



FLORIDA
DEPARTMENT of
CORRECTIONS

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August 20, 2021

Kenneth Plante, Coordinator
Joint Administrative Procedures Committee
680 Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400

RECEIVED
JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE
1:29 pm, Aug 20 2021

Re: Response to Additional Comments - Rule 33-210.101, F.A.C.

Dear Mr. Plante:

The Department of Corrections (hereinafter the “Department”) responds to the comments in your letter dated July 28, 2021, as follows:

1. Purpose and Effect:

Prior to the amendment of any rule other than an emergency rule, an agency shall give notice of its intended action, setting forth a “**short, plain explanation** of the purpose and effect of the proposed action.” § 120.54 (3)(a)1., Fla. Stat. (emph. supplied). Your letter asks whether the Department is aware of the cost of the new system since it is being developed with a third-party vendor. Your letter also suggests that the Department amend its Purpose and Effect statement or its Summary to identify how the proposed rule amendments increase the safety and security of inmates and staff.

a. Mail management is part of the Department’s contract with the contractor, JPAY, Inc. It is included in Contract #C2885, Amendment #2 and provides as follows:

The Contractor will work with the Department to finalize, document, and implement a mail management solution[...] The Contractor shall receive all physical mail sent to Department inmates at a Contractor-operated site (excluding Legal/Privileged Mail), digitize it, and transmit it to the inmate's JPay email account[.]

See Section II.F.4.f. of the Department’s #C2885 Contract with JPAY as revised by Amendment #2 in November of 2019. Per Contract #C2885, the cost of implementing a mail management solution is being borne by the vendor, not the Department. The above language is part of the contractual agreement with the vendor and no costs are added to the Department for implementation or management of the proposed system.

b. The Department will revise its Purpose and Effect section to identify how the proposed amendments to Rule 33-210.101 help meet the purpose and effect of increasing the safety and security of inmates and staff in a Notice of Change.

2. Summary: The Department will revise its Summary section to identify how the proposed amendments to Rule 33-210.101 help meet the purpose and effect of increasing the safety and security of inmates and staff in a Notice of Change.

3. Statement of Estimated Regulatory Costs and Legislative Ratification:

a. When evaluating the Rule, the Department went through the SERC checklist¹ which was provided to your office in its correspondence dated May 19, 2021. The Department maintains that a SERC was not required at the time of proposed rulemaking because the regulatory costs are estimated not to exceed \$200,000 in the first year of the proposed rule.

b. Regulatory costs are costs to regulated individuals and entities, not the Department. The blank SERC checklist and template used by the Department references costs to the Department in separate sections than that of “regulatory costs.” In light of this guidance, for purposes of determining whether a SERC is required and/or whether legislative ratification may be required at the time a rule is proposed, all alleged costs to the Department of Corrections in terms of manpower and administration are irrelevant to the Department’s determination of the costs of regulation.

Nevertheless, costs to the Department were considered and there are **no additional costs** to the Department in either implementing or enforcing Rule 33-210.101, as amended, other than the administrative costs of the rulemaking process. The costs of digitizing incoming mail will not be borne by the Department but will be borne by the contractor and will be part of the current contract (please see the section above regarding the Department’s contract with JPAY). As stated at the public hearing, the proposed rule will result in Department efficiencies by reducing certain FDC mail processing responsibilities.

The Department does not consider certain public comments received to be a “lower cost regulatory alternative” as required by section 120.541(1)(a), F.S., because the proposed alternative (no rulemaking) does not address the purpose of the rule amendments. However, the Department has decided to clear all misconceptions regarding the costs of the rule by providing a Statement of Estimated Regulatory Costs (SERC) to those who requested one. It will be served on all parties who requested one and your office once completed.

4. 33-210.101(1):

a. In order to provide additional clarity within the Notice Summary, the Department will supplement the Summary in a Notice of Change to clarify that the rule is creating an electronic routine mail process, and that one does not currently exist. An electronic messaging system already exists as

¹ This checklist is available on the website maintained by the Office of Fiscal Accountability and Regulatory Reform. See https://www.floridahasarighttoknow.myflorida.com/regulation_rulemaking/office_of_fiscal_accountability_regulatory_reform (last accessed August 17, 2021).

referenced in Rule 33-602.900, F.A.C., but digitization of incoming routine “paper” mail is not established in that rule.

b. Your letter requests an explanation of how the elimination of hard copy correspondence comports with the legislative intent contained in section 20.315(1)(d), F.S.² The Department acknowledges that section 20.315, F.S., establishes *general* legislative intent with respect to the Department’s purpose. However, the rule in question also implements section 944.09, Florida Statutes, which grants the Department the *specific* delegated authority to regulate mail. *See* § 944.09(1)(g), Fla. Stat. (2021). Please see the Order dated May 23, 2002, by Administrative Law Judge Michael Ruff, which provides as follows:

Inmates may send and receive mail only under such conditions as prescribed by the Department under Section 944.09, Florida Statutes. The Department has specific authority to adopt rules regulating mail moving into and out of its facilities pursuant to Section 944.09(1)(g), Florida Statutes.

It is the right of the inmate to send and receive mail that is here regulated, not the right of the Petitioner to send or receive mail. Even if the Petitioner did claim standing outside of her status as an attorney in fact, she would fail, because it is not her right to send and receive mail that is being regulated, rather it is that of the inmate. *Burns v. Department of Corrections*, DOAH Case 97-4538RP. (Wife's interest in visiting her spouse in prison; it was the inmate's privilege to receive visitors that was being regulated.)

Elizabeth Green v. Department of Corrections, No. 02-4723RP (Fla. DOAH May 23, 2003) (Order).

FDC’s decision to digitize routine mail is directly related to the statements of purpose contained in section 20.315, F.S. To that end, the rule change is intended to prevent drugs, illegal substances and other contraband coming into institutions from routine mail. The Department has an obligation to stop any threat from jeopardizing its ability to protect the lives of the public, staff, inmates and maintain a safe, secure, and humane environment. FDC has experienced multiple incidents of staff illnesses resulting from contact with Fentanyl and Suboxone, as well as inmate deaths and illnesses requiring emergency medical treatment from the consumption of dangerous drugs. Like Florida, other states and jurisdictions have experienced similar problems related to drugs and weapons being sent through routine mail and have switched to a digitized mail platform or are simply making photocopies of the mail to give the inmate.³

² Section 20.315, F.S., also establishes the Department’s purpose to “provide the level of security in institutions commensurate with the custody requirements and management needs of inmates.” *See* § 20.315(1)(i), F.S.

³ In a survey conducted by Correctional Leaders Associated, 31 states responded regarding Inmate Mail and Contraband with the question being presented of how mail is delivered to inmates. 6 states (19.35%) indicated that a photocopy, rather than direct physical mail, is given to an inmate. 9 additional states (29.03%) indicated “other,” and in 5 of these states both methods are used depending on certain factors and conditions. In one of the 9 “others,” it was indicated that photocopies of personal mail are made and delivered, while special handling mail is delivered directly to an inmate. In another one, while there is currently paper delivery, the state indicated a plan on moving to photocopying mail with the goal to digitize mail.

Specifically, from January 2019 to April 2021, FDC staff discovered over 35,000 dangerous contraband items hidden in paper mail such as fentanyl/oxycodone, cocaine, heroin, K2 (synthetic cannabinoid), methadone (bath salts), methamphetamine, marijuana, narcotic pills, Suboxone, cell phones, ammunition and weapons. Extremely dangerous substances such as liquid chemicals used to lace synthetic marijuana are soaked into paper and dried, making detection almost impossible. Likewise, opioids such as Fentanyl and Suboxone present an immediate danger to staff who must handle and inspect the mail. If the Department disregards this threat and fails to act, the Department will continue to see injury or death to staff and inmates.

As indicated in the above paragraph, digitizing mail will create a safer environment for inmates (and staff). As to a “humane” environment, inmates will have access to all of their mail, albeit in a digital format. The rule as proposed strikes a necessary balance between the rehabilitative goals of the Department and its need to maintain a safe incarceration environment. Inmates will be able to send physical mail as they currently do. They will have access to both emails and digitized routine mail and will be able to communicate with the general public. A different way of receiving mail does not constitute an inhumane environment.

Please see the below articles which provide background and examples as to the problems of drugs being introduced into prisons through routine mail, and how other jurisdictions have addressed the issue:

“Ohio Prisons to Digitally Scan Mail to Thwart Drug Smuggling” (accessible at https://www.chronicleonline.com/news/state/ohio-prisons-to-digitally-scan-mail-to-thwart-drug-smuggling/article_da885057-9cba-5944-b64e-85f4f3ca9e5b.html);

“Ohio Prisons to Scan Mail to Halt Drug Smuggling” (accessible at <https://www.journalgazette.net/news/local/ohio/20210815/Ohio-prisons-to-scan-mail-to-halt-drug-smuggling>);

“How to Get Drugs Into 50 Prisons? Soak Inmates’ Mail in Heroin, Ecstasy and Fentanyl” (accessible at <http://www.sun-sentinel.com/news/crime/fl-ne-fugitive-roy-kahn-kingpin-pimp-smuggled-dope-federal-prison-20190924-xgwxe5fz3rf77ijjn2aqh5kydy-story.html>);

“Letters Sent to Jail Had Drugs Hidden Behind the Postage Stamps, NC Sheriff Says” (accessible at <https://www.charlotteobserver.com/news/state/north-carolina/article241038251.html>);

“MDOC: To Fight Drug Smuggling, Prisoners Now Get Photocopies of Mail; Originals Shredded” (accessible at <https://www.freep.com/story/news/local/michigan/2020/10/23/michigan-prison-photocopies-mail-policy/3712961001/>);

“BOP to Implement Paperless Mail System in Attempt to Stop Drugs” (accessible at <https://www.prisonlegalnews.org/news/2020/feb/4/bop-implement-paperless-mail-system-attempt-stop-drugs/>);

“Texas Prison System Bans Greetings Cards, Postcards, Colored Paper in Mail” (accessible at

<https://www.prisonlegalnews.org/news/2020/aug/1/texas-prison-system-bans-greetings-cards-postcards-colored-paper-mail/>).

c. Digitized incoming routine mail will not be accessible to inmates after their release from custody. The contract referenced above provides that all purchased music and game content will be made available, but such content does not include emails or digitized routine mail. The Department will add language to the rule in the Notice of Change that clarifies this distinction. The rule, as already proposed, provides two solutions for the retention of physical mail: an inmate can pay to make a paper copy of incoming mail; or, the sender of mail can request mail be returned to them once scanned, as long as pre-paid postage is received.

d. Rule 33-602.900, F.A.C., is not at issue in the current Notice of Proposed Rule. Nevertheless, the Department will take into consideration such comments the next time the rule is opened for amendment. Further, language will be added to the Notice of Change directing individuals to the Department’s website who wish to obtain contact information for the electronic mail services vendor. Information regarding kiosk and tablet services is currently available on the Department’s website.

5. 33-210.101(5)(c):

Postage stamps, like paper correspondence, may themselves be soaked in dangerous substances or, because of their adhesive backing, may be used to conceal smaller items of contraband.⁴ FDC’s decision to digitize routine mail is directly related to its obligations contained in section 20.315, F.S. To that end, the purpose of the rule change is to prevent drugs, illegal substances and other contraband coming into institutions from routine mail. The Department has an obligation to stop any threat from jeopardizing its ability to protect the lives of the public, staff, inmates and maintain a safe, secure, and humane environment. FDC has experienced multiple incidents of staff illnesses resulting from contact with Fentanyl and Suboxone, as well as inmate deaths and illnesses requiring emergency medical treatment resulting from the consumption of dangerous drugs. Like Florida, other states and jurisdictions have experienced similar problems related to drugs and weapons being sent through routine mail and have switched to a digitized mail platform or are simply making photocopies of the mail to give the inmate.

Specifically, from January 2019 to April 2021, FDC staff discovered over 35,000 dangerous contraband items hidden in paper mail such as fentanyl/oxycodone, cocaine, heroin, K2 (synthetic cannabinoid), methadone (bath salts), methamphetamine, marijuana, narcotic pills, Suboxone, cell phones, ammunition and weapons. Extremely dangerous substances such as liquid chemicals used to lace synthetic marijuana are soaked into paper and dried, making detection

⁴ Consider the paper delivery methods for lysergic acid diethylamide (“LSD”). “LSD is an odorless and colorless substance with a slightly bitter taste [that is] available in saturated absorbent paper (e.g., blotter paper, divided into small, decorated squares, with each square representing one dose), tablets or ‘micro dots,’ saturated sugar cubes, or in a liquid form.” See DOJ/DEA Drug Fact Sheet, accessible at <https://www.dea.gov/sites/default/files/2020-06/LSD-2020.pdf>

almost impossible. Likewise, opioids such as Fentanyl and Suboxone present an immediate danger to staff who must handle and inspect the mail. If the Department disregards this threat and fails to act, the Department will continue to see injury or death to staff and inmates.

As indicated in the above paragraph, digitizing mail will create a safer environment for inmates (and staff). As to a “humane” environment, inmates will have access to all mail, albeit in a digital format. The rule as proposed strikes a necessary balance between the rehabilitative goals of the Department and its need to maintain a safe incarceration environment. Inmates will be able to send physical mail as they currently do. They will have access to both emails and digitized mail and will be able to communicate with the general public. A different way of receiving mail does not constitute an inhumane environment. It is also important to note that stamps are available to all inmates through the canteen, so the ability to send outgoing mail will be undeterred. These stamps are available at cost to an inmate, with a 55-cent stamp costing exactly 55 cents.⁵

6. 33-210.101(5)(f):

Blank paper greeting cards, like paper correspondence and postage stamps, can be soaked in dangerous substances. FDC’s decision to digitize routine mail is directly related to its obligations contained in section 20.315, F.S. To that end, the purpose of the rule change is to prevent drugs, illegal substances and other contraband coming into institutions from routine mail. The Department has an obligation to stop any threat from jeopardizing its ability to protect the lives of the public, staff, inmates and maintain a safe, secure, and humane environment. FDC has experienced multiple incidents of staff illnesses resulting from contact with Fentanyl and Suboxone, as well as inmate deaths and illnesses requiring emergency medical treatment from the consumption of dangerous drugs. Like Florida, other states and jurisdictions have experienced similar problems related to drugs and weapons being sent through routine mail and have switched to a digitized mail platform or are simply making photocopies of the mail to give the inmate.

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⁵ <http://www.dc.state.fl.us/ci/menus/MaleMenu.pdf>; <http://www.dc.state.fl.us/ci/menus/FemaleMenu.pdf>

As stated at the Public Hearing on June 11, 2021, the Department is looking into the possibility of selling blank greeting cards to inmates and their loved ones via canteen services so that inmates may continue to send greeting cards in outgoing mail. Since the public hearing, the Department's canteen vendor has agreed to work with the Department to sell greeting cards in the future. Further, it should be noted that inmates will be allowed to keep all greeting cards they have previously received through the routine mail process.

7. 33-210.101(6):

To avoid the possible need for future rulemaking to update a vendor's specific contact information included in the rule, the Department will instead put contact information for the vendor on its public website and put a note in the rule of how such information is accessible. The link for the public accessible website as of today's date is www.dc.state.fl.us/ci/tablets.html.

8. Law Implemented:

The Department acknowledges that section 20.315, F.S., establishes general legislative intent with respect to the Department. However, the Department has also been granted the specific delegated authority to regulate mail into and outside of its facilities under section 944.09, F.S. *See Green v. Dept. of Corr.*, No. 02-4723RP (Fla. DOAH May 23, 2003)(Order), *supra*. Inmates may only send and receive mail under the conditions prescribed by the Department under section 944.09, F.S.

The introduction of dangerous substances and contraband through incoming mail poses an obvious threat to a safe and humane prison environment. Rehabilitation efforts are necessarily impacted by an inmate's use of illicit drugs or other dangerous chemicals. FDC's decision to digitize routine mail is directly related to its obligations contained in section 20.315, F.S. To that end, the purpose of the rule change is to prevent drugs, substances and other contraband coming into institutions from routine mail. The Department has an obligation to stop any threat from jeopardizing its ability to protect the lives of the public, staff, inmates and maintain a safe, secure, and humane environment. FDC has experienced multiple incidents of staff illnesses resulting from contact with Fentanyl and Suboxone, as well as inmate deaths and illnesses requiring emergency medical treatment from the consumption of dangerous drugs. Like Florida, other states and jurisdictions have experienced similar problems related to drugs and weapons being sent through routine mail and have switched to a digitized mail platform or are simply making photocopies of the mail to give the inmate.

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9. Public Hearing:

The Department granted public requests for a hearing although the right being regulated (to receive and send mail) is that of FDC inmates. *See Green v. Dept. of Corr.*, No. 02-4723RP (Fla. DOAH May 23, 2003) (Order), *supra*. Nearly all requests for public hearing on the proposed rule requested that an electronic hearing be conducted because of the COVID-19 pandemic. The Department obliged and set up a meeting through the GoToWebinar application. This application was utilized because GoToWebinar is a preapproved meeting technology for state agencies.⁶

Rule 28-109.004(2), F.A.C., contemplates technical problems with the communications network during a proceeding. No such technical problems occurred during the public hearing. Instead, individuals failed to unmute their microphones on their home computers/laptops. The Department does not have access to attendees’ computers and cannot do anything to resolve such issues at the time of occurrence.⁷

The Department made every effort to mitigate the risk of such problems prior to the hearing date. When individuals signed up to attend the hearing, an automated email from GoToWebinar was sent to the attendees which included a link to instructions. The link was also displayed on the screen during the entirety of the hearing. Additionally, during the introduction at the beginning of the public hearing, the Department facilitator made the following statement:

Each speaker is also required to unmute himself or herself in order to be heard by the other people participating in the hearing. Additionally, in order to be heard, all speakers must be using the GoToWebinar app or must be logged into GoToWebinar on the internet. If you have opted to attend this hearing by telephone only, you will be in listen mode only and will not be able to speak. For those having technical issues, a “HOW TO: video link was provided at the time of registration, and the link to the video is included on the welcome screen to this webinar.

⁶All state agencies shall use the SUNCOM Network for agency telecommunications services as the services become available. § 282.703(5), F.S. Agencies may use their SUNCOM credentials to access GoToWebinar services. *See* https://www.dms.myflorida.com/business_operations/telecommunications/suncom2/conference_services/web_conference_services/logmein_web_conference_services

⁷ Many computers require a user to provide permission for an application to access the computer’s microphone. It is possible that many users did not go into their privacy settings to allow for the GoToWebinar application to access their microphone. GoToWebinar allows for users to test their equipment before a webinar, and users should have done so.

The Department does not dispute that some speakers were seemingly unable to unmute their microphones due to user error or equipment issues, but the Department's web service conference worked as intended and allowed approximately 100 people to speak remotely from the safety and security of their own location. It is also important to note that although some individuals were unable to speak due to their own technical issues, there appears to be no allegation that any individual that wished to "attend" the hearing was unable able to attend. Speaking and attendance are two different things; many members of the public attend public hearings without speaking on the record.

Even so, the Department further provided opportunity for attendees to provide input by leaving the record open for 72 hours after the hearing to receive written comments and questions. For those unable speak at the hearing, this allowed a way for their comments to be received and considered. The many comments received in all contexts conformed to a small number of general themes or concerns; comments made at the hearing and in written format have been considered in the drafting of the Department's Notice of Change. The Department has conducted a rulemaking process in which the general public has been able to comment and voice their opinions. It is unclear how conducting additional hearings on the matter would introduce new concerns not already taken under consideration by the Department.

Given that JAPC's comments were first received approximately only 20 days before expiration of the Department's 90-day window, the Department requested the rule be tolled on July 29, 2021, and JAPC tolled the rule as of that date. If this reply satisfies JAPC's concerns, the Department intends to move forward with its Notice of Change. **Please inform the Department, in writing, by August 27, 2021, whether JAPC has additional comments or concerns. If further concerns must be addressed, the Department requests confirmation from JAPC by August 27th that the rule will remain tolled until further communications are resolved.**

Thank you for your consideration of this response.

Sincerely,



Philip A. Fowler
Attorney Supervisor
Florida Department of Corrections

and



Jason W. Holman, Esq.
Assistant General Counsel
Florida Department of Corrections

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JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE
1:29 pm, Aug 20 2021

cc: Sharon Jones, Chief Attorney