



FLORIDA  
DEPARTMENT of  
CORRECTIONS

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September 27, 2021

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

**RECEIVED**  
**JOINT ADMINISTRATIVE**  
**PROCEDURES COMMITTEE**  
4:59 pm, Sep 27 2021

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

Dear Mr. Plante:

At the outset, it is important to note that the Department of Corrections (hereinafter "Department" or "FDC") has clear and unambiguous statutory authority to regulate mail to and from inmates and mail to and from correctional institutions.

The Department has clear and specific delegated authority to regulate mail into and outside of its facilities under Section 944.09, F.S. Specifically, Section 944.09(1)(g), F.S., provides that the department has authority to adopt rules related to "[m]ail to and from the state correctional system." Section 944.09(1)(o), F.S., provides that the department has authority to adopt rules related to "[m]ail to and from inmates, including rules specifying the circumstances under which an inmate must pay for the cost of postage for mail an inmate sends."

Inmates may only send and receive mail under the conditions prescribed by the Department under section 944.09, F.S. 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*, DOAH Case Number 02-4723RP (Order dated May 23, 2003).

The Department's responses to the comments in your letters dated September 10, 2021, and September 13, 2021, are as follows:

***Letter Dated September 10, 2021***

***1. 33-210.101(4)(a), F.A.C.***

a. 15 Page Limitation

The Committee asks for an explanation of how placing, apparently, *any* limitation on the number of incoming pages "promote[s] the purpose and effect of the rule '[t]o increase the safety and security of inmates and staff[.]'" The Committee acknowledges the Department's Notice of Change increased the allowable incoming number of pages; however, its question fails to fully acknowledge the Department's amended Purpose and Effect submitted in the Notice of Correction published on September 8, 2021. While the overarching reason (or, Purpose) for the rule is to increase safety and security of inmates and staff, the notice also explains that rulemaking is "necessary to establish the protocols for processing routine mail electronically and to update the regular routine mail process."<sup>1</sup> Electronic mail processing will necessarily operate differently than the current manual process. The overarching purpose of the proposed rule (improved security) cannot be successfully achieved without establishing protocols for the electronic mail process where the requirements or limitations of the new process differ from the existing manual process, lest the rule then be challenged as vague, arbitrary or capricious.

As for the reasoning behind the 15-page limitation (which is equal to 30 pages of text since each side of a page can be utilized), it is important to note that individuals and entities can send more than one parcel. There is no limitation on the number of parcels sent. Moreover, fifteen double-sided pages of correspondence is a lengthy individual letter. The limitation as to the size of an individual parcel is beneficial as the Department and its vendor do not have unlimited resources. Each parcel received must be scanned and converted into a digital format, and a limitation should be in place in order to do so as scanning machines are involved. Without such a limitation, there would be delays in processing all mail.

The Department declines to make any additional changes as it relates to the page limitation contained in proposed rule 33-210.101(4)(a), F.A.C.

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<sup>1</sup> See FDC's Notice of Correction, Fla.Admin.Reg., vol. 47, no. 174 (Sept. 8, 2021)

b. Exception to 15 Page Limitation

This comment relates to language that is not making its first appearance in the notice of proposed rulemaking. The language is present in the current rule. Under the current rule, an individual may request permission to send additional pages, as follows:

[U]nless the additional written materials pertain to an inmate's legal case, health, or other significant issues and prior approval is obtained from the warden to send in an enclosure of greater than 15 pages. Each page can be no larger than 8 1/2" x 14" in size; material can be on both sides of a page. This does not include publications, which shall be handled pursuant to Rule 33-501.401, F.A.C. Individual articles or clippings from publications the content of which is otherwise admissible are permissible, up to the 15 page limit. No item can be glued, taped, stapled or otherwise affixed to a page. Requests to send enclosures of greater than 15 pages shall be made to the warden or designee prior to sending the material. Exceptions to the 15 page limitation are intended for enclosures concerning legal, medical, or other significant issues, and not for material for general reading or entertainment purposes. The warden shall advise the sender and the mail room of his approval or disapproval of the request.

This language has been in place since May 9, 2010. Since May 9, 2010, this language has been part of rule amendments dated December 5, 2012, April 1, 2013, July 8, 2014, and May 25, 2016, with JAPC having many opportunities to raise concerns without having done so. This language includes:

- The manner for submitting an exception request;
- The timeline for review of an exception request;
- Reference to "Warden or Designee" for an exception request;
- The reference to "legal case, health or other significant issues"; and,
- "Other significant issues" in an exception request.

In response to JAPC's comments, the Department will make changes to this section. The updated language will provide the manner for submitting an exception request, will discuss the timeline for review of an exception request, will clarify that all requests for exception shall be sent to wardens, and that either a warden or his/her designee shall respond and state when a warden shall approve a request. The changes are in direct response to the committee asking for clarification.

In response to the committee's question regarding "legal mail," legal mail is not part of the routine mail rule and is specifically excluded. Legal mail is defined in a separate rule, Rule 33-210.102, F.A.C., as follows:

- (2) Legal mail shall be defined as mail to and from the following entities:
  - (a) Municipal, county, state and federal courts.
  - (b) State attorneys.
  - (c) Private attorneys.

- (d) Public defenders.
- (e) Legal aid organizations.
- (f) Agency clerks.
- (g) Government attorneys.

Correspondence regarding legal matters from an entity not included in the above list is not “legal mail” as defined by rule 33-210.102, F.A.C., and is processed as routine mail. For example, if a family member or friend sent an inmate copies of case law to help with a *pro se* case, that mail would not meet the criteria for legal mail processing under the applicable rule, but it could be considered for an exception to the page limitation in the current and proposed Routine Mail rule.

## **2. 33-210.101(4)(b), F.A.C.**

It is important to note that the “de minimus” language referenced in the Committee’s comment has been present in the rule since at least July 2, 2009. Since July 2, 2009, this language has been part of rule amendments dated May 9, 2010, December 5, 2012, April 1, 2013, July 8, 2014, and May 25, 2016, with JAPC having many opportunities to comment without having done so. This may be because *de minimis* is a clear term with a clear definition and legal meaning. According to Merriam-Webster Dictionary, *de minimis* means “lacking significance or importance: so minor as to merit disregard.” Such terms with clear definitions do not need to be defined in rule. However, the Department will clarify the term so that all costs over \$1.00 (one dollar) are not considered *de minimis* in relation with the routine mail rule. As such, there will be a clearly defined number so all parties involved have undisputed clarity.

## **3. 33-210.101(6), F.A.C.**

### **a. Correspondence Needing Translation**

Proposed Rule 33-210 101, F.A.C., as amended by FDC’s Notice of Change on September 7, 2021, currently proposes such language:

(6) Electronic processing of routine mail reduces the introduction of contraband through the routine mail process. Any incoming routine mail received by the Department or a Department contractor for electronic mail processing shall be opened and examined and is subject to being read by designated Department employees and by the Department contractor. *If the warden has approved an inmate to receive correspondence written in a language other than English, Spanish, or Creole, the correspondence may be translated to confirm that it complies with all applicable Department rules. If the correspondence cannot be translated by a Department employee where an inmate is housed or by the Department contractor, the correspondence will be processed, and a copy will be sent to another institution or the central office for translation.* Incoming routine mail that is properly addressed and otherwise in compliance with applicable Department rules shall not be held for processing for more than 72 hours after receipt by the Department or a Department contractor, excluding weekends and

holidays. . . (emphasis added).

The second emphasized sentence, which the committee quotes in its correspondence, *only* applies if a request has already been approved. A request is only approved if it passes the *de minimis* test and has been approved by the warden.

b. 72 Hour Processing

Items requiring translation will require 72 hours processing once the items have been translated. The Department will update the rule to clarify this.

c. Timeframe for Response to Request to Return Correspondence to Sender

As clearly stated in the proposed rule, hard copies of correspondence will be destroyed if no request is received before expiration of the 90-day retention period. No response from the contractor is needed. If a request is received during the 90-day period, physical mail will be returned to the sender. A timeframe for the contractor to “respond” will achieve nothing but delaying the processing time.

d. Availability After Release

Similar to the Department’s response to comments directed to proposed rule 33-210.101(4)(a), F.A.C. (see above), targeting a specific line of the proposed rule to ask how the specific line *alone* achieves the purpose and effect of increasing the safety and security of inmates and staff ignores that the proposed rule is intended and required to establish protocols for a different operational process. The rule as a whole unquestionably increases the safety and security of inmates and staff, as it is intended to keep dangerous drugs from being sent through the routine mail process. This provision was a protocol in order to implement the digitized routine mail process, which is also included in the purpose and effect of the proposed rule. The contract the Department has with JPAY, Contract #C2885, defines what “purchased content” includes, and what the contractor must make available to inmates following an inmate’s release. Digitized mail is *not* included and would not be as such is not “purchased.”

Nevertheless, in response to the correspondence dated September 10, 2021, from JAPC, FDC agrees that digitized routine mail can be made available to inmates following release on a data storage device, upon written request to the contracted vendor. As such, the Department will update the rule and add this provision into the rule text.

***Letter Dated September 13, 2021***

***1. 33-210.101(6), F.A.C.***

a. Vendor Pricing

The first concern raised in the Committee’s September 13, 2021 letter is that “the cost of inmate services provided by [the vendor] meet[s] the definition of a rule[.]” The prices



charged by the vendor are not required charges in the context of routine mail scanning and FDC declines to amend the second Notice of Change to include them. Section 120.52 (16), F.S., cited in the letter defines a rule as:

[...] each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice **requirements** of an agency and includes any form which imposes any **requirement** or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

§ 120.52 (16), Fla. Stat. (emphasis supplied). The prices apparently referenced in the letter are accessible at the vendor's website: <https://www.jpay.com/Agency-Details/Florida-State-Prison-System.aspx>.

As described in prior responses and the proposed rule itself, the scanning of routine mail will not involve any **required** purchase of any of the inmate tablet or kiosk services. Thus, the vendor's fees referenced in the letter do not "impose any requirement" upon the operation of the routine mail scanning process as proposed. Tablets are available free of charge to most inmates and will be used to access scanned routine mail at no cost to the inmate. Where an inmate's housing assignment prohibits the possession or use of a tablet to access routine mail, the mail will be printed out for the recipient inmate at no charge to the inmate. Finally, as described above, digitized routine mail can be made available to inmates following their release on a data storage device, upon written request. Any purchase of the vendor's paid services is an unrelated, elective and discretionary transaction conducted between the vendor and the users of its services. Accordingly, the costs for services referenced in the letter as a concern are irrelevant to the routine mail scanning requirements because those costs are not required for this rule to be fully implemented.

b. Electronic Stamp Charge

As explained above, the charge for an electronic stamp from FDC's vendor is irrelevant to the implementation of the rule at issue because electronic stamps are not required to be purchased in order for non-inmates and inmates to send and receive routine mail under the proposed rule. The statement on FDC's website is correct, however, because it refers to the price to be paid by inmates for outgoing e-mail.<sup>2</sup> An individual electronic stamp currently costs \$.039 for Florida inmates wishing to send outgoing e-mails through the service.<sup>3</sup> Only inmates can purchase a single stamp. The single-stamp price remains in effect as of the date of this response, but other prices are in effect for bundles of multiple stamps. As described on the vendor's web page, pricing for non-inmates currently starts at \$4.40 per 11 stamps; there is no single-stamp option for non-inmates. In either circumstance, electronic stamps from the vendor cost less than U.S. postage stamps, which

<sup>2</sup> "Secure Mail is available to inmates at a cost of \$.039/stamp, with one stamp purchasing one email." See <http://www.dc.state.fl.us/ci/tablets.html> (last accessed on September 23, 2021) (emphasis supplied).

<sup>3</sup> See <https://www.jpay.com/Agency-Details/Florida-State-Prison-System.aspx> (containing rates for "Outbound Email") (last accessed on September 23, 2021).

are currently priced at 55 cents per one-ounce letter.<sup>4</sup> Considered as a comment regarding the clarity of FDC's website, the agency submits that its website is currently correct and that additional information regarding pricing for non-inmates can be obtained on the vendor's website, which is linked from the FDC site. Again, such pricing is unrelated to the operation of the routine mail scanning process as proposed.

**2. 33-210.101(8), F.A.C.**

The September 13 letter requests a citation to a statutory provision authorizing FDC to "delegate the interpretation and application of Department rules to a third party." One is not necessary; FDC does not concede that a statute must explicitly grant interpretive powers to an agency's vendor in order for the vendor to carry out its contracted terms in this or any other context. Interpretation of any rule is a necessary component of an individual's compliance with it whether they are an agency employee, contract vendor or member of the public. The proposed rule is not an invalid exercise of delegated legislative authority<sup>5</sup> because FDC has been provided broad authority (and is specifically required by statute) to promulgate rules regarding incoming and outgoing mail. See §§ 944.09 (1)(g) and (1)(o), F.S.

Section 944.09 (1) of the Florida Statutes does not state that FDC's authority to process mail is nondelegable. The proposed rule introduces the use of contracted services to carry out mail processing under parameters established by FDC in the rule. State agencies have been granted authority to procure services from private vendors through an extensive statutory process established in chapter 287 of the Florida Statutes. State contract documents also must specify "a scope of work that clearly establishes all tasks the contractor is required to perform." § 287.058 (1)(d), F.S. Here, the vendor does not "interpret" the rule in a subjective manner. Per the contract with the vendor:

[a]ll emails and attachments (including photos and VideoGrams) will be monitored by the contractor per the parameters set by the Department. [] Monitoring must occur, and any violations will be [referred electronically] to be reviewed by the designated institutional contact within 48 hours (excluding weekends and state holiday), unless specified otherwise in [the] Contract.

See Contract C2885, Amendment #2, pgs. 28-29, excerpt attached hereto as Appendix A. Objective criteria requiring no "interpretation" such as paper size or page limits can easily be applied by vendor staff. See, e.g., Proposed Rule at ¶ (4). The proper concern is not **who** interprets an agency's rule but **how** the rule will be applied. Here, the proposed rule is a valid exercise of delegated legislative authority and, under the relevant facts, is not in danger of being applied in an arbitrary and capricious manner by employees of the vendor.

<sup>4</sup> See <https://about.usps.com/newsroom/national-releases/2020/1009-usps-announces-new-prices-for-2021.htm>, last accessed on September 23, 2021.

<sup>5</sup> See § 120.545 (1)(a), F.S.

**3. 33-210.101(9), F.A.C.**

The Committee's comment regarding paragraph (9) of the proposed rule mirrors its concern regarding paragraph (8) – that the proposed rule cannot (or perhaps should not, if the Committee's concern is policy-borne) be interpreted or applied by an employee of a vendor of contracted services. FDC adopts and reasserts its response above that the rule does not constitute an invalid exercise of delegated authority under sections 944.09 (1)(g) or (1)(o) of the Florida Statutes. No such delegation of authority to vendor employees in statute is required. All individuals (FDC employees, vendor employees, inmates, members of the public) must interpret and apply rules when they engage in an activity being regulated.

Paragraph (16) of the proposed rule states:

(16) Incoming and outgoing routine mail shall be delivered to and picked up from the institution or facility by the U.S. Postal Service only. Incoming routine mail that is to be processed electronically shall be sent via the U.S. Postal Service to a centralized address designated by the Department that is posted on the Department's public website. All such mail will be picked up for electronic mail processing by the Department contractor. All legal mail as defined in Rule 33-210.102, F.A.C., or privileged mail as defined in Rule 33-210.103, F.A.C., received at the centralized address designated by the Department shall be returned to the U.S. Postal Service for disposition.

Subjective interpretation of this paragraph is not necessary for vendor employees to comply with it. Definitions of "legal mail" and "privileged mail" are established in FDC's Legal Mail rule and Privileged Mail rule cross-referenced in paragraph (16). Similarly, paragraph (21) of the proposed rule also poses little reasonable risk of improper application because of the lengthy description of what constitutes non-standard envelopes:

(21) No packaging other than standard envelopes shall be given to inmates. Incoming mail that includes the following types of packaging shall be rejected and returned to the sender unopened: envelopes that have metal parts, boxes, padded envelopes, plastic bags, card stock type envelopes (e.g., U.S. Mail Priority or U.S. Mail Express cardboard envelopes), multi-layer packaging, bubble wrap, packing peanuts, and similar packaging.

Here, the proposed rule is a valid exercise of delegated legislative authority and, under the relevant facts, is not in danger of being applied in an arbitrary and capricious manner by employees of the vendor.



**4. FDC Letter Dated August 20, 2021**

**a. Present and Future Cost-Shifting**

The Committee's first question regarding FDC's August 20 letter indicates an uncertainty (apparently based on the verb tense used in FDC's letter) concerning whether either the current or future mail processing contract envision the contractor passing any costs for digitization on to inmates and those individuals corresponding with inmates. As explained elsewhere, tablets are available free of charge to most inmates and will be used (upon adoption of the proposed rule) to access scanned routine mail at no cost to the inmate. Upon adoption of the rule, where an inmate's housing assignment prohibits the possession or use of a tablet to access routine mail, the mail will be printed out for the recipient inmate at no charge to the inmate. Finally, as described above, upon implementation of the rule, released inmates may request electronic copies of digitized routine mail.

**b. Retention of Inmate Copies of Digitized Mail**

The Committee's final comment in its September 13 letter is that a provision should be added to rule relating to the availability of and costs associated with requesting paper copies of mail. The portion of FDC's August 20 letter referenced in the current comment related to the ability to retain copies of mail received through the digital scanning process after an inmate is released from FDC custody. FDC's prior letter pointed out that non-inmate mail senders can, upon adoption of the rule, request that the original copy be returned to the sender if the original is accompanied with a request and an addressed and stamped envelope. In response to the correspondence dated September 10, 2021 from JAPC, FDC agrees that digitized routine mail can be made available to inmates following release on a data storage device, upon written request to the contracted vendor. As such, the Department will update the rule and add this provision into the rule text.

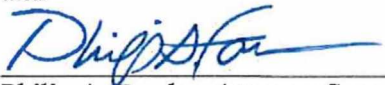
Thank you for your consideration of this reply.

Sincerely,



Lance E. Neff, General Counsel

and



Philip A. Fowler, Attorney Supervisor

for the Florida Department of Corrections

cc: Sharon Jones, Chief Attorney

RECEIVED  
JOINT ADMINISTRATIVE  
PROCEDURES COMMITTEE  
4:59 pm, Sep 27 2021

**APPENDIX A**  
**Contract #C2885**  
**Amendment #2**  
**Pgs. 28-29**

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4:59 pm, Sep 27 2021

**4. Performance Measure #4 – Priority 1 Ticket Response**

**Measure:** Upon notification or simply becoming aware of a software issue, the Contractor's technicians will respond to all Priority 1 trouble tickets within 24 hours. If on-site work is required, the Contractor shall dispatch a technician.

**Standard:** Ninety-eight percent (98%) of the time the Contractor shall respond to all Priority 1 trouble tickets within 24 hours.

**Financial  
Consequence:** Five hundred dollars (\$500.00) per percentage point, or fraction thereof, below ninety-eight percent (98%), monthly.

**5. Performance Measure #5 – Priority 2 Ticket Response**

**Measure:** Upon notification or simply becoming aware of a software issue, the Contractor's technicians will respond to all Priority 2 trouble tickets within 48 hours. If on-site work is required, the Contractor shall dispatch a technician.

**Standard:** Ninety-five percent (95%) of the time the Contractor shall respond to all Priority 2 trouble tickets within 48 hours.

**Financial  
Consequence:** Three hundred dollars (\$300.00) per percentage point, or fraction thereof, below ninety-five percent (95%), monthly.

**6. Performance Measure #6 – Support Request Tickets**

**Measure:** Upon request by the Department's Contract Manager, or designee, the Contractor shall provide information pertaining to a recording, mail, or configuration changes, such as disabling a tablet or kiosk.

**Standard:** All urgent requests, identified as such by the Department, to disable a kiosk or tablet for security concerns, will be completed by the Contractor within one (1) hour. All other requests made by the Department will be completed by the Contractor within two (2) business days.

**Financial  
Consequence:** Two hundred and fifty dollars (\$250.00) per hour to complete an urgent request made by the Department. Five hundred dollars (\$500.00) per day for failure to complete all other requests made by the Department within two (2) business days.

**7. Performance Measure #7 – Monitoring**

**Measure:** All emails and attachments (including photos and VideoGrams) will be monitored by the Contractor per the parameters set by the Department.

**Standard:** Monitoring must occur, and any violations will be placed in the Censored or Sent to Security bucket to be reviewed by the

**CONTRACT #C2885  
AMENDMENT #2**

designated institutional contact within 48 hours (excluding weekends and state holiday), unless specified otherwise in this Contract.

Financial

Consequence: Five hundred dollars (\$500.00) per occurrence for failure to monitor content and provide the results to the designated institutional contact within 48 hours.

**8. Performance Measure #8 – Monitoring Compliance of Video Only Sessions**

Measure: The Contractor shall monitor all video visitation sessions in real-time.

Standard: The Contractor shall submit evidence that one hundred percent (100%) of all video visitation sessions were visually monitored by designated personnel.

Financial

Consequence: Five hundred dollars (\$500.00) per percentage point, or fraction thereof, below one hundred percent (100%), monthly or as designated by the Department's Contract Manager.

**9. Performance Measure #9 – Monitoring Compliance of Video and Audio Sessions**

Measure: The Contractor shall monitor two percent (2%) of each day's video visitation sessions using both audio and visual review.

Standard: The Contractor shall submit evidence that two percent (2%) of the selected video visitation sessions were monitored using both audio and visual review.

Financial

Consequence: Two thousand five hundred dollars (\$2,500.00) per day for failure to monitor two percent (2%) of each day's video visitation sessions both audio and visual.

**10. Performance Measure #10 – Additional Kiosk Activation**

Measure: The Contractor shall confirm successful kiosk activation after implementation of service is approved by the Department. This performance measure is only in reference to new kiosks added after the initial kiosk implementation.

Standard: The Contractor shall confirm, in writing, to the Department's Contract Manager, or designee, activation of all kiosks within 24 hours of the Go-Live date approved by the Department.

Financial

Consequence: One thousand dollars (\$1,000.00) per day, per activation site, for failure to activate kiosks within 24 hours of the Go-Live date approved by the Department.

By execution of this Contract, the Contractor hereby acknowledges and agrees that its performance under the Contract shall meet the standards set forth above. The