use, sales tax schedules and rate tables cards to provide the sales tax effective brackets for counties that do not impose a discretionary sales surtax and for counties that impose one or more discretionary sales surtax. Copies are available, without cost, by one or more of the following methods: 1) downloading the appropriate Sales Tax Rate Table Bracket Cards from the Department's Internet site at [www.myflorida.com/dor/taxes](http://www.myflorida.com/dor/taxes); or, 2) ~~faxing a forms request to the Distribution Center at (850)922-2208; or, 3)~~ calling the Department at (800)352-3671, Monday through Friday, 8 a.m. to 7 p.m., Eastern Time; or, 3) visiting any local Department of Revenue Service Center Distribution Center at (850)488-8422; or, 4) writing the Florida Department of Revenue, Distribution Center, 168A Blountstown Highway, Tallahassee, Florida 32304; or, 5) visiting any local Department of Revenue Service Center to personally obtain a copy. Persons with hearing or speech impairments may call the Department's TDD at (800)367-8331 or (850)922-1115.

Rulemaking Specific Authority 212.12(11), 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 212.03(1), (3), (6), 212.031(1)(c), (d), 212.04(1), 212.05(1), 212.08(3), 212.12(9), (11) FS. History—Revised 10-7-68, 6-16-72, Amended 9-24-81, 7-20-82, Formerly 12A-1.04, Amended 12-13-88, 8-10-92, 3-17-93, 12-13-94, 6-19-01, 11-1-05,\_\_\_\_\_.

12A-1.038 Consumer's Certificate of Exemption; Exemption Certificates.

(1) through (2) No change.

(3) SALES MADE TO EXEMPT ENTITIES OTHER THAN GOVERNMENTAL UNITS.

(a) through (f) No change.

(g)1. TRANSACTION AUTHORIZATION NUMBER ISSUED PRIOR TO OR AT THE POINT-OF-SALE – VALID FOR A SINGLE TRANSACTION ONLY. In lieu of obtaining a copy of the exempt entity's valid Consumer's Certificate of Exemption for each sale, the selling dealer may obtain a Transaction Authorization Number or a Vendor Authorization Number from the Department when making a tax-exempt sale to the exempt entity or its authorized representative.

2. The selling dealer may obtain a transaction authorization number prior to or at the point-of-sale by using the Department's on-line Certificate Verification System at [www.myflorida.com/dor/eservices](http://www.myflorida.com/dor/eservices) or by calling the Department's automated nationwide toll-free verification system at 1(877)357-3725. When using the Department's on-line Certificate Verification System, the dealer may key up to five Florida Consumer's Certificate of Exemption numbers into the system. When using the Department's automated nationwide toll-free verification system, the selling dealer is prompted to key in a single Florida Consumer's Certificate of Exemption number. Either verification system will issue a 13-digit transaction authorization number or alert the selling dealer that the purchaser does not have a valid Florida Consumer's Certificate of Exemption. Selling dealers using the automated telephone verification system who do not have a touch-tone telephone will be connected to a live operator during the hours of 8:00 a.m. to 7:00 p.m. (Eastern Time), Monday through Friday. Persons with hearing or

speech impairments may call the Department's TDD at 1(800)367-8331 or (850)922-1115.

3. through 4. No change.

(h) No change.

(4) through (6) No change.

Rulemaking Specific Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 95.091(3), 212.02(4), (14)(c), 212.05(1)(j), 212.06(1)(c), (16), 212.0601, 212.07(1), 212.08(5)(m), (6), (7), 212.085, 212.18(2), (3), 212.21(2) FS. History—Revised 10-7-68, 6-16-72, Amended 9-28-78, 7-20-82, 4-29-85, Formerly 12A-1.38, Amended 8-10-92, 3-17-93, 9-14-93, 12-13-94, 10-2-01, 6-12-03, 7-31-03, 6-28-04, 11-6-07,\_\_\_\_\_.

12A-1.039 Sales for Resale.

(1) through (2) No change.

(3) Except as provided in subsection (4), a dealer making a sale for resale is required to document the exempt sale by CHOOSING ONE of the following three methods:

(a) No change.

(b) TRANSACTION RESALE AUTHORIZATION NUMBER ISSUED PRIOR TO OR AT THE POINT-OF-SALE – VALID FOR SINGLE TRANSACTION ONLY. In lieu of obtaining a copy of the purchaser's Annual Resale Certificate for each tax-exempt sale made for the purposes of resale, the selling dealer may obtain a Transaction Resale Authorization Number or a Vendor Resale Authorization Number from the Department.

1. A "transaction resale authorization number" must be obtained by the selling dealer prior to or at the point-of-sale by using the Department's on-line Certificate Verification System at [www.myflorida.com/dor/eservices](http://www.myflorida.com/dor/eservices) or by calling the Department's automated nationwide toll-

free telephone verification system at 1(877)357-3725.

2. When using the Department's on-line Certificate Verification System, the dealer may key up to five purchaser's sales tax certificate of registration numbers into the system. When using the Department's automated nationwide toll-free verification system, the selling dealer is prompted to key in a single purchaser's sales tax certificate of registration number. The system will either issue a 13-digit transaction resale authorization number or alert the selling dealer that the purchaser does not have a valid resale certificate. Selling dealers using the automated telephone verification system who do not have a touch-tone phone will be connected to a live operator during the hours of 8:00 a.m. to 7:00 p.m. (Eastern Time), Monday through Friday. Persons with hearing or speech impairments may call the Department's TDD at 1(800)367-8331 or (850)922-1115.

3. through 5. No change.

(c) No change.

(4) through (8) No change.

Rulemaking Specific Authority 212.07(1)(b), 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 95.091(3), 212.02(14), 212.05(1)(b), (i), 212.07(1), 212.085, 212.13(5)(c), (d), 212.17(6), 212.18(2), (3), 212.21(2), 213.053(10) FS. History—Revised 10-7-68, 1-7-70, 6-16-72, 9-26-77, Amended 7-20-82, 4-12-84, Formerly 12A-1.39, Amended 1-2-89, 9-14-93, 12-13-94, 10-2-01, 6-12-03, 11-6-07,\_\_\_\_\_.

12A-1.060 Registration.

(1) through (2) No change.

(3) REGISTRATION OF TRANSIENT ACCOMMODATIONS.

(a) through (d) No change.

(e)1. To collectively register transient accommodations that are located in a single county, the agent, representative, or management company holding a dealer's certificate of registration may file an Application for Collective Registration for Rental of Living or Sleeping Accommodations (Form DR-1C). A separate Form DR-1C is required for each county.

2. The agent or management company must provide the following information for each property, other than a time-share unit, which is to be collectively registered:

a. Property owner's name;

b. Property owner's federal identification number, social security number, or individual taxpayer identification number (if applicable);

c. Property owner's mailing address;

d. Location address of each property; and

e. An indication of whether the property is located within a city's limits.

3. through 5. No change.

6. Social security numbers are used by the Department as unique identifiers for the administration of Florida's taxes. Social security numbers obtained for tax administration purposes are confidential under Sections 213.053 and 119.071, F.S., and are not subject to disclosure as public records.

(4) through (6) No change.

Rulemaking Specific Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 212.03(1), (2), 212.04(4), 212.0596(1), (2), 212.06(2), 212.12(2), (5), (6), 212.14(4), 212.16(1), (2), 212.18(3) FS. History—Revised 10-7-68, 1-7-70, 6-16-72, Amended 3-21-77, 5-10-77, 10-18-78, Formerly 12A-1.60, Amended 6-10-87, 1-2-89, 11-12-90, 3-17-94, 1-2-95, 3-20-96, 11-

30-97, 4-2-00, 6-19-01, 10-2-01(1), 10-2-01(1), 8-1-02, 4-17-03, 6-12-03, 6-4-08,\_\_\_\_\_.

12A-1.061 Rentals, Leases, and Licenses to Use Transient Accommodations.

(1) through (6) No change.

(7) REGISTRATION.

(a) No change.

(b)1. Transient accommodations, including timeshare units, that are rented, leased, let, or for which a license to use has been granted to others for periods six months or less may be collectively registered by an agent, representative, or management company under the provisions of subsection (3) of Rule 12A-1.060 ~~paragraph 12A-1.060(1)(c)~~, F.A.C. ~~(See Rule 12A-1.060, F.A.C.)~~

2. No change.

3. The following is a suggested format of the written agreement executed after July 1, 1994, between an agent, representative, or management company and the owner of any transient accommodations that are offered for rent, lease, let, or for which a license to use is granted to others for periods of six months or less:

I, \_\_\_\_\_ (Name of Property or Timeshare Period Owner), hereby authorize \_\_\_\_\_ (Name of Agent, Representative, or Management Company) to act as my representative to rent, lease, let, or grant a license to others to use my described property (properties) or timeshare period (timeshare periods) located at \_\_\_\_\_ (use additional paper if necessary) and to charge, collect, and remit sales tax levied under Chapter 212, F.S., to the Department of Revenue. I acknowledge that, by renting, leasing, letting, or offering a license to others to use any transient accommodations, as defined in subsection (2) of Rule 12A-1.061 ~~(2)~~, F.A.C., I am exercising a

taxable privilege under Chapter 212, F.S., and as such acknowledge that I am ultimately liable for any sales tax due the State of Florida on such rentals, leases, lets, or licenses to use. I fully understand that should the State be unable to collect any taxes, penalties, and interest due from the rental, lease, let, or license to use my property, a warrant for such uncollected amount will be issued and will become a lien against my property until satisfied.

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(Signature of Property Owner/Lessor)

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(Signature of Agent, Representative, or Management Company).

4. No change.

5. The agent, representative, or management company must notify the Department of Revenue when it receives affirmative, written notice that it ceases to manage any transient accommodation for which it has collectively registered under the provisions of subsection (3) of Rule 12A-1.060 ~~paragraph 12A-1.060(1)(c)~~, F.A.C. The agent, representative, or management company may contact any taxpayer service center or Central Registration at (850) 488-9750. A written notification that includes the sales tax registration number of the property or timeshare unit; the name, address, and federal identification number, social security number, or individual taxpayer identification number (if applicable) of the property owner; and the name, location address, federal identification number, social security number, or individual taxpayer identification number (if applicable), and sales tax registration number of the agent, representative, or management company may be provided to the Department at the following address:

Florida Department of Revenue

Central Registration

P. O. Box 6480

Tallahassee, Florida 32314-6480.

6. Social security numbers are used by the Department as unique identifiers for the administration of Florida's taxes. Social security numbers obtained for tax administration purposes are confidential under Sections 213.053 and 119.071, F.S., and not subject to disclosure as public records.

(8) through (19) No change.

Rulemaking Specific Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 92.525(1)(b), 212.02(2), (10)(a)-(g), (16), 212.03(1), (2), (3), (4), (5), (7), 212.031, 212.04(4), 212.08(6), (7)(i), (m), 212.11(1), (2), 212.12(7), (9), (12), 212.13(2), 212.18(2), (3), 213.37, 213.756 FS. History—Revised 10-7-68, 1-7-70, Amended 1-17-71, Revised 6-16-72, Amended 7-19-72, 4-19-74, 12-11-74, 5-27-75, 10-18-78, 4-11-80, 7-20-82, 1-29-83, 6-11-85, Formerly 12A-1.61, Amended 10-16-89, 3-17-94, 1-2-95, 3-20-96, 11-30-97, 7-1-99, 3-4-01(4), 3-4-01(2), (5), (14), 10-2-01, 8-1-02,\_\_\_\_\_.

12A-1.0911 Self-Accrual Authorization; Direct Remittance on Behalf of Independent Distributors.

(1) No change.

(2)(a) through (g) No change.

(h) Holders of Sales and Use Tax Direct Pay Permits must notify the Department within 30 days of any change of circumstances that may affect the dealer's qualification to hold the permit. ~~The permit will be revoked if the Department determines that the holder of a direct pay~~

permit no longer meets the requirements set forth in this rule.

(i) No change.

(3) No change.

Rulemaking Specific Authority 212.17(6), 212.18(2), (3), 212.183, 213.06(1) FS. Law

Implemented 212.05(1)(e)3., 4., 212.0598, 212.06(11), 212.08(4)(a)2., (8), (9), 212.12(13),

212.18(3), 212.183 FS. History–New 4-7-92, Amended 5-19-93, 9-14-93, 11-16-93, 9-30-99, 10-

2-01, 6-12-03, \_\_\_\_\_.

12A-1.097 Public Use Forms.

(1) The following public use forms and instructions are employed by the Department in its dealings with the public related to the administration of Chapter 212, F.S. These forms are hereby incorporated by reference in this rule.

(a) through (b) No change.

Form Number	Title	Effective Date
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(2) through (6)(i) No change.

(j) DR-15ZC	Application for Florida Enterprise Zone Jobs Credit for Sales Tax <del>Effective June 7, 2006</del> (R. <u>06/08</u> <del>06/06</del> )	___ 04/07
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(k) DR-15ZCN	Instructions for Completing the Sales and Use Tax Return, Form DR-15, when taking the Enterprise Zone Jobs Tax Credit under the New Law (R. <u>06/08</u> <del>06/06</del> )	___ 04/07
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(l) through (m) No change.

(7) through (12) No change.

~~(13) DR-36~~ County Officers' Interest Report (R. ~~12/89~~) 08/92

~~(14) DR-38~~ Tax Collector's Report—6% Sales Tax and/or  
Surtax (R. ~~06/02~~) 04/03

(15) through (23) Renumbered (13) through (21) No change.

~~(22)~~(24) DR-300400 Boat, Motor Vehicle, or Aircraft Dealer  
Application for Special Estimation of Taxes  
(R. 02/08 ~~06/99~~) \_\_\_ 09/04

~~(23)~~(25) DR-600013 Request for Verification that Customers are  
Authorized to Purchase for Resale (R. 06/08  
~~06/07~~) \_\_\_ 01/08

Rulemaking Specific Authority 201.11, 202.17(3)(a), 202.22(6), 202.26(3), 212.0515(7),  
212.07(1)(b), 212.08(5)(b)4., (7), 212.11(5)(b), 212.12(1)(b)2., 212.17(6), 212.18(2), (3),  
213.06(1), 376.70(6)(b), 376.75(9)(b), 403.718(3)(b), 403.7185(3)(b), 443.171(2), (7) FS. Law  
Implemented 92.525(1)(b), (3), 95.091, 125.0104, 125.0108, 201.01, 201.08(1)(a), 201.133,  
201.17(1)-(5), 202.11(2), (3), (6), (16), (24), 202.17, 202.22(3)-(6), 202.28(1), 203.01, 212.02,  
212.03, 212.0305, 212.031, 212.04, 212.05, 212.0501, 212.0515, 212.054, 212.055, 212.06,  
212.0606, 212.07(1), (8), (9), 212.08, 212.084(3), 212.085, 212.09, 212.096, 212.11(1), (4), (5),  
212.12(1), (2), (9), (13), 212.13, 212.14(4), (5), 212.17, 212.18(2), (3), 213.235, 213.29, 213.37,  
219.07, 288.1258, 376.70, 376.75, 403.717, 403.718, 403.7185, 443.036, 443.121(1), (3),  
443.131, 443.1315, 443.1316, 443.171(2), (7) FS. History-New 4-12-84, Formerly 12A-1.97,  
Amended 8-10-92, 11-30-97, 7-1-99, 4-2-00, 6-28-00, 6-19-01, 10-2-01, 10-21-01, 8-1-02, 4-17-

03, 5-4-03, 6-12-03, 10-1-03, 9-28-04, 6-28-05, 5-1-06, 4-5-07, 1-1-08, 4-1-08, 6-4-08, 1-27-09,

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STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12B-8, FLORIDA ADMINISTRATIVE CODE  
INSURANCE PREMIUM TAX  
AMENDING RULE 12B-8.001

SUMMARY OF PROPOSED RULE

The proposed amendments to Rule 12B-8.001, F.A.C. (Premium Tax; Rate and Computation): (1) include technical corrections, including updating statute references, expiration dates, and references, and removing obsolete language regarding the annuity exemption in effect prior to July 1, 1990; (2) include corporation not for profit self-insurance funds under Section 624.4625, F.S., and Public Housing Authorities Self-Insurance Funds under Section 624.46226, F.S., as entities whose premiums, contributions, and assessments are subject to a 1.6 percent tax; (3) clarify that dividends used to purchase paid-up additions are not an additional gross receipt; (4) incorporate information on the Florida Life and Health Insurance Guaranty Association Assessment, including payments due as a result of Florida Life and Health Insurance Guaranty Association refunds of prior assessments that were used in the computation of credits by an insurer, and the acceleration of Florida Life and Health Insurance Guaranty Association credits when an insurer surrenders its certificate of authority and ceases doing business in Florida; (5) reference Section 624.50921, F.S., for the insurance premium tax credits for assessments paid under Chapter 440, F.S., and the corporate income tax paid under Chapter 220, F.S.; and (6) provide general information on the salary tax credit exceptions.

## FACTS AND CIRCUMSTANCES JUSTIFYING PROPOSED RULE

The proposed amendments to Rule 12B-8.001, F.A.C. (Premium Tax; Rate and Computation), are necessary to: (1) update provisions to include self-insurance funds that are subject to the insurance premium tax; (2) provide for salary tax credit exceptions; (3) incorporate information on the Florida Life and Health Insurance Guaranty Association Assessment; (4) incorporate references to section 624.5092, F.S., and (5) provide technical corrections to update references and to remove obsolete provisions.

## FEDERAL COMPARISON STATEMENT

The provisions contained in this rule do not conflict with comparable federal laws, policies, or standards.

## SUMMARY OF RULE DEVELOPMENT WORKSHOP

### HELD ON DECEMBER 9, 2008

The proposed amendments to Rule 12B-8.001, Florida Administrative Code (Insurance Premium Taxes, Fees and Surcharges) were noticed for a rule development workshop in the Florida Administrative Weekly on November 21, 2008 (Vol. 34, No. 47, pp. 6078-6079). A rule development workshop was held on December 9, 2008, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida, to allow members of the public to ask questions and make comments regarding these proposed rule amendments.

### **PARTIES ATTENDING**

For the Department of  
Revenue

PATRICK LOEBIG, Workshop Moderator  
JANET YOUNG, Tax Law Specialist  
ROBERT DUCASSE, Tax Law Specialist

From the Public

RALPH SCHWARZ, Colodny, Faas, Talenfeld, P.A.

RHEB HARBISON, Carlton Fields, P.A.

Prior to the rule development workshop, Mr. Curtis C. Leonard, American Council of Life Insurers, provided written comments on the proposed amendments to Rule 12B-8.001, F.A.C., relating to the Florida Life and Health Insurance Guaranty credit. Members of the public attending the workshop did not express interest in this rule.

Part of the purpose of the proposed amendments to Rule 12B-8.001, F.A.C., is to incorporate information on the Florida Life and Health Insurance Guaranty Association Assessment and to provide technical corrections to update references and to remove obsolete provisions.

Mr. Leonard's letter provided two comments. The first comment suggests that whatever portion of an available Florida Life and Health Insurance Guaranty Association credit was not completely used in a particular year should be allowed to carry forward and be used in a subsequent year. Mr. Leonard states that since there is no language in the statutes prohibiting the carry forward of unused credits, such practice should be permitted. The second comment seeks rule clarification on whether Florida Life and Health Insurance Guaranty Association credits of one insurer transfer to a second insurer when the second insurer acquires the first insurer and the first insurer ceases to exist.

Tax credits, like deductions and other exemptions and exclusions from taxation, are strictly construed against the taxpayer. When the Florida Legislature has intended for unused credits to carry forward, it has provided specific language for that to occur. Examples of carry forward language exist in sections 624.5105(1)(e) and 624.5107(2)(e), F.S. Section 631.72, F.S., which governs the Florida Life and Health Insurance Guaranty Association credit, contains no such language. Without statutory language specifically providing for a carry forward of the

Florida Life and Health Insurance Guaranty Association credit, no authority exists. In addition, the rules of statutory construction presume that the statutory language providing for the carry forward of the community contribution credit in section 624.5105, F.S., and the child care tax credit in section 624.5107, F.S., was necessary in order for the unused tax credits to be carried forward.

Section 631.72, F.S., contains no carry forward provision for Florida Life and Health Insurance Guaranty Association credits that are not fully used by an insurer in a particular year as a result of insufficient tax liability. There is no authority to provide for a carry forward of the unused credits in the proposed rule amendments.

In regards to the second comment, section 631.72(2), F.S., specifically provides an acceleration of unused Florida Life and Health Insurance Guaranty Association credits against an insurer's final corporate income tax return or insurance premium tax return when the insurer ceases doing business in Florida and surrenders its certificate of authority to transact insurance in Florida. Section 631.72, F.S., does not contain any exception to the acceleration process and does not contain any carry forward or transfer provision for Florida Life and Health Insurance Guaranty Association credits that are not fully used during the acceleration process. In addition, the rules of statutory construction presume that the statutory language providing for the transfer of certified capital company credits in section 288.99, F.S. (2001), was necessary in order for the tax credits to transfer during a merger or acquisition. There is no statutory authority to provide for a carry forward or transfer of unused credit to a surviving entity in a merger or acquisition.

*Changes to sub-sub-subparagraph (3)(c)2.c.(I) of the proposed rule: Proposed sub-sub-subparagraph (3)(c)2.c.(I) was changed to specifically provide that Florida Life and Health*

*Insurance Guaranty Association credits do not transfer from an insurer that is merged or acquired out of existence to a surviving insurer.*

**SUMMARY OF CHANGES TO THE PROPOSED AMENDMENTS TO RULE 12B-8.001, F.A.C.:**

Based on the comments received and made a part of the rule development workshop, the following change was made to the proposed changes to Rule 12B-8.001, F.A.C.:

Sub-sub-subparagraph (3)(c)2.c.(I):

- Provide that Florida Life and Health Insurance Guaranty Association credits do not transfer from an insurer that is merged or acquired out of existence to a surviving insurer

SUMMARY OF RULE HEARING

HELD ON APRIL 28, 2009

The Governor and Cabinet, sitting as head of the Department of Revenue, met on March 10, 2009, and approved the publication of the Notice of Proposed Rule for changes to Rule 12B-8.001, F.A.C. (Insurance Premium Taxes, Fees and Surcharges). A notice for the public hearing was published in the Florida Administrative Weekly on March 27, 2009 (Vol. 35, No. 12, p. 1530).

SUMMARY OF RULE HEARING

HELD ON JUNE 29, 2009

The proposed amendments to Rule 12B-8.001, F.A.C. (Insurance Premium Taxes, Fees and Surcharges), were noticed in the Florida Administrative Weekly on May 22, 2009 (Vol. 35, No. 20, pp. 2350-2354). A rule hearing was held on June 29, 2009, in Room 118, Carlton

Building, 501 S. Calhoun Street, Tallahassee, Florida, to allow members of the public to ask questions and make comments concerning these proposed rule amendments. There was one attendee present to observe the proceedings without comment.

**PARTIES ATTENDING**

For the Department of  
Revenue

LARRY GREEN, Hearing Officer  
JANET YOUNG, Tax Law Specialist  
ROBERT DUCASSE, Revenue Program Administrator

From the Public

TREVOR B. MASK, Colodny, Fass, Talenfeld, Karlinsky, Abate

In response to written comments received from the Joint Administrative Procedures Committee, dated June 18, 2009, the provisions of sub-subparagraph a. of subparagraph 2. of paragraph (c) of subsection (3) of Rule 12B-8.001, F.A.C., have been clarified to provide that insurers who have paid an assessment to the Florida Life and Health Insurance Guaranty Association can claim a credit as provided in Section 631.72, F.S. When adopted, that sub-subparagraph will read:

2.a. Effective with the tax return filed for the 1997 taxable year, insurers who have paid an assessment to the Florida Life and Health Insurance Guaranty Association (Association FLHGA) may claim a credit for part of such assessment as provided for in Section 631.72, F.S. the Florida Statutes. Any credits not taken or utilized when available cannot be carried forward.

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12B-8, FLORIDA ADMINISTRATIVE CODE  
INSURANCE PREMIUM TAXES, FEES AND SURCHARGES  
AMENDING RULE 12B-8.001

12B-8.001 Premium Tax; Rate and Computation.

(1) A tax is imposed on insurance premiums or assessments, including membership fees, finance charges, and policy fees and gross deposits received from subscribers to reciprocal or interinsurance agreements, and on annuity premiums or considerations, received during the preceding calendar year. Such tax is imposed no matter whether the insurer possesses a valid Florida certificate of authority ~~(COA)~~, if the issuing or collecting insurer would have been required to obtain a certificate of authority ~~COA~~ prior to issuing these policies and contracts or collecting premiums on them. The administration, auditing, collection, and enforcement of the insurance premium taxes and assessments are vested in the Department of Revenue, with the exception of taxes under Chapters 175 and 185, F.S., where the Department's only functions are ~~function is~~ collection and maintenance of a database. "Policies and premiums" respectively mean and include those policies or other contracts or agreements effecting and evidencing insurance, and premiums and other considerations for such policies as described and contemplated by the provisions of Sections 624.509 and 624.510, F.S.; or any other sections subject to the provisions of Section 624.509, F.S. Per-policy fees charged under Section 626.7451(11), F.S., by licensed managing general agents fall under the definition of "premiums" as defined in Section 627.403, F.S., and are subject to premium tax as set forth in Section 624.509, F.S.

(a) A tax at the rate of 1.75 percent of the gross amount of receipts for insurance premiums and assessments shall be applied to the following types of policies:

1. through 6. No Change.

7. Insurance issued by a captive or industrial captive insurer under Part V IV, Chapter 628, F.S.

8. through 9. No Change.

(b) Annuity policies or contracts. A tax at the rate of 1 percent shall be applied on the gross receipts on annuity policies or contracts paid by holders thereof in Florida.

1. The premium tax authorized by this section shall not be imposed upon receipts of annuity premiums or considerations paid by holders in this state if the tax savings derived are credited to the holders of this state until July 1, 1990. After July 1, 1990, the premium tax authorized by this section shall not be imposed upon receipts of annuity premiums or considerations paid by holders in this state if the tax savings are credited to annuity holders.

2. through 3. No Change.

(c) No Change.

(d) A tax at the rate of 1.6 percent of the gross premiums, contributions, or assessments received by the following shall be applied:

1. through 2. No Change.

3. Corporation Not for Profit Self-Insurance Funds under Section 624.4625, F.S.

4. Public Housing Authorities Self-Insurance Funds under Section 624.46226, F.S.

(e) Dividends payable under insurance policies that, at the option of the holders of such policies, are applied to purchase paid-up additions, are not additional gross receipts of the insurer for purposes of the insurance premium tax contained in Section 624.509, F.S.

(2) Installments of tax. An estimated tax shall be filed on April 15, June 15, and October 15 of each year, which shows the estimated amount of tax due for the preceding quarter, except the June 15 installment shall be for the period ending June 30; payment of that estimated amount shall be made at the time the report is filed. No credit for any of the allowable credits may be made against the insurer's premium tax until the annual premium tax return is filed. Taxpayers may not credit any estimated tax payments against their estimated premium tax. Any estimated payment credits not taken when available cannot be carried forward or carried back. On or before March 1 in each year, an annual return shall be filed showing, by quarters, the gross amount of receipts taxable for the preceding year and the installment payments made during the year. A final payment of tax due for that year shall be made at the time the taxpayer files its his annual return. A 10 percent penalty shall be imposed on any underpayment or late payment due and payable with the annual return. Installments of tax are applicable to taxes imposed by Sections 175.101, 185.08, 252.372, 624.4621, 624.475, 624.509, 624.510, 624.515, 627.357, 628.6015, 629.5011, and 636.066, F.S.

(a) The installment of the estimated premium tax due shall not be less than 90 percent of the amount finally shown to be due in any quarter, as evidenced by the annual report, without deductions for any credits. Effective January 1, 1993, the 90 percent shall be based on the actual tax paid for that year, as evidenced by the annual return, after allowable credits. The 90 percent will be determined by computing the gross tax due for each quarter, direct premiums written times the tax rate, less 25 percent of the allowable credits as evidenced by line 2 of the first page of the annual return filed for that year times 90 percent. However, the taxpayer has the option of paying, in each installment, 27 percent of the amount of annual tax reported, after allowable credits, on his return for the previous year without penalty or interest applying. If a return was

not filed for the previous year, the installments must meet the 90 percent requirement. If the tax is not paid in this manner, a 10 percent penalty shall be imposed on each underpayment or late payment of tax due and payable for that quarter. If the installment is based on 27 percent of the amount of the annual tax reported on the return for the preceding year and the installment payment is remitted to the Department after the due date, the installment shall be based on the 90 percent requirement instead of the 27 percent method. Any underpayment or delinquent payment shall be subject to a penalty of 10 percent, and interest at the rate of 12 percent per year from the due date until paid. ~~The Department of Revenue, by written request as outlined in Rule Chapter 12-13, F.A.C., may eliminate or compromise penalties or interest.~~

(b) through (c) No Change.

(3) Credits Against the Tax.

(a)1. through 2. No Change.

3. If a taxpayer is required to amend its corporate income tax liability under Chapter 220, F.S., the taxpayer shall amend its corresponding insurance premium tax return for the tax year in which it claimed, or was entitled to claim the credit provided in Section 624.509(4), F.S., for the corporate income tax paid for that tax year. The taxpayer shall file an amended insurance premium tax return and pay additional tax due, if any, or claim a refund, if any, as provided in Section 624.50921, F.S.

(b) Salaries. Fifteen percent of the amount paid after June 30, 1988, in salaries by the insurer to employees located or based in Florida may be credited against the net tax imposed by Section 624.509, F.S.

1. No Change.

2. Employees are those covered under Chapter 443, F.S., Unemployment Compensation, by the insurer taking the credit, a service representative ~~as defined in Section 626.081, F.S.~~, a supervising or managing general agent ~~as defined in Section 626.091, F.S.~~, and an adjuster or claims investigator, as defined in Section 626.015 ~~626.101~~, F.S.

3. through 6. No Change.

7. Salary Tax Credit Exceptions.

a. Subparagraph 624.509(5)(b)4., F.S., allows an affiliated group of corporations that created a service company within its affiliated group on July 30, 2002, to allocate the salary of each service company employee covered by contracts with affiliated group members to the companies for which the employees perform services. If the service company was not created within the affiliated group on the specific date, July 30, 2002, this alternative tax credit calculation cannot be used.

b. Subparagraph 624.509(5)(a)2., F.S., allowed insurers and their affiliated groups to make an irrevocable election on or before August 1, 2005, to make an alternative salary tax credit calculation based in part upon the 2002 amount of salary tax credit correctly computed under the law. If the insurer and its affiliated group did not make a timely election (on or before August 1, 2005) to use this alternative method, this alternative salary tax credit cannot be used.

c. Unless funding is specifically provided by the Legislature for a specific tax year, the alternative salary tax credit calculation in subparagraph 624.509(5)(b)5., F.S., is not valid.

d. Effective July 1, 2006, paragraph 624.509(6)(b), F.S., provides that, to the extent that the salary tax credit is limited by the 65 percent limitation, the excess of the salary tax credit that was available and exceeded the 65 percent limitation may be transferred to any insurer that is a member of that insurer's affiliated group if such excess salary tax credit is related to salaries and

wages of employees whose place of employment is located within an enterprise zone created pursuant to Chapter 290, F.S. The amount of such excess salary tax credit transferred to all affiliates can not exceed 25 percent of such excess salary tax credit. An affiliated group of corporations that participates in a concurrent common paymaster arrangement as defined in Section 443.1216, F.S., is not eligible to use this provision. Any such transferred credits are subject to the same provisions and limitations set forth in Part IV, Chapter 624, F.S.

(c) Assessments Credited Against the Tax.

1.a. Payments made by an insurance carrier, group self-insurer, or commercial self-insurance fund, for assessments made pursuant to Section 440.51, F.S., shall be allowed as a deduction against the amount of any other tax levied by the state upon the premiums, assessments, or deposits for workers' compensation insurance on contracts or policies of said insurance carrier, self-insurer, or commercial self-insurance fund.

b. If an insurance carrier, group self-insurer, or commercial self-insurance fund receives a refund of a previously paid assessment under Chapter 440, F.S., for which it claimed a credit on a previously filed insurance premium tax return, the insurance carrier, group self-insurer, or commercial self-insurance fund shall file an amended insurance premium tax return and pay the additional tax, if any, for the year in which the credit was originally claimed pursuant to Section 624.50921, F.S.

2.a. Effective with the tax return filed for the 1997 taxable year, insurers who have paid an assessment to the Florida Life and Health Insurance Guaranty Association (Association FLHIGA) may claim a credit for part of such assessment as provided ~~for~~ in Section 631.72, F.S. ~~the Florida Statutes~~. Any credits not taken or utilized when available cannot be carried forward.

b.(I) When the Association refunds money to an insurer from a previous assessment that was paid by the insurer, and the insurer had claimed credit or partial credit against its insurance premium tax or corporate income tax for that previous payment to the Association, the insurer is required to pay part of that refund to the Department of Revenue pursuant to Section 631.72, F.S.

(II) Example. ABC Insurance Company paid a \$300,000 Class B assessment to the Association in 1998. On its 1999 – 2004 insurance premium tax returns, ABC claimed credits of \$15,000 ( $\$300,000 \times .05$ ) each year for its 1998 payment to the Association. The total credit taken by ABC, based on the 1998 Association assessment, was \$90,000 ( $\$15,000$  per year for 6 years). In 2005, the Association issued ABC a refund of \$30,000 from the 1998 assessment. In accordance with subsection 631.72(3), F.S., a \$9,000 payment is due to the Department of Revenue in 2005 from that refund ( $\$30,000 \times .05 \times 6$  years). The \$9,000 that is due to the Department of Revenue in 2005 is a repayment of the credits that the insurer had already claimed in tax years 1999 through 2004 against its insurance premium tax or corporate income tax for the \$30,000 that was refunded by the Association. For tax years 2005 and thereafter, ABC should only use a payment of \$270,000 to the Association for its 1998 assessment when computing its credit for payments to the Association.

c.(I) When an insurer surrenders its certificate of authority and ceases doing business in Florida, all uncredited Association assessments for the current tax year and future tax years may be credited against the insurer's final insurance premium tax return or final corporate income tax return pursuant to Section 631.72, F.S. Florida Life and Health Insurance Guaranty Association credits do not transfer from an insurer that is merged or acquired out of existence to a surviving insurer.

(II) Example. XYZ Insurance Company paid a \$100,000 Class B assessment to the Association in 2004, which results in a credit of \$5,000 per year for 2005 through 2024. On its 2005 insurance premium tax return, XYZ Insurance Company only claimed a \$3,000 credit for its payment to the Association in 2004 because it had very little direct written premium during calendar year 2005. In 2006, XYZ Insurance Company surrendered its certificate of authority to the Florida Office of Insurance Regulation. On its 2006 final insurance premium tax return or its final corporate income tax return, XYZ Insurance Company may claim a credit of \$5,000 for the 2004 payment to the Association and an accelerated credit of \$90,000 (total credit of \$95,000 for the 2004 payment to the Association).

(d) Community Contribution Tax Credit.

1. through 4. No Change.

5. Expiration. With the exception of the carryovers allowed in Section 624.5105(1)(3)(e), F.S., the provisions of Section 624.5105, F.S., paragraph (3)(d) will expire and be void on June 30, 2015 2005.

(e) No Change.

(4) through (9) No Change.

Rulemaking Specific Authority 213.06(1), 220.183(4)(d)(6), 288.99(11), 624.5105(4)(b)(6) FS. Law Implemented 175.101, 175.1015, 175.121, 175.141, 185.08(3), 185.085, 185.10, 185.12, 213.05, 213.235, 220.183(3), 288.99(11), 624.4621, 624.46226, 624.4625, 624.475, 624.509, 624.5092, 624.50921, 624.510, 624.5105, 624.511, 624.518, 624.519, 624.520(2), 626.7451(11), 627.3512, 627.357(9), 628.6015, 629.5011, 634.131, 634.313(2), 634.415(2) FS. History-New 2-3-80, Formerly 12B-8.01, Amended 3-25-90, 4-10-91, 2-18-93, 6-16-94, 10-19-94, 1-2-96, 12-9-97, 6-2-98, 4-2-00, 10-15-01, 8-1-02, 6-20-06,\_\_\_\_\_.

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12C-1, FLORIDA ADMINISTRATIVE CODE  
CORPORATE INCOME TAX AND EMERGENCY EXCISE TAX  
AMENDING RULE 12C-1.0222  
REPEALING RULE 12C-1.032

SUMMARY OF PROPOSED RULES

The proposed substantial rewording of Rule 12C-1.0222, F.A.C.: (1) changes the title to “Returns; Extensions of Time; Payments of Tentative Tax,” to reflect the revised provisions of the rule; (2) provides when a return submitted to the Department by electronic means or by a paper return is timely filed; (3) provides that an extension of time will be valid until 15 days after the expiration of the federal extension or until six months after the due date, whichever occurs earlier; (4) provides that a taxpayer who has not obtained a federal extension of time to file a return may obtain an extension of time to file a Florida return by establishing good cause as to why the return cannot be filed by the original due date; (5) requires that taxpayers who request an extension of time to file a return must submit Form F-7004 (Florida Tentative Income/Franchise and Emergency Excise Tax Return and Application for Extension of Time to File Return) with the amount of tentative tax due to the Department; (6) provides the extended return due dates for the Florida corporate income tax return and for the Florida partnership return; and (7) provides when the request for an extension of time to file will be invalidated for failure to pay the tentative tax due.

The proposed repeal of Rule 12C-1.032, F.A.C. (Payment of Tentative Tax), removes

provisions regarding when a tentative tax return will be considered timely filed with the Department that are incorporated into the proposed substantial rewording of Rule 12C-1.0222, F.A.C.

#### FACTS AND CIRCUMSTANCES JUSTIFYING PROPOSED RULES

The Internal Revenue Service recently reduced the extension period for filing a Florida partnership return from six months to five months. (Bulletin IR-2008-084, June 30, 2008) The proposed substantial rewording of Rule 12C-1.0222, F.A.C. (Returns; Extensions of Time; Payments of Tentative Tax), is necessary to change the extension period for filing a Florida partnership return to five months. Changes are also necessary to include the requirements for filing corporate income tax returns with the Department electronically and to simplify all provisions on how to obtain an extension of time to file a Florida corporate income tax return or a Florida partnership return. The purpose of the proposed repeal of Rule 12C-1.032, F.A.C. (Payment of Tentative Tax), is to remove provisions regarding the requirement to pay tentative tax that will be included in the proposed substantial rewording of Rule 12C-1.0222, F.A.C.

#### FEDERAL COMPARISON STATEMENT

The provisions contained in these rules do not conflict with comparable federal laws, policies, or standards.

## SUMMARY OF RULE DEVELOPMENT WORKSHOP

SCHEDULED ON JANUARY 15, 2009

A Notice of Proposed Rule Development Workshop was published in the Florida Administrative Weekly on December 24, 2008 (Vol. 34, No. 52, p. 6754), regarding the proposed substantial rewording of Rule 12C-1.0222, F.A.C. (Returns; Extensions of Time; Payments of Tentative Tax), and the proposed repeal of Rule 12C-1.032, F.A.C. (Payment of Tentative Tax). This notice advised the public that, if requested, a rule development workshop would be conducted on January 15, 2009. No request was received by the Department. No person appeared to ask questions or make comment regarding these proposed amendments.

## SUMMARY OF RULE HEARING

HELD ON MARCH 10, 2009

The Governor and Cabinet, sitting as head of the Department of Revenue, met on March 10, 2009, and approved the publication of the Notice of Proposed Rule for changes to Rule 12C-1.0222, F.A.C. (Returns; Extensions of Time; Payments of Tentative Tax), and the proposed repeal of Rule 12C-1.032, F.A.C. (Payment of Tentative Tax). A notice for the public hearing was published in the Florida Administrative Weekly on January 30, 2009 (Vol. 35, No. 4, p. 442).

## SUMMARY OF RULE HEARING

HELD ON JUNE 29, 2009

The proposed amendments to Rule 12C-1.0222, F.A.C. (Returns; Extensions of Time; Payments of Tentative Tax), and the proposed repeal of Rule 12C-1.032, F.A.C. (Payment of

Tentative Tax), were noticed in the Florida Administrative Weekly on May 22, 2009 (Vol. 35, No. 20, pp. 2354-2356). A rule hearing was held on June 29, 2009, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida, to allow members of the public to ask questions and make comments concerning these proposed rule amendments. There was one attendee present to observe the proceedings without comment.

**PARTIES ATTENDING**

For the Department of  
Revenue

LARRY GREEN, Hearing Officer  
JANET YOUNG, Tax Law Specialist  
ROBERT DUCASSE, Revenue Program Administrator

From the Public

TREVOR B. MASK, Colodny, Fass, Talenfeld, Karlinsky, Abate

In response to written comments received from the Joint Administrative Procedures Committee, dated June 18, 2009, the provisions of Rule 12C-1.0222(2)(a), F.A.C., have been changed to remove reference to federal case law and Internal Revenue Service Announcements for purposes of determining “good cause” for granting extensions of time for filing Florida corporate income tax returns. In addition, the provisions of subparagraph (2)(b)1. and subparagraph (3)(b)2. have been revised to provide that Forms F-7004 and F-1065 are incorporated by reference in Rule 12C-1.051, F.A.C.

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12C-1, FLORIDA ADMINISTRATIVE CODE  
CORPORATE INCOME TAX AND EMERGENCY EXCISE TAX  
AMENDING RULE 12C-1.0222  
REPEALING RULE 12C-1.032

(Substantial Rewording of Rule 12C-1.0222 follows. See Florida Administrative Code for present text.)

12C-1.0222 Returns; ~~Filing Requirements~~; Extensions of Time; Payments of Tentative Tax.

(1) Returns.

(a) A return submitted to the Department by electronic means, as provided in Rule Chapter 12-24, F.A.C., is considered to be timely filed if the submission of the electronic return is initiated, and a confirmation from the Department is received, before 5:00 p.m., Eastern Time, on or before the due date (including any extensions) prescribed by law. Taxpayers who meet the requirements of subsection (3) of Rule 12-24.003, F.A.C., must submit returns by electronic means. A hard-copy (paper) return is considered to be timely filed if postmarked on or before the due date (including any extensions) prescribed by law. If the due date falls on a Saturday, Sunday, or legal holiday, a return will be considered timely if a confirmation for an electronic return is received by the Department on or before 5:00 p.m., Eastern Time, or a hard-copy (paper) return is postmaked, on the next succeeding day that is not a Saturday, Sunday, or legal holiday. For this purpose, a legal holiday will mean a holiday that is observed by federal or state

agencies as this term is defined in Chapter 683, F.S., and Section 7503 of the Internal Revenue Code of 1986, as amended.

(b)1. Example: Corporation A's Florida corporate return was due Thursday, November 1. The envelope in which the return was mailed was postmarked November 1; therefore, the return is considered to have been filed on time.

2. Example: Corporation B's Florida corporate return was due Saturday, September 1. Monday, September 3, was Labor Day. The envelope in which the return was mailed was postmarked Tuesday, September 4. The return is considered timely filed because it was postmarked the next succeeding day which was not a Saturday, Sunday, or legal holiday.

(2) Requests for Extensions of Time to File Return.

(a) An extension of the due date of any required return will be effective until 15 days after the expiration of the federal extension or until six (6) months after the due date of the return, whichever occurs earlier. The aggregate amount of time of extensions for a return cannot exceed 6 months. If an automatic extension is not permitted because a federal extension has not been requested or is not allowed, the application for extension of time to file a return must contain sufficient facts to establish good cause why the return cannot be filed on or before the original due date. An extension of time for filing a return does not operate as an extension of time for payment of the tax or any part thereof.

(b) A corporation or a partnership that has been granted an automatic extension of time for filing its federal corporate income tax return or its federal partnership return by the Internal Revenue Service, or that establishes good cause, will be granted an extension of time to file its Florida return when the following requirements are met:

1. Form F-7004, Florida Tentative Income/Franchise and Emergency Excise Tax Return

and Application for Extension of Time to File Return (incorporated by reference in Rule 12C-1.051, F.A.C.), signed by a person duly authorized by the taxpayer to sign a request for extension, is filed with the Department on or before the due date prescribed for filing the return. See Rule 12C-1.0221, F.A.C., for persons authorized to request an extension of time to file. For affiliated groups, the parent company qualified to file a Florida consolidated income tax return must file Form F-7004. An extension granted to the parent company of an affiliated group applies to the parent company's consolidated return. If any corporate partner requires an extension of time to file its separate Florida corporate income tax return, a separate Form F-7004 must be filed by the corporate partner with the Department.

2. The amount estimated to be the balance of its proper tax due for the taxable year after giving effect to payments and credits on its declaration of estimated income tax is paid to the Department.

(3) Extended Return Due Dates.

(a) Upon the timely filing of Form F-7004, properly prepared and including payment of any tax determined to be due, an extension will be allowed.

(b) An extension of the due date of any required return is effective until 15 days after the expiration of the federal extension, or until six (6) months after the due date prescribed by law, whichever occurs first. The aggregate amount of time of extensions for a return cannot exceed six (6) months. No further extensions are allowed.

1. The automatic federal extension period for a federal corporate income tax return is six (6) months. For a corporation whose fiscal year ends December 31, a required Florida corporate income tax return is due April 1 of the following year. When a taxpayer is granted an extension of time to file its federal corporate income tax return, the extended due date for the federal return

is September 15. When the requirements of this rule are met and the corporation is granted an extension of time to file its Florida corporate income tax return, the extended due date for the Florida return is October 1.

2. The automatic federal extension of time to file a federal partnership return is five (5) months. When a taxpayer is granted an extension of time to file its Florida Partnership Information Return (Form F-1065, incorporated by reference in Rule 12C-1.051, F.A.C.), the due date is 15 days after the federal return due date. For example, a partnership whose fiscal year ends on December 31, will be granted an extension of time from May 1 to October 1 to file its Florida partnership return when all the requirements for an extension of the due date of a return provided in this rule are met.

(c)1. Failure to make payment with an application when one is required will void the request for extension of time to file. The taxpayer will be subject to the penalty provided in Section 220.801, F.S., for failure to file a timely return. Interest will be assessed on any tax due from the due date of the return to the date of payment.

2. An extension of time will be invalidated when the:

a. Tentative tax due is not paid with the application for extension (Form F-7004); or,

b. The tax is underpaid by the greater of \$2,000 or thirty percent (30%) of the tax due on the return when filed.

Rulemaking Specific Authority 213.06(1), 220.51 FS. Law Implemented 220.222, 220.32, 220.801 FS. History-New 10-20-73, Amended 10-8-74, 4-21-75, 3-5-80, 12-18-83, Formerly 12C-1.222, Amended 12-21-88, 12-19-89, 4-8-92, 3-18-96, 3-13-00, 3-15-04,\_\_\_\_\_.

12C-1.032 Payments of Tentative Tax. ~~Tentative returns shall be filed in connection with~~

~~any extension of time for filing a return. Tentative returns shall be deemed timely filed only if received by the Department of Revenue on or before the due date prescribed by law; provided, however, that a return mailed to the Department and actually received after its due date shall be deemed timely filed if it bears a United States post office postmark dated on or before said due date.~~

Rulemaking Specific Authority 213.06(1), 220.51 FS. Law Implemented 220.32 FS. History—  
New 10-20-72, Formerly 12C-1.32, Amended 12-21-88, Repealed\_\_\_\_\_.