

PROPOSED RULEMAKING

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 203]

Lead Occupation Accreditation and Certification

The Department of Labor and Industry (Department), under the authority contained in the Lead Certification Act (act) (35 P. S. §§ 5901—5916), proposes regulations concerning the accreditation of training providers and the certification of lead-based-paint occupations.

Purpose of Proposed Rulemaking

The proposed regulations, set forth in Annex A, set forth stringent accreditation requirements and procedures for training providers and certification requirements and procedures for lead-based-paint occupations. The Department met with various representatives from the lead-based-paint industry to discuss these proposed regulations.

The act requires that the Department's regulations be no more stringent than the Federal requirements. These regulations are proposed to incorporate current Federal requirements.

Statutory Authority

The Department is publishing these proposed regulations under the authority contained in the act and in the Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102—550, Title X, October 28, 1992, 106 Stat 3897—3926.

Summary of Proposed Rulemaking

§ 203.1 (relating to definitions)

This proposed section provides definitions for the terms used in the chapter. The definitions found in the act are included.

§ 203.2 (relating to general administrative requirements)

This proposed section defines the purpose and scope of the proposed chapter and incorporates the Environmental Protection Agency (EPA) proposed standards found at 59 FR 45872 (September 2, 1994), to be codified at 40 CFR Part 745.

§ 203.3 (relating to training course accreditation procedures)

This proposed section provides for the accreditation of initial and refresher training courses. An application for accreditation shall be received 30 days before a training provider's first course session. The Department will grant conditional accreditation if the materials submitted are complete and comply with the Department's requirements. The Department will issue final-course approval after it determines, from a complete review of the materials and observation of the course, that the course meets the requirements of the act and these proposed regulations.

This proposed section sets out the specific requirements for courses in each of the occupations. For EPA occupation classifications, these regulations adopt the EPA's course requirements by reference.

This proposed section sets out the course text requirements, provides requirements for course changes and sets forth course-provider recordkeeping requirements.

§ 203.4 (relating to certification procedures and requirements)

This proposed section provides the requirements for initial and renewal occupation certifications. Lead-based-paint occupation certifications are valid for 1 year.

This proposed section provides the certification requirements and proof of certification requirements.

§ 203.5 (relating to denial, suspension or revocation of certification or accreditation)

This proposed section provides the grounds and the process for denial, suspension or revocation of accreditation or certification. The grounds for these actions are set out in subsection (a). These grounds are based on those found in the act and the EPA's model plan. This proposed section provides for notice and hearing, in accordance with 2 Pa.C.S. (relating to administrative law and procedure).

§ 203.6 (relating to work practices)

This proposed section incorporates EPA and United States Department of Housing and Urban Development (HUD) rules, regulations and guidelines. This section also imposes additional recordkeeping requirements.

§ 203.7 (relating to reciprocity)

This proposed section provides for the recognition of accreditation and certification granted by other states. The Department may enter into reciprocal agreements with other states and jurisdictions with accreditation and certification requirements substantially similar to those set forth in the act and these proposed regulations.

§ 203.8 (relating to fees)

This proposed section provides the fee schedules for initial and renewal certification fees, training course accreditation fees and refresher training course accreditation fees. There is a fee cap of \$5,000 per year on training-course-provider fees for an individual provider.

§ 203.9 (relating to enforcement procedures and penalties)

This proposed section provides for civil penalties for violations of the act and these proposed regulations. This proposed section sets out certification and accreditation violations. It provides the standards to be used by the Department in determining a civil penalty, and allows the Department to issue orders for hazardous conditions.

§ 203.10 (relating to notification requirements)

This proposed section provides for notification for lead-based-paint abatement projects to the Department. This proposed section also provides for changes to the original notification of a lead-based-paint project.

Affected Persons

These proposed regulations will affect persons in lead-based-paint occupations, contractors, training providers and building owners.

Fiscal Impact and Paperwork

The Department will incur additional administrative costs and paperwork as a result of the proposed regulations. Lead-based-paint contractors, persons in lead-based-paint occupations and training-course providers will incur additional expenses as a result of these proposed regulations. Training providers will be required to keep some additional records on their students.

Sunset Date

A sunset date is not appropriate because the Commonwealth's program must be certified and in compliance with Federal standards.

Contact Person

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed regulations to Sharon K. Lawson, Administrator, Asbestos Section, Bureau of Occupational and Industrial Safety, Department of Labor and Industry, Room 1402, Labor and Industry Building, Seventh and Forster Streets, Harrisburg, PA 17120, within 30 days of publication in the *Pennsylvania Bulletin*.

Prior to the adoption of final regulations, the Department will carefully review and consider comments received concerning this proposal. Written comments will be officially reviewed and considered by the Department within 30 days of the publication of these proposed regulations.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of the proposed regulations on February 28, 1996, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Labor Relations Committee and the Senate Labor and Industry Committee. In addition to submitting the proposed regulations, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1982-2, "Improving Government Regulations." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed regulations, it will notify the Department within 30 days of the close of the public comment period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review by the Board, the General Assembly and the Governor of objections raised prior to final publication of the proposed regulations.

JOHNNY J. BUTLER,
Secretary

Fiscal Note: 12-47. No fiscal impact; (8) recommends adoption. Fees generated should offset program costs.

Annex A**TITLE 34. LABOR AND INDUSTRY****PART X. BUREAU OF OCCUPATIONAL AND INDUSTRIAL SAFETY****CHAPTER 203. LEAD-BASED PAINT OCCUPATION ACCREDITATION AND CERTIFICATION**

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§ 203.1. Definitions.

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

Abatement—A set of measures designed to eliminate or reduce lead-based paint hazards in accordance with standards established by the EPA. The term includes the following:

(i) The removal of lead-based paint and lead-contaminated dust, the permanent containment or encapsulation of lead-based paint, the replacement of lead-painted surfaces or fixtures and the removal or covering of lead-contaminated soil.

(ii) The preparation, clean up, disposal and postabatement, clearance-testing activities associated with these measures.

(iii) Less-than-full abatement whereby the sources of lead contamination are reduced sufficiently to create a lead-safe environment rather than a lead-free environment.

The term does not include renovation and remodeling or landscaping activities by contractors whose primary intent is not to permanently eliminate or reduce lead-based paint hazards, but is instead to repair, restore or remodel a given structure or dwelling. The term does not include renovation and remodeling activities conducted by homeowners in their homes.

Accessible surface—An interior or exterior surface painted with lead-based paint that is accessible for a young child to mouth or chew.

Accreditation—A certificate issued by the Department permitting a person to conduct lead-based paint occupational training courses.

Act—The Lead Certification Act (35 P. S. §§ 5901—5916).

CDC—The United States Centers for Disease Control and Prevention.

Certification—A certificate issued by the Department permitting a person to work in a lead-based paint occupation and which contains a recent photograph of that person.

Certified contractor—A person, firm, company or institution which has been approved by the Department to perform lead-based paint activities in this Commonwealth.

Children—Individuals who are under 6 years of age.

Commercial building—A building constructed for the purpose of commercial or industrial activity and not primarily intended for use by the general public, including office complexes, industrial buildings, warehouses, factories and storage facilities.

Deleading—Activities conducted by a person who offers to eliminate or reduce lead-based paint or lead-based paint hazards or to plan these activities.

Demolition—Pulling down or completely destroying a building or structure or substantial removal of building elements.

Department—The Department of Labor and Industry of the Commonwealth.

Discipline—A classification for a specific lead-hazard activity.

EPA—The United States Environmental Protection Agency.

Friction surface—An interior or exterior surface that is subject to abrasion or friction. The term includes certain window, floor and stair surfaces.

HUD—The United States Department of Housing and Urban Development.

Hazard activities—Any set of measures designed to eliminate or reduce lead hazards in accordance with standards established by the EPA and other Federal agencies.

Hazardous condition—A condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil or a lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces or impact surfaces that would result in adverse human health effects as established by the administrator of the EPA under section 403 of the Toxic Substance Control Act (15 U.S.C.A. § 2683).

Impact surface—An interior or exterior surface that is subject to damage by repeated impacts; for example, certain parts of door frames.

Inspection—The term includes the following:

(i) A surface-by-surface investigation to determine the presence of lead-based paint, as provided in section 302(c) of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C.A. § 4822(c)).

(ii) The provision of a written report explaining the results of the investigation.

Inspector-risk assessor—A person trained to identify the presence of lead-based paint and to collect additional information designed to assess the level of risk to residents of target housing.

Lead-based paint—Paint or other surface coatings that contain lead in excess of the most current HUD standards, or in the case of paint or other surface coatings on target housing, such lower level as may be established by the Secretary of HUD under the Lead-Based Paint Poisoning Prevention Act.

Lead-based paint activities—The term includes the following:

(i) With respect to target housing, the term includes risk assessment, inspection and abatement.

(ii) With respect to a public building constructed before 1978, or a commercial building, bridge or other structure or superstructure, the term includes identification of lead-based paint and materials containing lead-based paint, deleading and removal of lead from bridges and demolition.

Lead-based-paint hazard—A condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces or impact surfaces, which exposure would result in adverse human health effects as established by the Department.

Nonprofit training provider—A training provider organized for a purpose not involving pecuniary profit, incidental or otherwise, to its members.

OSHA—The Occupational Safety and Health Administration.

Occupations—The term includes worker, supervisor, inspector, risk-assessor, project designer and all other occupations covered by the EPA and OSHA rules, regulations and guidelines on lead-based paint activities.

Person—The term includes the following:

(i) An individual.

(ii) A corporation, partnership or association.

(iii) The Commonwealth, including an agency and instrumentality of the Commonwealth.

(iv) A political subdivision, including an agency or instrumentality of a political subdivision.

Planner-project designer—A person trained and certified to plan and design lead-based-paint activities.

Public building—A building constructed prior to 1978, which is generally open to the public or occupied or visited by children. The term includes schools, day care centers, museums, airport terminals, hospitals, stores, restaurants, office buildings, convention centers and government buildings. The term excludes target housing.

Renovation and remodeling activities—Activities whose primary intent is not to permanently eliminate or reduce lead-based-paint hazards, but is instead to repair, restore or remodel a given structure or dwelling.

Residential dwelling—The term includes the following:

(i) A single-family dwelling, including attached structures such as porches and stoops.

(ii) A single-family dwelling unit in a structure that contains more than one separate residential dwelling unit and in which each unit is used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one or more individuals.

Risk assessment—Onsite investigation to determine and report the existence, nature, severity and location of lead hazards in residential dwellings, including the following:

(i) Information gathering regarding the age and history of the housing and occupancy by children under 6 years of age.

(ii) Visual inspection.

(iii) Wipe sampling or other environmental testing and sampling techniques.

(iv) Other activity as may be appropriate.

(v) Provision of a report explaining the results of the investigation.

Secretary—The Secretary of the Department.

Superstructure—A large steel or other industrial structure, such as a bridge or water tower which might contain lead-based materials.

Target housing—Housing constructed prior to 1978, or any zero-bedroom dwelling. The term excludes housing for the elderly or persons with disabilities unless a child who is under 6 years of age resides or is expected to reside in the housing.

XRF analyzer—A machine that utilizes X-Ray Fluorescence (XRF) to test for the presence of lead-based paint.

§ 203.2. General administrative requirements.

(a) *Purpose and scope.* This chapter implements the certification, accreditation, work practices and other requirements of the act.

(b) This chapter applies to the following persons:

(1) Persons engaged in lead-based-paint occupations in this Commonwealth.

(2) Persons performing lead-based-paint abatement upon or within a building which they own or occupy who utilize employees to perform lead-based-paint abatement.

(3) Training course providers desiring to provide training courses required for employment in any lead-based-paint-abatement occupations in this Commonwealth.

(c) This subchapter does not relieve any person subject to the act from any duty or responsibility under any other Federal or State statutes or regulations, or local ordinances relating to lead-based-paint abatement.

(d) EPA standards found at 59 FR 45872 (September 2, 1994), to be codified at 40 CFR Part 745, or successor regulations, are incorporated by reference as the standards by which to carry out the provisions of the act.

(e) If the EPA regulations found at 40 CFR Part 745 and the remaining provisions of this chapter conflict, the provisions of this chapter apply.

§ 203.3. Training course accreditation procedures.

(a) *Federal regulations.* Training providers shall meet the EPA training course requirements found at 59 FR 45872 (September 2, 1994), to be codified at 40 CFR Part 745, or successor regulations.

(b) *Accreditation of initial and refresher courses.*

(1) Any person may apply to the Department for approval to conduct training courses, including refresher training courses. Any person desiring to apply as an approved training provider for a specific course shall complete an application prescribed by the Department and submit the completed application with the appropriate fee prescribed by § 203.8 (relating to fees). The application must be received by the Department at least 30 days prior to the first course session. The Department will not process an application which is submitted without the fee or that is incomplete.

(2) A provider requesting accreditation of a training course given outside this Commonwealth shall, in addition to complying with paragraph (1), submit copies of applicable State or Federal approvals, along with the name, address and telephone number of the person, department or agency giving the approval.

(3) The Department will grant conditional accreditation of a training course if it determines that the materials submitted are complete and demonstrate that the course substantially meets the Department's requirements.

(4) The Department will grant final accreditation of a conditionally accredited training course and issue a certificate of accreditation when it has determined from a complete review of application materials that the course meets the Department's requirements, and when a Department representative has observed and satisfactorily evaluated the course in progress.

(5) The Department will inform the provider in writing of its reasons for denying conditional and final accreditation. The Department may schedule a reevaluation at its discretion.

(6) Course accreditation shall be renewed annually in the manner prescribed by paragraph (1).

(c) *Course test.*

(1) A monitored final written examination will be required for all courses unless provided for in this chapter. For students who are unable to take a written examination, the Department may accept an equivalent oral examination.

(2) Training course instructors who provide oral examinations for students who are unable to take a written examination shall issue an answer sheet to be marked by the attendee. The student shall sign the answer sheet,

and it shall become a part of the training course provider's recordkeeping as described in this chapter.

(3) The minimum number of multiple-choice questions for initial lead occupation course examinations shall be as follows:

- (i) 100—Lead-based paint risk assessor.
- (ii) 100—Lead-based paint project designer.
- (iii) 50—Lead-based paint inspector.
- (iv) 100—Lead-based paint supervisor.
- (v) 50—Lead-based paint worker.

(4) The minimum number of multiple choice questions for refresher lead-based-paint-occupation course examinations shall be 25 questions.

(5) A passing grade on the course list is a score of 70% or more.

(d) *Changes to accredited training courses.*

(1) A provider may change an accredited training course only with approval of the Department. The provider shall submit to the Department written notice of the contemplated change at least 10 days before its proposed implementation date. The Department may waive the 10-day requirement for good cause shown.

(2) Changes may include the following:

- (i) Topic covered.
- (ii) Course materials.
- (iii) Training course instructors.
- (iv) Teaching methods.
- (v) Dates and location of scheduled courses.
- (vi) Language in which course is given.

(3) The Department may grant conditional approval of a change pending its detailed evaluation of the change.

(e) *Training course provider requirements.*

(1) The provider shall notify the Department in writing of the scheduled commencement of a course at least 5 days before the first session.

(2) The provider shall cooperate with the Department in all matters relating to the conduct of the course and shall permit representatives of the Department to attend course sessions at no cost. The provider shall make available to the Department, upon request and at no cost, course materials, examinations and records.

(3) The provider shall submit the following information to the third-party testing agency, for each student who has met the qualifications for supervisor, risk assessor or inspector for a training certificate, within 5 days of the successful completion of the course:

- (i) The student's name.
- (ii) The student's address.
- (iii) The student's telephone number, if available.
- (iv) The student's unique identification number.
- (v) The name of the course completed.
- (vi) The date of the course.
- (vii) The course test score.

§ 203.4. Certification procedures and requirements.

(a) *Federal regulations.* Applicants for certification shall meet the EPA certification course requirements

found at 59 FR 45872 (September 2, 1994), to be codified at 40 CFR Part 745, or successor regulations.

(b) *Certification of individuals.* An applicant for certification in a lead-based-paint occupation shall submit a completed application on a form provided by the Department, along with the appropriate fee designated in § 203.8 (relating to fees), and a copy of the training certificate required under EPA regulations. The Department will not process an application that is incomplete or submitted without the proper fee.

(c) *Contractor certification.* Applications for certification of a contractor or firm shall be submitted in the same manner as provided by subsection (b), except that no EPA training certificate is required.

(d) *Proof of certification.*

(1) A person engaged in a lead-based-paint occupation shall possess a Commonwealth-issued photo identification card or Commonwealth notification for a photo identification card. This documentation shall be available at each work site for inspection by the Department.

(2) A person whose photo identification card or Commonwealth notification for a photo identification card is lost or destroyed shall notify the Department in writing within 2 days, and shall maintain a copy of the written notification at the work site until the Department issues a new photo identification card or Commonwealth notification for a photo identification card.

(3) A contractor or firm shall have available on the work site a certificate of approval issued by the Department.

(e) *Renewal.* Certification shall be renewed annually in the same manner as provided in subsections (a) and (b). Photo identification cards and certificates of approval will be issued annually.

(f) *Supervisors.* A certified supervisor may perform the tasks of a worker.

§ 203.5. Denial, suspension or revocation of certification or accreditation.

(a) *Grounds.*

(1) The Department may deny an application for certification or accreditation, and may suspend or revoke a certification or accreditation issued under the act and this chapter for one or more of the following reasons:

(i) Fraudulently or deceptively obtaining or attempting to obtain accreditation or certification.

(ii) Failure to meet the requirements of the act or this chapter.

(iii) Failure to meet applicable Federal or State standards relating to lead-based-paint activities.

(iv) Failure to pay a required fee.

(v) Failure to meet standards for conducting lead-based-paint activities.

(b) *Notice and hearing.*

(1) Actions of the Department related to denial, suspension or revocation will be taken subject to the right of notice, hearing and adjudication in accordance with 2 Pa.C.S. (relating to administrative law and procedure). Hearings will be conducted under 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure).

(2) After hearing, the Department by written order may affirm, reverse or modify the denial, suspension or revocation.

(c) *Administrative proceedings, civil actions and criminal proceedings.* Denial, suspension or revocation of certification or accreditation will not affect or mitigate an administrative proceeding, civil action or criminal proceeding permitted by the act or this chapter or by any other law or regulation.

§ 203.6. Work practices.

(a) Work practices shall conform to current HUD and EPA guidelines, rules and regulations on lead-based-paint activities.

(b) Additional recordkeeping requirements are as follows:

(1) The lead-based-paint contractor shall maintain a list of individuals engaged in lead-based-paint occupations or who enter the lead-based-paint-abatement project area at each job site. The list shall include the following information:

(i) Names.

(ii) Certification identification number.

(iii) Job classification or job title.

(iv) Time in daily.

(v) Time out daily.

(vi) Other information that may be required by the Department.

(2) These records shall be available to the Department upon request.

§ 203.7. Reciprocity.

(a) *Certification of occupations and accreditation of other training programs.*

(1) The Department may enter into reciprocal agreements with other states and jurisdictions which have established accreditation and certification requirements substantially similar to those set forth in the act and this chapter.

(2) The Department will designate, by notice in the *Pennsylvania Bulletin*, states and jurisdictions which have certification and accreditation programs for which the Department has granted reciprocity.

(b) *Procedure and fees.*

(1) A person applying for accreditation under this section shall comply with § 203.3(b) (relating to training course accreditation procedures) and pay the appropriate fee listed in § 203.8 (relating to fees).

(2) A person applying for certification under this section shall comply with § 203.4(b) (relating to certification procedures and requirements) and pay the appropriate fee listed in § 203.8.

§ 203.8. Fees.

(a) *General information.* This section sets out the Department's certification and accreditation fees. Fees shall be remitted by check or money order made payable to the Commonwealth of Pennsylvania. Fees are not refundable.

(b) *Certification fees.* Applicants for certification in lead occupations shall remit the following initial and annual renewal fees:

- (1) Lead-based-paint risk assessor \$300
- (2) Lead-based-paint project designer \$300

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|---------------------------------|-------|
| (3) Lead-based-paint inspector | \$300 |
| (4) Lead-based-paint supervisor | \$100 |
| (5) Lead-based-paint worker | \$ 50 |
| (6) Lead-based-paint contractor | \$500 |

(c) *Training course accreditation fees.* Providers of training courses shall remit the following initial and annual renewal accreditation fees:

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|--|---------|
| (1) Application for each initial training course | \$1,000 |
| (2) Renewal of accreditation for the initial training course | \$ 500 |

(d) *Refresher training course accreditation fees.* Providers of refresher training courses shall remit the following initial accreditation and annual renewal fees:

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|--|--------|
| (1) Accreditation of each refresher lead-based-paint course | \$ 500 |
| (2) Renewal of accreditation for refresher lead-based-paint course | \$ 250 |

(e) *Cumulative fees.* Within any calendar year, cumulative course accreditation fees will not exceed \$5,000 for an individual training provider.

(f) *Waiver of fees.* Accreditation fees will not be imposed on any state, local government or nonprofit training provider. Certification fees will not be imposed on any state, local government or nonprofit training provider, as long as employees actually perform the lead-based-paint activities.

§ 203.9. Enforcement procedures and penalties.

(a) *General rule.* A person may not cause, permit or allow a lead-based-paint activity to be performed in violation of the act or this chapter. A person may not cause, permit or allow the performance of an act or operation in violation of an order issued by the Department under the act or this chapter.

(b) *Violations.* The Department will have the power to issue an order requiring compliance with the act or this chapter.

(1) An order will be served, personally or by certified mail, upon the person being charged with the violation.

(2) In the case of a violation of lead-based-paint work practice standards, a copy of the order will also be served, personally or by certified mail, upon the property owner and a copy shall be posted on the premises.

(c) *Hazardous conditions.* If the Department determines that a hazardous condition exists, the Department may do one or more of the following:

(1) Issue an order to those engaged to cease immediately all lead-based-paint activities until the condition is corrected.

(2) Issue an order to remove any workers except those needed to abate the hazard from the project work area until the condition is corrected to prevent further project activity.

(3) Issue an order to evacuate appropriate portions of the site until the condition is corrected.

(4) Certify the existence of a lead-based-paint hazard that exists due to the failure of a contractor or the contractor's employe to comply with the act, charge the added cost of any corrective cleanup or removal to the contractor responsible for the hazardous condition which exists due to the noncompliance, and collect the cost by lien or other means as may be authorized by law.

(5) Apply to an appropriate court for relief by injunction or restraining order against any person responsible for the hazardous condition.

(d) *Penalties.* In addition to the sanctions or remedial orders provided in this section, a person who fails to comply with a requirement of the act or this section, or who fails to obey an order issued by the Department, may be subject to one or more of the following penalties:

(1) Denial, suspension or revocation of accreditation or certification for a person, training provider or contractor as provided by § 203.5 (relating to denial, suspension or revocation of certification or accreditation).

(2) Administrative penalties of not more than \$1,000 for the first offense, not more than \$5,000 on the second offense and not more than \$10,000 for each subsequent offense. Each day a violation continues to exist shall constitute an additional, separate and distinct violation.

(i) If the violating person is a contractor, in determining the penalty, consideration shall be given to the appropriateness of the penalty to the size of the business of the person charged, taking into account the number of employees employed by that person, the dollar volume of sales or business, the amount of capital investment and financial resources, and other information that may be available relative to the size of the business of the person.

(ii) In determining the penalty, consideration shall be given to the appropriateness of the penalty to the gravity of the violation, taking into account factors, including, any history of prior violation; any evidence of willfulness or failure to take reasonable precautions to prevent violations; and the extent of exposure to hazardous conditions.

(e) *Finality of determination.* An administrative determination of a civil penalty for a violation of the act or this chapter shall become final 15-calendar days after receipt of the notice-of-penalty determination by certified mail by the person so charged, unless the person has filed, with the Department, an exception to the determination that the violation for which the penalty is imposed occurred.

§ 203.10. Contractor notification requirements.

(a) *Notification.*

(1) Lead-based-paint abatement contractors shall notify the Department before engaging in a lead-based-paint abatement project in the manner prescribed by the Department.

(2) Notification shall be postmarked or hand delivered to the Department at least 5-business days prior to the project start date.

(3) In the case of an emergency project, verbal notification shall be given immediately to the Department and written notification shall be provided to the Department within 1 business day of the emergency. Notification by fax in emergencies is acceptable if followed by original written and signed notification.

(b) *Contents of the notification.* The notification shall contain, at a minimum, the following information:

(1) The name, address and certification number of the contractor.

(2) The name and address of the lead-based-paint abatement project and the political subdivision where it is located.

(3) The name and address of the building owner.

(4) The name and address of the landfill where the lead will be sent for disposal.

(5) The estimated start and the completion date of the project.

(6) The anticipated number of certified persons to be used at the work site.

(7) A copy of Model OSHA Written Compliance Plan, Form 9.1, filed with OSHA for the project.

(c) *Changes to notification.*

(1) If there is a change in any of the information provided on the notification form, the contractor shall immediately notify the Department of the changes in the manner provided in subsection (a)(3), provided that:

(i) In the case of a postponement of the start date, the contractor shall provide the Department with immediate verbal notification and shall submit written confirmation of the postponement within 1 business day before the original start date.

(ii) In the case of an advancement of the start date, the contractor shall provide the Department with written notification of the advancement at least 5 business days prior to the new start date.

(iii) Notification by fax is acceptable if followed by the original written and signed notification.

(2) Notification to the Department does not relieve the lead-based-paint contractor of the responsibility for making written notification as may be required by a municipality, agency of the Commonwealth or agency of the Federal government.

[Pa.B. Doc. No. 96-395. Filed for public inspection March 15, 1996, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 127]

General Conformity

The Environmental Quality Board (EQB) proposes to add Chapter 127, Subchapter J (relating to general conformity) to read as set forth in Annex A. The proposed regulations will adopt by reference the General Conformity Rule (rule) promulgated by the United States Environmental Protection Agency (EPA) under section 176(c) of the Federal Clean Air Act Amendments of 1990 (CAA). The regulations are contained in 40 CFR Part 93, Subpart B (relating to determining conformity of general Federal actions to state or Federal implementation plans) with respect to the conformity of general Federal actions to the Commonwealth's State Implementation Plan (SIP).

The EQB approved the proposed rulemaking at its January 16, 1996, meeting.

A. *Effective Date*

These proposed regulations will go into effect immediately upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. *Contact Persons*

For further information, contact J. Wick Havens, Chief, Division of Air Resource Management, Bureau of Air Quality, Rachel Carson State Office Building, 12th Floor,

P. O. Box 8468, Harrisburg, PA 17105-8468, telephone: (717) 787-4310; or Joyce Epps, Assistant Counsel, Bureau of Regulatory Counsel, Rachel Carson State Office Building, 9th Floor, P. O. Box 8464, Harrisburg, PA 17105-8464, telephone: (717) 787-7060.

Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposal is available through the Department of Environmental Protection's (Department) Web site (<http://www.dep.state.pa.us>).

For further information regarding public comments and hearings, see Section I of this Preamble.

C. *Statutory Authority*

This proposal is being made under section 5 of the authority of the Air Pollution Control Act (35 P.S. § 4005) which grants to the EQB the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth.

D. *Background*

The purpose of this proposal is to ensure that Federal actions do not adversely affect the timely attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) or emission reduction plans leading to attainment. The intent of integrating Federal actions with air quality planning is to protect this Commonwealth's air quality by helping to ensure that SIP growth projections are not exceeded, emission reduction targets are achieved and air quality attainment and maintenance efforts are not undermined. Adoption of these proposed regulations will not impact any existing Commonwealth air quality regulations.

The proposed regulations will place additional requirements on Federal agencies taking action within this Commonwealth which is covered by the rule. The rule places responsibility on the Federal agency to perform a conformity determination and to make the determination available for public review. The conformity determination examines direct and indirect emissions of regulated air pollutants resulting from the Federal actions. Conformity with the applicable SIP must be determined prior to initiating the action.

Examples of Federal actions requiring conformity determinations include:

- leasing of Federal land
- airport construction/modification grants
- private construction on Federal land
- construction of Federal office buildings
- prescribed burning
- reuse of military bases
- water treatment plants

E. *Summary and Purpose of Proposed Regulations*

Federal promulgation of these proposed regulations is required by section 176(c) of the CAA. The Commonwealth is required by section 51.851 of the rule to submit to the EPA by November 30, 1994, a revision to the air quality SIP, which establishes conformity criteria and procedures consistent with the rule. The Department is proposing to incorporate the rule by reference.

Under these proposed regulations and the underlying Federal regulations, departments, agencies or instrumentalities of the Federal government are not permitted to

engage in, support in any way or provide financial assistance for, or issue a license or permit, or approve an activity which does not conform to Pennsylvania's air quality SIP. Prior to taking any action, a determination that the proposed Federal action conforms to the air quality SIP must be made by the Federal agency in accordance with the policy, criteria and procedures contained in the EPA regulation.

The general conformity rule covers direct and indirect emissions of criteria pollutants or their precursors that are caused by a Federal action, are reasonably foreseeable and can practically be controlled by the Federal agency through its continuing program responsibility. Criteria pollutants are carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO₂), ozone, particulate matter (PM-10) and sulfur dioxide (SO₂). The criteria and procedures established in the rule apply only in areas that are nonattainment or maintenance with respect to any of these criteria pollutants.

F. *Benefits and Costs*

Executive Order 1982-2 requires a statement of the benefits of a proposed rulemaking, as well as the costs which may be imposed. It also requires a statement of the need for, and a description of, any forms, reports or other paperwork required as a result of the proposed regulations.

Emission Impact

The proposed regulations will not change the emission impact of the existing air quality regulations. The current regulations are intended to achieve or maintain the Federal NAAQS for the general conformity criteria pollutants CO, Pb, NO₂, ozone, PM-10 and SO₂.

Environmental Impact

The proposed regulations are intended to prevent environmental degradation by Federal actions. The proposed regulations require consistent planning between the different programs. These proposed regulations will require Federal agencies to ensure that the Commonwealth's air quality is protected. The function of the air quality SIP is to bring the noncomplying areas into compliance with the Federal NAAQS and to maintain compliance once it is established.

Impact on Regulated Industry

The proposed regulations will affect departments, agencies or instrumentalities of the Federal government that engage in, support in any way or provide financial assistance for, license or permit or approve any activity which does not conform to the Commonwealth's SIP. An appropriate conformity study is required prior to the planned Federal activity.

Cost to the Commonwealth

The proposed regulations will not affect costs to the Commonwealth. Regional offices presently review the types of environmental impact statements that these proposed regulations will require.

Cost to Local Government

The proposed regulations will not impose additional costs on local governments.

Cost to General Public

The proposed regulations will not impose additional costs on the general public.

Paperwork Requirements

The proposed regulations require affected actions to include SIP planning methods and goals in evaluation of the environmental impact. The proposed regulations should not affect present paperwork requirements. Presently, environmental assessments are required of major activities that may adversely affect Pennsylvania's air quality. These proposed regulations will direct Federally influenced activities to explicitly include Pennsylvania SIP planning and goals in the assessment.

G. *Sunset Date*

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which it was intended.

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of these proposed regulations on March 5, 1996, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees. In addition to submitting the proposed regulations, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1982-2, "Improving Government Regulations." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed regulations, it will notify the Department within 30 days of the close of the public comment period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the proposed regulations, by the Department, the General Assembly and the Governor of objections raised.

I. *Public Comments*

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed regulations to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477. Comments received by facsimile will not be accepted. Comments must be received by May 22, 1996. In addition to the written comments, interested persons may also submit a summary of their comments to the EQB. The summary may not exceed 1 page in length and must also be received by May 22, 1996. The summary will be provided to each member of the EQB in the agenda packet distributed prior to the meeting at which the final regulations will be considered. Comments may be submitted electronically to the EQB at RegComments@A1.dep.state.pa.us. The subject heading of the proposal and a return name and address must be included in each transaction. Comments submitted electronically must also be received by the EQB by May 22, 1996.

J. *Public Hearings*

The EQB will hold three public hearings for the purpose of accepting comments on the proposed regulations. The hearings will be held at 1 p.m. as follows:

April 15, 1996 Department of Environmental Protection
Southwest Regional Office
400 Waterfront Drive
Pittsburgh, PA

April 17, 1996 Department of Environmental Protection
1st Floor Meeting Room
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA

April 22, 1996 Department of Environmental Protection
Southeast Regional Office
Suite 6010, Lee Park
555 North Lane
Conshohocken, PA

Persons wishing to present testimony at the hearings should contact Sharon Freeman at the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477, telephone: (717) 787-4526, at least 1 week in advance of the hearing to reserve a time to present testimony. Oral testimony will be limited to 10 minutes for each witness, and three written copies of the oral testimony must be submitted at the hearing. Each organization is requested to designate one witness to present testimony on its behalf.

Persons with a disability who wish to attend a hearing, and require an auxiliary aid, service or other accommodation to participate in the proceeding, should contact Sharon Freeman at the address and telephone number listed in this section; or for TDD users, the AT&T Relay Service at (800) 654-5984 to discuss how the Department can best accommodate their needs.

JAMES M. SEIF,
Chairperson

Fiscal Note: 7-295. No fiscal impact; (8) recommends adoption.

(Editor's Note: The following subchapter is new. It has been printed in regular type to enhance readability.)

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE III. AIR RESOURCES

CHAPTER 127. CONSTRUCTION, MODIFICATION, REACTIVATION AND OPERATION OF SOURCES

Subchapter J. GENERAL CONFORMITY

Sec.
127.801. Purpose.
127.802. Adoption of standards.

§ 127.801. Purpose.

This subchapter adopts the general conformity rule promulgated by the EPA under section 176(c) of the Clean Air Act (42 U.S.C.A. § 7506(c)) and the regulations codified at 40 CFR Part 93, Subpart B (relating to determining conformity of general Federal actions to state or Federal implementation plans), with respect to the conformity of general Federal actions to the Commonwealth's State Implementation Plan.

§ 127.802. Adoption of standards.

The general conformity rule promulgated in 40 CFR Part 93, Subpart B (relating to determining conformity of general Federal actions to state or Federal implementation plans), by the Administrator of the EPA under section 176(c) of the Clean Air Act (42 U.S.C.A. § 7506(c))

is adopted in its entirety by the Department and incorporated herein by reference.

[Pa.B. Doc. No. 96-396. Filed for public inspection March 15, 1996, 9:00 a.m.]

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

[34 PA. CODE CH. 101]

General Requirements

The Unemployment Compensation Board of Review (Board), under the authority contained in sections 203 and 505 of the Unemployment Compensation Law (law) (43 P. S. §§ 763(d) and 825) proposes these amendments to replace Chapter 101, Subchapter E (relating to telephone hearings). The proposed amendments provide guidelines and standards for scheduling and conducting appeal hearings in whole, or in part, by telephone.

Purpose of Proposed Rulemaking

The former regulations governing hearings conducted by telephone sunsetted on April 8, 1994, but telephone hearings continued to be conducted when all parties agreed to be bound by the expired regulations. In addition to the former regulations having sunsetted, minor problems of interpretation were noted. These problems of interpretation stemmed primarily from minor ambiguities in the regulations which occasionally caused difficulty in application for the parties or the tribunal. The proposed telephone regulations are designed to address these problems by providing clarification, conforming to the *Pennsylvania Code & Bulletin Style Manual*, 3rd Edition, and, primarily, improve organization in order to ensure that telephone hearings are conducted in a uniform manner. The ultimate purpose is to provide fundamental fairness to all parties involved in the appeal process.

Explanation of Proposed Regulations

Subchapter E governs telephone hearings. This subchapter was rescinded on April 8, 1994, under the sunset date provided in former § 101.126(b). The following reinstates the sunsetted regulations as revised. Most of the revisions involve reorganization or rewording for clarity. The proposed amendments have also been given new section numbers for organizational purposes.

§§ 101.121—101.126 (Reserved). This is proposed to be deleted in order to show the history of the telephone regulations.

Proposed § 101.127(a) (relating to purpose and scope) sets forth the purpose of the telephone hearing regulations. This is similar to sunsetted § 101.121.

Proposed § 101.127(b) sets forth the scope of the telephone regulations. This is similar to sunsetted § 101.125(e) and has been placed here for organizational purposes. It has been reworded to promote clarity without changing the meaning.

Proposed § 101.128(a) (relating to scheduling of telephone testimony) provides that a party or witness located at least 50 miles from the hearing site may testify by telephone. This will eliminate problems involving fractional miles and clarify the intent of the regulation that

50 miles distance, in itself, is sufficient to allow telephone testimony. This is similar to sunsetted § 101.122(a) and has been reworded for clarity and style only.

Proposed § 101.128(b) provides the reasons for which telephone testimony can be scheduled upon request of a party or witness. This is similar to sunsetted § 101.122(b) and has been reworded for clarity and style only.

Proposed § 101.128(c) provides that a party or witness identified prior to the taking of testimony may testify by telephone. This change from sunsetted § 101.122(c) was made so that all sections relating to the scheduling of witnesses and taking of testimony are in conformity.

Proposed § 101.128(d) requires that the tribunal promptly rule on a request that testimony be taken by telephone and that the ruling will be documented on the record. This proposed section is the same as sunsetted § 101.122(d).

Proposed § 101.128(e) provides that a party or witness scheduled to testify by telephone will be permitted to testify in person. This proposed section is the same as sunsetted § 101.122(e).

Proposed § 101.129(a) (relating to procedures subsequent to scheduling) provides guidance to the tribunal if a party moves to withdraw consent to the receipt of telephone testimony. This proposed section is essentially the same as sunsetted § 101.123(a) with minor word changes for clarity and style.

Proposed § 101.129(b) provides how and when an objection to the receipt of telephone testimony can be made. This proposed section is the same as sunsetted § 101.123(b).

Proposed § 101.129(c) provides that the tribunal will promptly rule on objections to testimony to be received by telephone and that the ruling will be documented on the record. This proposed section is the same as sunsetted § 101.123(c).

Proposed § 101.130(a) (relating to notice of testimony by telephone and use of documents) provides that notices of telephone hearings will be mailed to parties and their counsel or authorized agents, if known. The hearing notice will indicate the time of hearing in all relevant time zones and, if known, the names of counsel, authorized agents, parties, and witnesses that are scheduled to provide telephone testimony or representation. The purpose is to assure that all known counsel or authorized agents receive notice and that any confusion concerning the time a party or witness will be called to testify by telephone will be eliminated. Also, listing the names of counsel, and the like, if known, gives parties notice of participants, but does not preclude witnesses or representation as provided for in proposed § 101.131(f). This proposed section is a hybrid of sunsetted § 101.124(a) and (b). Any changes are for purposes of organization and clarity.

Proposed § 101.130(b) requires that a copy of the telephone hearing regulations be sent with the notice of telephone hearing and that, if a copy is not sent, any testimony and evidence taken at the hearing may be excluded from consideration and a new hearing scheduled in compliance with the regulations. By providing that copies of the telephone regulations are sent to all parties before the hearing, or that testimony taken may be excluded and a new hearing scheduled, it will be ensured that all parties are aware of their rights during a telephone hearing. In the past, copies of the regulations have not always been provided and, as a result, parties

have sometimes given uninformed consent to waiving their rights. This proposed section is similar to sunsetted § 101.124(b).

Proposed § 101.130(c) provides that a party intending to testify by telephone or offer testimony of witnesses by telephone shall, before the start of the hearing, provide the tribunal with the name, location and telephone number of those persons who will testify by telephone. This proposed section was part of sunsetted § 101.124(c).

Proposed § 101.130(d) requires that the tribunal send to all parties in advance of the hearing all documents relied upon by the job center, whether the party is appearing in person or testifying by telephone. Fairness dictates that all parties have comparable time and opportunity to review the documents in preparation for the hearing. This is similar to the sunsetted § 101.124(f).

Proposed § 101.130(e) provides that if any testimony or evidence is to be given or taken from or with the aid of a document or writing, the document or writing must be delivered to the tribunal for distribution before the hearing or before testimony is taken. Under sunsetted § 101.124(d), this section was interpreted to allow the party appearing in person the opportunity to use documents that had not been distributed to the party or witnesses testifying by telephone. This practice violated the right of the party testifying by telephone to a fair hearing by denying that party the opportunity to examine the documents to determine authenticity and accuracy. The proposed section will assure fundamental fairness to all parties by ensuring that all documents are distributed to all parties before the testimony begins.

Proposed § 101.131(a) requires that all parties be advised of the right to object to testimony by telephone.

Proposed § 101.131(b) (relating to conduct of a telephone hearing) provides that any party may object to telephone testimony at the hearing and, if so, shall state the reasons why; and provides direction to the tribunal when such an objection is made. This proposed section is similar to sunsetted § 101.123(d) and has been revised for clarification purposes only.

Proposed § 101.131(c) requires that, at the beginning of the hearing, the tribunal will state on the record the time and telephone number at which the tribunal initiates contact with any party, witness or counsel who is testifying by telephone. This new section is designed to create a clear record of the attempt by the tribunal to complete the telephone contact and thus alleviate the problems resulting from contacting parties in different time zones, when hearings begin late, or incorrect numbers have been given to or dialed by the tribunal. The expected effect will be a decrease in the number of remand hearings necessary due to parties alleging that they were available for the hearing, but did not receive a call from the tribunal.

Proposed § 101.131(d) requires that the tribunal tape record and preserve the telephone hearing record and so advise all parties and witnesses. Anyone has the right to refuse to have their testimony recorded. If anyone refuses to have their testimony tape recorded, the tribunal will provide for stenographic recording of testimony. This is consistent with the right of anyone to refuse to have their testimony tape recorded. The proposed requirement that the tribunal be advised of the objection to tape recording in advance of the hearing is to allow the tribunal sufficient time to make alternate arrangements for stenographic recording of testimony. This is similar to sunsetted § 101.125(a).

Proposed § 101.131(e) requires that the tribunal allow parties a reasonable opportunity to question any party or witness testifying by telephone for the purpose of verifying the identity of party or witness. This proposed section is similar to sunsetted § 101.125(b).

Proposed § 101.131(f) provides that any party or witness not identified in advance of or at the beginning of the telephone hearing, prior to the taking of any testimony, may not testify by telephone. Testimony taken or given in violation of this provision will be excluded from consideration by the tribunal. This section informs all parties of the consequences of prohibited testimony and gives the reviewing bodies clear direction concerning how to treat prohibited testimony. This is similar to sunsetted § 101.124(c).

Proposed § 101.131(g) provides that no person may prompt or direct the testimony of a witness testifying by telephone, and that testimony taken in violation of this provision will be excluded. This proposed section is similar to sunsetted § 101.125(c) and changes are for purposes of clarity only.

Proposed § 101.131(h) provides that a document or writing not provided as required by § 101.130(e) will not be admitted and testimony given or taken from it will not be considered unless consent to consider the testimony and document has been requested from and given by all parties. Testimony in violation of this subsection will be excluded. This change is proposed for the same reasons cited in proposed § 101.131(f). This proposed section is similar to sunsetted § 101.125(c).

Proposed § 101.131(i) provides for the administering of a special oath for witnesses and parties testifying by telephone. The special oath is to emphasize the restrictions on anyone testifying by telephone and to help ensure that they will comply with the restrictions concerning the use of documents and the prohibition against improper prompting and directing during the hearing by any other person.

Proposed § 101.132 (relating to presentation by telephone) provides that a party's counsel or authorized agent may provide representation by telephone at any time, but may provide testimony only if the criteria of § 101.128(a) and (b) are met. The purpose is to enhance the right of all parties to obtain counsel or representation of their choice. Because representatives do not usually give testimony, there are no due process issues involved in this provision. Telephone representation alone will not trigger the telephone regulations because proposed § 101.127 speaks only to telephone testimony by parties and witnesses. If a representative will give testimony, the requirements set forth in § 101.128(a) and (b) must be met, and the telephone regulations will be triggered.

Who is affected by the Proposed Amendments

Unemployment compensation claimants, employers and their respective representatives (attorneys, paralegals, union representatives, tax consultants, and the like), and witnesses who participate in appeal hearings where testimony or representation will occur by telephone will be affected. Telephone hearings constitute approximately 6.5% of all hearings conducted.

The proposed amendments will ensure that parties involved in a hearing where testimony is received by telephone have a fair hearing. Most proposed changes from the former telephone hearing regulations involve relocation of sections for clarity, or rewording for clarity or style.

Cost and paperwork requirement

There will be negligible cost to the agency to revise the existing regulations and a small number of forms. There will be no costs to local government, the private sector or the general public. Parties who appear by telephone can potentially save money in travel costs and time because their presence at a central location will not always be required.

Sunset date

The effectiveness of the additions to Chapter 101 will be reviewed periodically by the Board. Thus, no sunset date is necessary.

Contact Persons

The contact persons are Clifford F. Blaze, Esq., (717) 783-1232 or Linda S. Lloyd, Esq., (717) 787-8510, Room 1623 Labor and Industry Building, Seventh and Forster Streets, Harrisburg, PA 17121.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted a copy of these proposed amendments on March 1, 1996, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Committees. In addition to submitting the proposed amendments, the Board provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Board in compliance with Executive Order 1982-2, "Improving Government Regulations." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed amendments, it will notify the Board within 30 days of the close of the public comment period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review by the Board, the General Assembly and the Governor of objections raised, prior to final publication of the proposed amendments.

WILLIAM A. HAWKINS,
Chairperson

Fiscal Note: 12-43. (1) Labor & Industry Administration Fund; (2) Implementing year is 1994-95 \$Negligible; (3) 1st succeeding year is 1995-96 \$Negligible; 2nd succeeding year is 1996-97 \$Negligible; 3rd succeeding year is 1997-98 \$Negligible; 4th succeeding year is 1998-99 \$Negligible; 5th succeeding year is 1999-00 \$Negligible; (4) FY ____ \$ N/A; FY ____ \$ NA; FY ____ \$ N/A; (8) recommends adoption.

Annex A

**TITLE 34. LABOR AND INDUSTRY
PART VI. UNEMPLOYMENT COMPENSATION
CHAPTER 101. GENERAL REQUIREMENTS
Subchapter E. TELEPHONE HEARINGS**

(Editor's Note: As part of this proposal, the Board is proposing to delete the existing text of §§ 101.121—101.126, which appears at 34 Pa. Code pages 101-41—101-45, serial pages (207529)—(207533).)

Sec.	
101.121—101.126.	(Reserved).
101.127.	Purpose and scope.
101.128.	Scheduling of telephone testimony.
101.129.	Procedures subsequent to scheduling.
101.130.	Notice of testimony by telephone and use of documents.

- 101.131. Conduct of a telephone hearing.
 101.132. Representation by telephone.

(*Editor's Note:* The following sections are new. They have been printed in regular type to enhance readability.)

§ 101.127. Purpose and scope.

(a) In-person testimony is normally preferable to testimony by telephone; however, there can be reasons to justify receiving testimony by telephone. This subchapter is promulgated to provide the conditions under which testimony by telephone will be scheduled and received, to safeguard the due process rights of the parties, and to ensure that testimony by telephone is received under uniformly applied rules. Testimony by telephone may be received only if specifically authorized by this subchapter.

(b) When the general rules of this chapter conflict with the provisions of this subchapter, the provisions of this subchapter control.

§ 101.128. Scheduling of telephone testimony.

(a) The tribunal may schedule, on its own motion, testimony by telephone of a party or witness when it appears from the record that the party or witness is located at least 50 miles from the location at which the tribunal will conduct the hearing.

(b) The tribunal may schedule testimony by telephone of a party or witness, at the request of one or more parties, when one of the following applies:

(1) The parties consent to the receipt of testimony by telephone.

(2) The party or witness is reasonably unable to testify in person because of compelling reasons, such as employment, transportation or medical problems.

(c) Only a party or witness scheduled to testify by telephone, or identified prior to the taking of testimony in accordance with § 101.131(f) (relating to conduct of a telephone hearing), may testify, and the testimony of each other party or witness shall be received in person.

(d) The tribunal will promptly rule on a request that testimony be taken by telephone after a reasonable attempt to obtain the positions of other parties. The basis for the request, the position of other parties, if known, and the ruling will be documented on the record.

(e) A party or witness scheduled to testify by telephone will be permitted to testify in person.

§ 101.129. Procedures subsequent to scheduling.

(a) If a party moves to withdraw consent to the receipt of testimony by telephone prior to the taking of testimony, the tribunal will allow the withdrawal if it is found that the consent was not freely and knowingly given.

(b) An objection to the receipt of testimony by telephone shall set forth the reasons in support thereof and shall be promptly communicated to the tribunal, but may not be asserted subsequent to the taking of testimony.

(c) The tribunal will promptly rule on objections to testimony by telephone after a reasonable attempt to obtain the position of the other party. The basis for the objection, the position of the other party, if known, and the ruling will be documented on the record.

§ 101.130. Notice of testimony by telephone and use of documents.

(a) When testimony by telephone is to be taken, the tribunal will mail the notice of a hearing to the parties

and, if known, to their counsel or authorized agent at least 14 days in advance of the hearing. The hearing notice will indicate:

(1) The time of the hearing in all relevant time zones.

(2) The names of counsel, authorized agent, parties and witnesses, if known, who are scheduled to appear or testify by telephone.

(b) When testimony by telephone is to be taken, the tribunal will send a copy of this subchapter with the notice of hearing. If a copy of this subchapter has not been provided to the parties or their counsel or authorized agent in advance of the hearing, testimony and evidence given or taken at the hearing may be excluded from consideration, and a new hearing in compliance with this chapter will be scheduled.

(c) A party intending to testify, to offer the testimony of witnesses or to be represented by telephone, shall, in advance of the beginning of the hearing, supply the tribunal with the name, location and telephone number of the persons who will so appear.

(d) When scheduling a telephone hearing, the tribunal will enclose with the notice of hearing copies of the documents upon which the initial determination was based. These copies will accompany the notices of hearing to all parties.

(e) When testimony or evidence will be given or taken from or with the aid of a document or writing, the document or writing shall be delivered to the tribunal and distributed by the tribunal to each other party and, if known, counsel or authorized agent before or at the beginning of the testimony. The tribunal may request that the documents or writings be delivered up to 5 days in advance of the hearing. See § 101.131(h) (relating to conduct of a telephone hearing).

§ 101.131. Conduct of a telephone hearing.

(a) Before testimony is received, the tribunal will advise all parties of the right to object to telephone testimony and to request an in-person hearing in compliance with Subchapter B (relating to provisions governing hearings before the Department or referee).

(b) A party may pursue an objection to telephone testimony at the hearing and shall set forth reasons in support thereof. If the objection is sustained, the tribunal will reschedule the hearing at a later date, either in person or by telephone, in accordance with Subchapter B or this subchapter. If the objection is not sustained, the tribunal may proceed with the hearing.

(c) At the start of the hearing, the tribunal will state on the record the time and telephone numbers at which the tribunal initiates the contact with any party, witness, legal counsel or authorized agent who is to testify or appear by telephone.

(d) The proceedings of the hearing will be tape recorded to preserve the record. A person testifying or appearing by telephone will be advised by the tribunal that the proceedings are being tape recorded. A person has the right to refuse to have their telephone testimony tape recorded. Persons who so object shall advise the tribunal in advance of the hearing, and state the basis for their objection. The tribunal will promptly rule on the objection and will document on the record both the basis for the objection and the ruling. If the tribunal sustains the objection, the tribunal will provide for stenographic recording of the testimony.

(e) The tribunal will permit parties a reasonable opportunity to question other parties or witnesses testifying by telephone for the purpose of verifying the identity of the parties or witnesses. Falsification of identity may subject the parties or witnesses to prosecution and punishment.

(f) A party or witness not identified to the tribunal and all other parties before the beginning of the testimony will not be permitted to testify by telephone. Testimony taken or given in violation of this subsection will be excluded from consideration.

(g) A person may not prompt or direct the testimony of a witness testifying by telephone. Testimony taken or given in violation of this subsection shall be subject to objection and will be excluded from consideration by the tribunal.

(h) A document or writing not provided as required by § 101.130(e) (relating to notice of testimony by telephone and use of documents) may not be admitted nor testimony given or taken from it unless consent has been requested

from and given by all parties. Testimony taken or given in violation of this subsection will be excluded from consideration.

(i) All parties or witnesses testifying by telephone shall take a special oath, administered by the tribunal at the start of the hearing, that they will comply with the restrictions on documents and writings, and that their testimony will not be prompted or directed during the hearing by any other person.

§ 101.132. Representation by telephone.

The counsel or authorized agent of a party may provide representation at a hearing by telephone, but may not provide testimony unless the representative meets the criteria in § 101.128(a) or (b) (relating to scheduling of telephone testimony).

[Pa.B. Doc. No. 96-397. Filed for public inspection March 15, 1996, 9:00 a.m.]