RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 78—80]

Oil and Gas

The Environmental Quality Board (Board) by this order amends Chapters 78—80 (relating to oil and gas wells; oil and gas conservation; and gas well classification). The amendments to Chapter 78 simplify notification and reporting requirements, clarify requirements for the discharge to land surface of tophole water, and clarify surface casing and cementing procedures. The amendment to Chapter 79 provides consistency with the requirements of Chapter 78. Chapter 80 is deleted since the gas well classification program under the Federal Natural Gas Policy Act of 1978 has been terminated.

This order was adopted by the Board at its meeting of December 16, 1997.

A. *Effective Date*

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

B. *Contact Persons*

For further information contact James E. Erb, Director, Bureau of Oil and Gas Management, P. O. Box 8765, Rachel Carson State Office Building, Harrisburg, PA 17105-8765, (717) 772-2199, or Kurt Klapkowski, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (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 final rulemaking is available electronically through the Department of Environmental Protection's (Department) Web site (http://www.dep.state.pa.us).

C. *Statutory Authority*

The final rulemaking is being made under the authority of section 604 of the Oil and Gas Act (58 P. S. § 601.104), which directs the Board to adopt regulations; section 5 of the Oil and Gas Conservation Law (58 P. S. § 405), which authorizes the Department to promulgate and enforce rules and regulations to effectuate the purposes and intent of that act; section 105 of the Solid Waste Management Act (35 P. S. § 6018.105), which requires the Board to adopt rules and regulations; section 5 of The Clean Streams Law (35 P. S. § 691.5), which authorizes the Department to adopt rules and regulations; and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20) which authorizes the Board to adopt regulations necessary for the Department to perform its work.

D. *Background and Purpose*

This final rulemaking is a result of the Department's Regulatory Basics Initiative. The Regulatory Basics Initiative was announced in August 1995 as an overall review of the Department's regulations and policies. The Department solicited public comments in August of 1995 by giving the regulated community, local governments, environmental interests and the general public the opportunity to identify specific regulations and guidance which were either more stringent than Federal standards, served as barriers to innovation, were obsolete or unnecessary, which imposed costs beyond reasonable environmental benefits, or served as barriers to adopting new environmental technologies, recycling and pollution prevention.

In February, 1996, the Governor executed Executive Order 1996-1 Regulatory Review and Promulgation establishing standards for the development and promulgation of regulations. This final rulemaking meets the requirements of Executive Order 1996-1.

As a result of the request for public comments under the Regulatory Basics Initiative, six commentators submitted 40 comments on the proposed amendments pertaining to the Oil and Gas Program. The Department prepared a comment and response document responding to all comments received. Those comments, plus internal staff review of the regulations, resulted in proposed amendments which were approved by the Board as proposed rulemaking on March 18, 1997.

The proposed rulemaking was published in the *Pennsylvania Bulletin* for public comment on May 3, 1997. The public comment period concluded on June 2, 1997. As discussed in more detail in Section E to this Preamble, the Board received one comment from two commentators. There were no public meetings or hearings.

This final rulemaking has been reviewed by the Oil and Gas Technical Advisory Board (Board) at its July 14, 1997, meeting. The Board developed a written report containing comments at that meeting. That report was presented to the Board as part of the final regulatory package.

E. *Summary of Comments and Responses on the Proposed Rulemaking*

There was only one comment submitted on the proposed amendments during the public comment period. This comment, received from the Pennsylvania Oil and Gas Association (POGAM) and the Independent Regulatory Review Commission (IRRC), related to the proposal to require a vent when plugging a well in a coal area with cement from total depth to the surface. POGAM and IRRC commented that the venting requirements are inconsistent with the general plugging requirements, and that if a well is properly cemented from total depth to the surface, downhole conditions that necessitate the installation of a vent for safety purposes are not present. Upon reconsideration and discussion with the Board, the Department concurred with the comment and retained the existing language in § 78.91(h) (relating to general provisions).

F. *Benefits, Costs and Compliance*

Executive Order 1996-1 requires a cost/benefit analysis of the amendments.

Benefits

The amendments will benefit oil and gas operators by reducing reporting requirements, clarifying technical requirements pertaining to casing and cementing procedures and plugging procedures, providing standards for oil spill prevention that are consistent with Federal requirements, and eliminating outdated and obsolete requirements.

Compliance Cost

The amendments impose no additional compliance costs on the oil and gas operator. The changes to the reporting requirements should decrease compliance costs to oil and gas operators by $12,500 per year. The Department's costs of administering and enforcing these requirements will not change significantly.

Paperwork Requirements

The amendments will not result in additional forms or reports. Since reports of predrilling surveys and annual monitoring reports for disposal or enhanced recovery wells will only be submitted upon request of the Department, paperwork requirements are being reduced.

G. *Sunset Review*

These final-form 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 they were 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 amendments on April 21, 1997, to IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In compliance with section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments, as well as other related documents.

In preparing these final-form regulations, the Department has considered the comments received from IRRC and the public. These comments are addressed in the comment and response document and Section E of this Preamble. The Committees did not provide comments on the proposed rulemaking.

These final-form regulations were deemed approved by the House and Environmental Resources and Energy Committees on January 27, 1998. IRRC met on February 13, 1998, and deemed approved the final-form regulations in accordance with section 5(c) of the Regulatory Review Act.

I. *Findings of the Board*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) These final-form regulations do not enlarge the purpose of the proposal published at 27 Pa.B. 2126 (May 3, 1997).

(4) These final-form regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

J. *Order*

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code. Chapters 78—80, are amended by amending §§ 78.14, 78.52, 78.60, 78.83, 78.123, 78.125 and 79.15; and by deleting §§ 80.1, 80.11, 80.12, 80.21—80.26 and 80.31—80.34 to read as set forth at 27 Pa.B. 2126.

(b) The Chairperson of the Board shall submit this order and 27 Pa.B. 2126 to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson shall submit this order and 27 Pa.B. 2126 to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and 27 Pa.B. 2126 and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately.

JAMES M. SEIF
Chairperson

(*Editor's Note*: The proposal to amend § 78.91(h) included with the proposed amendments of the Board at 27 Pa.B. 2126 has been withdrawn.)

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 1185 (February 28, 1998).)

Fiscal Note: Fiscal Note 7-318 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 98-372. Filed for public inspection March 6, 1998, 9:00 a.m.]

Title 31—INSURANCE

INSURANCE DEPARTMENT

[31 PA. CODE CH. 113]

Mass Merchandising of Property and Casualty Insurance

The Insurance Department (Department) hereby deletes §§ 113.51—113.62 (relating to mass merchandising of property and casualty insurance) under the authority of sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412). These regulations were previously promulgated under sections 601 and 621 of The Insurance Department Act of 1921 (40 P. S. §§ 231 and 251); section 354 of The Insurance Company Law of 1921 (40 P. S. § 477b); The Fire, Marine and Inland Marine Rate Regulatory Act (40 P. S. §§ 1221—1238); and The Casualty and Surety Rate Regulatory Act (40 P. S. §§ 1181—1199).

Purpose

The purpose of the deletion of §§ 113.51—113.62, is to eliminate redundant regulations. Adopted in 1971, the regulations were prescribed to prevent abuses in the mass merchandising of property and casualty insurance. The regulations imposed requirements on insurance companies licensed to do business in this Commonwealth, and on their agents, where mass merchandising is used as a method of selling. The regulations required the Department's approval of rates and policies prior to the sale of insurance policies, and required the licensure of agents who sell the policies. The regulations also prohibited specific sales practices. In addition, the regulations required the insurer to give notice to the insured prior to cancellation for nonpayment of premiums, to provide assistance in obtaining other insurance to individuals who are denied insurance under the mass merchandising plan and to maintain statistics. The regulations are no

longer necessary because their requirements merely repeat or duplicate present statutory requirements and are unduly burdensome.

Specifically, these regulations duplicate existing authorities governing the filing of insurance rates and policy forms. The Department has statutory authority to review property and casualty policy rates prior to use under The Fire, Marine and Inland Marine Rate Regulatory Act and The Casualty and Surety Rate Regulatory Act. The Department also has the existing authority to review property and casualty policy forms prior to use under section 354 of The Insurance Company Law of 1921. These regulations also repeat the requirement of agent and broker licensure provided under sections 601 and 621, respectively, of The Insurance Department Act.

Further, the attempt to prevent specific abuses in the mass merchandising of property and casualty insurance is no longer necessary, since the statutory authority to regulate unfair practices in the business of insurance exists under the Unfair Insurance Practices Act (UIPA) (40 P. S. §§ 1171.1—1171.15). The requirement of providing written notice to the insured prior to cancellation for nonpayment of premiums exists under the act of June 5, 1968 (P. L. 140, No. 78) (40 P. S. §§ 1008.1—1008.11) known as Act 78 (relating to the cancellation and nonrenewal of private passenger automobile insurance), the act of July 3, 1986 (P. L. 396, No. 86) (40 P. S. §§ 3401—3409) known as Act 86 (relating to commercial property and casualty risks) and section 5(a)(9) of the UIPA (40 P. S. § 1171.5(a)(9)) (relating to owner occupied residential properties and personal property of individuals). Finally, the sections requiring 1) the rendering of assistance to individuals in obtaining insurance is unduly burdensome; and 2) the reporting of statistics is no longer used by the Department.

Statutory Authority

These regulations are being deleted under the authority of sections 206, 506, 1501 and 1502 of The Administrative Code of 1929. These regulations were previously promulgated under section 601 and 621 of The Insurance Department Act of 1921; section 354 of The Insurance Company Law of 1021; The Fire, Marine and Inland Marine Rate Regulatory Act; and The Casualty and Surety Rate Regulatory Act.

Comments

Notice of this deletion was published at 27 Pa.B. 1848 (April 12, 1997) as a proposed rulemaking with a 30-day comment period.

No comments were received from the standing committees during the 30-day public comment period. Comments were solicited from the various trade associations representing the insurance industry. Comments were received from the Insurance Federation of Pennsylvania, Inc.

The Insurance Federation of Pennsylvania (IFP)

The IFP expressed support for the deletion of these regulations. They agreed that sections proposed for deletion are either outdated or otherwise covered with the same force and effect in existing laws.

Fiscal Impact

The deletion of these sections will have no fiscal impact. Because of the redundancy of the regulatory provisions to authorizing statutes, the provisions of the regulations remain in effect under the statutes.

Paperwork

The deletion of these sections will have no effect on paperwork requirements.

Affected Parties

The deletion of these sections will affect all insurers who are licensed to sell insurance in this Commonwealth.

Effectiveness/Sunset Date

The rulemaking will become effective upon final publication in the *Pennsylvania Bulletin*. Because the rulemaking deletes obsolete regulations, no sunset date has been assigned.

Contact Person

Questions and comments concerning this rulemaking may be addressed to Randolph L. Rohrbaugh, Director, Property and Casualty Bureau, 1311 Strawberry Square, Harrisburg, PA 17120, (717) 787-3044.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of this rulemaking on July 23, 1997, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Insurance Committee and the Senate Banking and Insurance Committee. In addition to the rulemaking, 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 1996-1, "Regulatory Review and Promulgation." In compliance with section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received. A copy of that material is available to the public upon request.

This rulemaking was deemed approved by the House and Senate Committees on December 8, 1997, in accordance with section 5.1(d) of the Regulatory Review Act. The amendments were deemed approved by IRRC in accordance with section 5(g) of the Regulatory Review Act on December 9, 1997.

Findings

The Insurance Commissioner finds that:

(1) Public notice of intention to adopt this rulemaking has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The adoption of this rulemaking in the manner provided for in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

Order

The Commissioner, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 31 Pa. Code Chapter 113, are amended by deleting §§ 113.51—113.62 to read as set forth at 27 Pa.B. 1848.

(b) The Commissioner shall submit this order and 27 Pa.B. 1848 to the Office of General Counsel and Office of Attorney General for approval as to form and legality as required by law.

(c) The Commissioner shall certify this order and 27 Pa.B. 1848 and deposit them with the Legislative Reference Bureau as required by law.

(d) The rulemaking adopted by this order shall take effect June 5, 1998.

M. DIANE KOKEN,
Insurance Commissioner

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 6878 (December 27, 1997).)

Fiscal Note: Fiscal Note 11-144 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 98-373. Filed for public inspection March 6, 1998, 9:00 a.m.]

INSURANCE DEPARTMENT
[31 PA. CODE CH. 137]
Miscellaneous

The Insurance Department (Department) hereby deletes Chapter 137 (relating to miscellaneous) under the authority of sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412); sections 213, 214 and 216 of The Insurance Department Act of 1921 (40 P. S. §§ 51, 52 and 54); and the Casualty and Surety Rate Act (40 P. S. §§ 1181—1199).

Purpose

The purpose of this rulemaking is to delete Chapter 137 to eliminate obsolete regulations. The regulations, adopted in 1971, imposed several requirements on insurance companies licensed to do business in this Commonwealth. The regulations required companies to provide the Department with reports on unsafe products, to provide notification of internal consumer affairs programs and to practice honest advertising of insurance products.

The Department has determined that the requirement to report information on unsafe products is not essential, the requirement has not been enforced, and statutory authority already exists to request this information, if necessary (40 P. S. §§ 323.1—324.13). In addition, the requirement regarding unsafe products duplicates information required to be supplied by manufacturers, retailers and distributors to the Consumer Products Safety Commission of the Federal Government and, thus, need not be routinely collected by an insurance regulator.

The requirement concerning internal consumer affairs programs has also been determined by the Department to be unnecessary. The Department already monitors insurers' handling of consumer complaints through its market conduct examinations and requires compliance with the Unfair Insurance Practices Act (40 P. S. §§ 1171.1—1171.15) and companion regulations, Chapter 146 (relating to unfair insurance practices).

Finally, the requirement that insurers advertise in an honest manner is already a requirement of, and is enforced through section 5 of the Unfair Insurance Practices Act (40 P. S. § 1171.5). Further, advertising is the subject of Chapter 51 (relating to advertising provisions).

Comments

Notice of proposed rulemaking was published at 27 Pa.B. 1850 (April 12, 1997), with a 30-day public comment period. No comments were received from the Legislative standing committees, the Independent Regulatory Review Commission (IRRC) or the general public.

Fiscal Impact

The Department estimates that 4—5 million claims are reviewed by Commonwealth insurers annually. The cost of reviewing these claims for the purpose of identifying unsafe products, as well as the cost of developing a system for retrieving and reporting information, would exceed $5 million annually. Therefore, the approximate savings of this deletion is estimated to be $5 million on an annual basis.

Paperwork

The deletion of this chapter will decrease paperwork requirements for the affected parties in that the deletion eliminates unnecessary reporting requirements for the insurance industry.

Affected Parties

The deletion of this chapter will affect all insurers who are licensed to sell insurance in this Commonwealth.

Effectiveness/Sunset Date

The rulemaking will become effective upon final publication in the *Pennsylvania Bulletin*. Because the rulemaking deletes obsolete regulations, no sunset date has been assigned.

Contact Person

Peter Salvatore, Insurance Department, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-0636.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 31, 1997, the Department submitted a copy of the notice of proposed rulemaking, published at 27 Pa.B. 1850 to IRRC and to the Chairpersons of the House Committee on Insurance and the Senate Committee on Banking and Insurance for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received, as well as other documentation.

In preparing these final-form regulations, the Department has considered all comments received from IRRC, the Committees and the public. These final-form regulations were deemed approved by the House Committee and the Senate Committee on January 26, 1998. The amendments were deemed approved by IRRC in accordance with section 5(g) of the Regulatory Review Act on January 27, 1998.

Findings

The Insurance Commissioner finds that:

(1) Public notice of intention to delete these regulations as set forth in order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code, §§ 7.1 and 7.2.

(2) The deletion of these regulations in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

Order

The Insurance Commissioner, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 31 Pa. Code Chapter 137, are amended by deleting §§ 137.2—137.4 to read as set forth at 27 Pa.B. 1850.

(b) The Commissioner shall submit this order and 27 Pa.B. 1850 to the Office of General Counsel and Office of Attorney General for approval as to form and legality as required by law.

(c) The Commissioner shall certify this order and 27 Pa.B. 1850 and deposit them with the Legislative Reference Bureau as required by law.

(d) The deletion of these regulations as adopted by this order shall take effect upon publication in the *Pennsylvania Bulletin*.

M. DIANE KOKEN,
Insurance Commissioner

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 859 (February 14, 1998).)

Fiscal Note: Fiscal Note 11-141 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 98-374. Filed for public inspection March 6, 1998, 9:00 a.m.]

Title 58—RECREATION

STATE ATHLETIC COMMISSION

[58 PA. CODE CH. 21]
HIV Testing

The State Athletic Commission (SAC), on August 25, 1997, adopts final rulemaking to amend § 21.8 (relating to boxers) to require applicants for a professional boxer's or professional kickboxer's license, as part of their annual application for licensure, to submit a report from a licensed medical laboratory or a facility operated by the Department of Health (DOH) indicating that the applicant has tested negative for the Human Immunodeficiency Virus (HIV). The test may not have been initiated more than 60 days prior to the date of application. SAC, by this order, adopts the amendment to § 21.8 to read as set forth in Annex A.

Statutory Authority

SAC's authority to promulgate this amendment is 5 Pa.C.S. §§ 101—2110 (relating to Athletics and Sports Code) (code). In particular, the following sections of the code are applicable to this final rulemaking: section 910(a) (relating to standards for issuance of licenses and permits); section 103(b) (relating to duties of Commission); section 105(8) (relating to powers and duties of Executive Director); section 501 (relating to Medical Advisory Board); section 701 (relating to boxing regulated); section 901 (relating to power of the Commission to issue, withhold, suspend or revoke licenses and permits); and section 912 (relating to applications for licenses and permits).

Background

This amendment is intended to decrease the risk of professional boxers, professional kickboxers, ring personnel and the public of being infected with HIV during professional boxing contests or exhibitions. Professional boxers and professional kickboxers wear minimal clothing and are in constant physical contact with each other. Open wounds and bleeding occur frequently, and body fluids are often sprayed around the ring. The information received by SAC indicates that the risk of contracting HIV under these circumstances is minimal. By this amendment, however, SAC seeks to further decrease the risk and probability of transmitting HIV at professional boxing events. Contracting HIV is invariably fatal and there is no known cure.

Summary of Comments and Responses on Proposed Rulemaking

Notice of proposed rulemaking was published at 27 Pa. B. 2555 (May 24, 1997). SAC did not receive any public comments during the public comment period which ended on June 23, 1997. SAC received comments from the Independent Regulatory Review Commission (IRRC) on July 23, 1997, which set forth concerns regarding clarity of language in the proposed amendment and which incorporated two sets of comments from: (1) Dr. Steven J. Gluckman, M.D., Director of Infectious Diseases, University of Pennsylvania Medical Center; and (2) Scott Burris, Associate Professor of Law on behalf of the American Civil Liberties Union of Pennsylvania. Responses to these comments are set forth as follows.

1. *Comments of Dr. Steven J. Gluckman, M.D., Director of Infectious Diseases, University of Pennsylvania Medical Center.* Initially, Dr. Gluckman identified some minor drafting errors in the proposed amendment, noting that the preamble to the proposed amendment refers to bodily fluids and the Auto-Immunodeficiency Syndrome (AIDS). Dr. Gluckman provided the correct phrasing and terminology, "body" fluids and the "Acquired Immunodeficiency Syndrome (AIDS)." Dr. Gluckman also noted that this amendment cannot actually protect professional boxers and professional kickboxers from being infected with HIV, as set forth in the preamble, but would merely decrease the risk of infection to participants. SAC acknowledges that the amendment will not absolutely protect participants but will decrease the risk of transmission.

Dr. Gluckman further maintained that because there are no known boxing-related transmissions of HIV and only two known sports transmissions, the money expended to implement the HIV testing program could be better spent on programs to educate teenagers regarding HIV transmission and to support needle exchange programs. He also opined that the logical extension of the testing would be to require HIV testing for other contact sport participants rather than limiting testing to professional boxers and professional kickboxers. Finally, Dr. Glickman suggested that more money could be saved by the Commonwealth by instituting measures to prevent brain damage in professional boxers.

In reviewing these commented, SAC determined that they dealt primarily with issues outside its jurisdiction. In light of the slight, but real risk of blood-borne HIV transmission in a boxing event, SAC continues to believe that HIV testing for professional boxers and professional kickboxers is appropriate. The risk of blood exposure is greater in boxing than in many other contact sports. SAC has no authority or jurisdiction over other contact sports such as football and has only minimal authority over promoters in professional wrestling.

Additionally, it should also be noted that the costs of mandating HIV testing are minimal. Therefore, contrary to the comments of Dr. Gluckman, the small amount of funding necessary to support the testing program could not support other HIV education programs aimed at teenagers and to support needle exchange programs, programs outside the jurisdiction of SAC.

The minimal fiscal impact can be estimated by assuming that 70% of the 440 licensees (308 individuals) avail

themselves of free DOH tests at $4 per test. The Department of Health would incur an additional $1,232 in costs in the first year to provide the testing services. If a test is positive, a confirmation test must be performed at a cost of approximately $34 per test. DOH statistics reveal approximately 1.5% of initial tests are positive. Consequently, if 308 tests are performed by DOH, approximately five confirmation tests would need to be performed at a total cost of $170. These costs are minimal and are far outweighed by the benefits in decreasing the risk of participants, ring personnel and the public from being exposed to HIV.

SAC has recognized that education is an important element in helping insure that boxers are able to provide negative HIV test results. Accordingly, SAC assists professional boxers in obtaining information on the risk of contracting HIV outside of the ring. The license application provides the applicant with the option of receiving information regarding the HIV virus. This effort, however, would be supplemented by HIV testing and should not be considered in lieu thereof. Regardless of any educational programs in place, SAC has determined that given the reality and risk of HIV transmission in the boxing ring, this risk can be lessened by requiring a negative HIV test result as a condition for licensure.

Although SAC agrees that it is appropriate to supply information about the transmission of the HIV, SAC rejected the suggestion that it provide pretesting counseling. The Confidentiality of HIV-Related Information Act (35 P. S. §§ 7601—7612) required counseling to be provided by the testing services.

Dr. Gluckman also commented that there are no known boxing related transmissions of HIV and that the proposed amendment is of minimal import. Nevertheless, information received by SAC indicates that the Centers for Disease Control and Prevention have verified the transmission of HIV during a pair of bloody fistfights. See *Transmission of Zidovudine-Resistant HIV during a bloody fight, Journal of American Medical Association, Ippolilog. Del Peggio, P.Ariel C. 1994: 272 (G): 433-4.* Accordingly, the risk of HIV transmission in the boxing ring through blood contact is a reality. This reality is recognized by most professional boxing licensees.

In response to a survey conducted by SAC in February and April 1996, 90% of licensees indicated concern about the possibility of contracting HIV from another boxer. The risk is also recognized by other boxing commissions. By implementing this final-form regulation, Pennsylvania would join Nevada, New York, New Jersey, Washington, Oregon, Arizona and Puerto Rico in requiring HIV testing of all potential boxers. For the foregoing reasons, SAC concludes that no changes need to be made in the final-form rulemaking in response to the comments of Dr. Gluckman.

2. *Comments by the American Civil Liberties Union of Pennsylvania.*

Commentators from the American Civil Liberties Union of Pennsylvania (ACLU) asserted that requiring professional boxers to furnish a negative HIV test result as a part of the licensing application violates Title 2 of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C.A. §§ 12131—12165) and section 504 of the Rehabilitation Act of 1973. The ACLU contends that HIV-positive individuals are protected from discrimination under these statutes and that SAC has not demonstrated that a mandatory test will protect boxers.

The ACLU concluded, under the statutes in the proceeding paragraph that the proposed testing is probably illegal, because the risk of HIV transmission in a boxing contest or exhibition is speculative.

SAC disagrees. Because the risk of HIV transmission does exist in professional boxing contests and exhibitions, mandatory HIV testing for boxers is necessary. The judicial decisions cited by the ACLU in support of their position involve mandated testing for venues other than the boxing ring. With respect to the Federal statutes cited, SAC concludes that they are not violated; the test requirement is imposed because of circumstances unique to professional boxing contests or exhibitions. An HIV-positive boxer cannot perform boxing activities with reasonable accommodations needed to prevent the occurrence of open wounds or the spread of body fluids, as required by the ADA. Permitting such a boxer to participate therefore poses a direct threat to the health and safety of the participants, ring personnel and those in attendance.

SAC believes that the risk of HIV transmission is not as speculative as the ACLU contends. Of all combative sports, the risk of blood exposure is significantly greater in boxing than in any other sport. As noted in the preceding paragraph, the Centers for Disease Control and Prevention have verified the transmission of HIV during a pair of bloody fistfights. Therefore the risk of HIV transmission in the athletic setting by means of blood contact is a reality. Given current medical evidence, the possibility of risk can support mandated testing. SAC contends that mandated testing need not be based upon a certainty of risk. Because the duration and severity of the HIV virus is certain, the duration of the possible risk posed by an HIV positive boxer in the ring is permanent. Because of the severity of harm, testing is appropriate, given the risk of transmission. See *Skoales v. Mercy Health Corporation*, 887 F. Supp. 765 (E.D. Pa. 1994).

This acknowledgment of the high potential risk is echoed in an article entitled *HIV- Infected Competitive Athletes; What are the risks? What precaution should be taken? Journal of General Internal Medicine V. 12 April, 1997, Feller, Alexander and Flainigan, Timothy.* The article acknowledges that the highest potential HIV risk in competition involves blood contact of a participant involved in a combative sport. The article also calls into question the ACLU's comment that there is no evidence that HIV infection can affect a boxer's qualifications or ability to participate in a professional boxing match. The profession of boxing is a strenuous sport requiring participants to be in top physical condition as a result of a strenuous exercise regimen. The article notes that the weighable evidence suggests that while moderate exercise may be beneficial "strenuous exercise may not". See p. 244—245. SAC has determined that no change should be made in the final rulemaking in response to the ACLU comments.

3. *Comments of IRRC*

Two comments regarding the proposed amendment were made by IRRC. The first comment involved the clarity of the proposed rulemaking which appears to omit any provision for a private sector facility to perform an HIV test. Additionally, IRRC noted that the citation to 28 Pa. Code § 15.11 (relating to minimum public health programs) appears to be erroneous.

As noted by IRRC, the citation should be to 28 Pa. Code § 5.11 (relating to permit, requirements, application, and conditions), not 28 Pa. Code § 15.11. Accordingly, the final-form regulation has been amended to reflect the proper citation.

As amended, the final rulemaking provides that a private sector facility can perform an HIV test. This is

because the regulation found at 28 Pa. Code § 5.11 specifically relates to the licensing of private clinical laboratories by the DOH. Given the provisions of 28 Pa. Code § 5.11, the final-form regulation has been altered slightly to clarify that the testing may be conducted by a laboratory licensed in another jurisdiction that meets the requirements to be issued a permit under that section. With the addition of the proper 28 Pa. Code citation, it is clear that tests may now be provided by a DOH facility, a private laboratory possessing a permit under 28 Pa. Code § 5.11 or a private laboratory licensed in another jurisdiction that meets the requirements to be issued a permit under that section.

IRRC commentators also raised the issue of whether SAC should require professional boxers and professional kickboxers to provide negative test results for HIV at times in addition to the annual application for licensure. Times other than licensure could include every 6 months, as originally suggested by DOH or in connection with a boxer's prefight physical examination. IRRC raises this question because of (1) the latency period (of approximately 6 to 8 weeks) after exposure to the HIV virus before a positive test for the HIV antibodies can occur; and (2) the ongoing risk to boxers and others when placed in contact with the blood of the participants. Consequently, IRRC requested SAC to explain its policy position of requiring a boxer to furnish a negative HIV test report only at the time of initial and annual licensing.

In requiring applicants for a professional boxing license and a professional kickboxing license to furnish a negative HIV test report only at the time of initial and annual licensure, SAC attempted to balance the interests of license applicants, current licensees, prospective participants, ring personnel and the public relative to the level of risk of contracting HIV during a boxing event. In light of the concerns expressed by these constituencies as well as those of the American Civil Liberties Union and the DOH, SAC believes that requiring applicants to furnish a negative HIV test report only at the time of initial and annual licensure satisfies these interests. Not to require testing, as urged by the ACLU, would ignore the level of risk of contracting HIV in a boxing competition and would not address legitimate concerns. To require testing more often would inflate the perceived level of risk of contracting the HIV during a boxing competition and would be overly intrusive for licensees and applicants. Requiring testing in connection with a boxer's prefight physical would subject a boxer to an average of four to six tests a year. This testing would be redundant. Additionally, because most prefight physicals are conducted only a few hours before the scheduled bout, test results in most cases would not be available in a timely manner if conducted in conjunction with the prefight physical.

In tying the HIV test to the time of initial and annual licensure, SAC submits that the testing complies with the intent of maintaining the confidentiality of HIV status in accordance with the Confidentiality of HIV-Related Information Act. Under section 910 (relating to standards for issuance of licenses and permits) of the code, 5 Pa.C.S. § 910, SAC is required to consider the best interests and welfare of the public, the preservation of the safety and health of participants and the best interests of boxing generally in determining whether to issue or renew any license. Additionally, the applicant must establish that he is: (1) of good moral character; (2) of good reputation; (3) physically fit and mentally sound; (4) skilled in his profession; (5) of requisite age and experience; and (6) not addicted to the intemperate use of alcohol or to the use of narcotic drugs.

In requiring only an annual or initial test report, SAC recognizes that all provisions of section 910 are applicable. These general and specific standards, combined with the requirement of providing the negative HIV test results, comprise a list of possible reasons why SAC may deny the applicant a license. Therefore, when an applicant is denied a license, the denial could be based upon a variety of reasons. Accordingly, the public could not infer that it was due solely to the applicant having failed to provide a negative HIV test report. Additionally, when an applicant is not able to obtain a negative HIV test report and therefore chooses not to apply for a license, the public could not infer any particular reason why the applicant failed to apply for licensure.

In contrast thereto, if SAC were to require negative HIV test reports to be provided on a regular basis, such as every 6 months, the public could infer that a license revocation 6 months after initial licensure was due solely to the failure to furnish a negative HIV test report. Any license revocation tied to the HIV testing schedule would clearly be based upon the failure to provide negative test results. The revocation would violate the spirit and intent, if not the actual provisions requiring the confidentiality of test results, of the Confidentiality of HIV-Related Information Act. Accordingly, except for the minor changes made to the final-form regulation for clarification purposes, SAC concludes that no additional changes need to be made.

Compliance with Executive Order 1996-1, Regulatory Review and Promulgation

SAC reviewed this final rulemaking and considered its purpose and likely impact upon the public and the regulated population under the directives of Executive Order 1996-1, Regulatory Review and Promulgation. The final-form regulation addresses a compelling public interest as described in this preamble and otherwise complies with Executive Order 1996-1.

Fiscal Impact

Implementation of the final rulemaking will cost DOH approximately $1,232, based on the assumption that 70% of the 440 licensees (308 individuals) avail themselves of free DOH tests, who would not otherwise go to DOH for a free test, at $4 per test. If a test is positive, a confirmation test must be performed at a cost of approximately $34 per test. DOH statistics reveal approximately 1.5% of initial tests are positive. Consequently, if 308 tests are performed by DOH, approximately five confirmation tests would need to be performed at a total cost of $170. The 308 tests that will be performed for SAC licensees represents about 1.2% of the approximately 26,420 total HIV test performed for calendar year 1995 by DOH.

During the first year of implementation, SAC staff will have to dedicate some additional time to helping licensees adjust to the new requirement. However, SAC does not anticipate adding any staff to implement the amendment. Consequently, the only additional cost is the printing of a one-page form that will accompany the renewal application which will be used to certify that the licensed medical laboratory or DOH facility checked the identity of the licensee before taking the blood sample. The cost to develop and duplicate the form will be less than $200.

Benefits

Although not all individuals who contract HIV subsequently develop Acquired Immunodeficiency Syndrome (AIDS), the occurrence of AIDS in HIV positive persons is invariably fatal to date. Accordingly, SAC has determined that a risk exists with respect to the possibility of

contracting HIV at a professional boxing or kickboxing match, although SAC was unable to determine the exact probability of an athlete contracting HIV at these events. For those reasons, it is difficult to put a monetary value on preventing HIV-infected licensees from participating in events.

Assuming that an individual who tested positive for HIV has an increased risk of developing AIDS and would therefore require extensive medical treatment, one empirical measure of the benefits of reducing the transmission of HIV is the avoided medical costs of caring for a person with AIDS. DOH reports that it costs private agencies that are funded by the Commonwealth about $120,000 to care for a patient in the advanced stages of AIDS. Most boxers do not have large annual incomes from boxing or other employment. Therefore, they are likely to require public support for AIDS treatment. Consequently, if this amendment prevents one individual from contracting HIV who then develops AIDS, the savings in medical treatment alone would exceed the cost of administering this regulation over several decades.

A secondary benefit could derive from changes in individuals' behavior. If an applicant who would not otherwise be tested for the virus learns that he has contracted HIV, an individual would then be able to modify his conduct to decrease the probability of infecting other individuals. Increased self-awareness of an HIV-positive individuals' status could benefit the community at large.

Paperwork Requirements

Applicants for annual renewal of a boxing license currently must complete a form that consists of 19 simple questions and is less than one page in length. As a result of this amendment, applicants will be required to attach to the application a one-page laboratory report provided by the laboratory and a form signed by the laboratory indicating that the laboratory confirmed the identity of the applicant before the test was administered. This form will be provided to all applicants along with the annual application form.

Sunset Date

SAC continually monitors the effectiveness of its regulations through communications with the regulated population and input from its medical advisory committee; accordingly, no sunset date has been set.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), SAC submitted a copy of the notice of proposed rulemaking published at 27 Pa. B. 2555 (May 24, 1997), to IRRC and the Chairperson of the House and Senate Committees on State Government for review and comment. In compliance with section 5(b.1), SAC also provided IRRC and the Committees with all comments received, as well as other documentation.

In preparing this final-form regulation, SAC has considered all comments received from IRRC, the Committees, individual Legislators and the public.

This final-form regulation was deemed approved by the House and Senate Committees on November 26, 1997. IRRC met on January 13, 1998, and approved the final-form regulation in accordance with section 5(c) of the Regulatory Review Act.

Contact Person

Further information may be obtained by contacting Gregory Sirb, Executive Director, State Athletic Commission, 16 Pine Street, Harrisburg, PA 17101, (717) 787-5720.

Findings

SAC finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202), and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) This amendment does not enlarge the purpose of the proposed rulemaking published at 27 Pa.B. 2555.

(4) This amendment is necessary and appropriate for administration and enforcement of the authorizing acts identified in this preamble.

Order

SAC, acting under its authorizing statutes, orders that:

(a) The regulations of SAC, 58 Pa. Code Chapter 21, are amended by amending § 21.8 to read as set forth in Annex A.

(b) SAC shall submit this order and Annex A to the Office of General Counsel and to the Office of Attorney General as required by law.

(c) SAC shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on publication in the *Pennsylvania Bulletin*.

GREGORY SIRB,
Executive Director

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 588 (January 31, 1998).)

Fiscal Note: Fiscal Note 16-13 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 58. RECREATION

PART I. STATE ATHLETIC COMMISSION

Subpart B. BOXING

CHAPTER 21. PROFESSIONAL BOXING

§ 21.8. Boxers

(a) Professional boxers shall be licensed by the Commission. The Commission will not license or renew the license of a professional boxer unless the license application is accompanied by a report from a Department of Health facility, a laboratory possessing a permit from the Department of Health under 28 Pa. Code § 5.11 (relating to permit, requirements, application, and conditions), or a report from a laboratory licensed in another jurisdiction that meets the requirements to be issued a permit under 28 Pa. Code § 5.11 and is acceptable to the Commission, which indicates that the applicant has been tested for any virus, antibody, antigen or etiologic agent determined to cause or indicate the presence of human immunodeficiency virus and the results of those tests were negative. The tests shall have been initiated no more

than 60 days prior to the date of filing the application. A boxer whose application for license has been denied has the right to a hearing before the Commission under 2 Pa.C.S. (relating to administrative law and procedure). The applicant shall apply, in writing, to the Commission requesting a hearing at which time the Commission will conduct a hearing within 10 business days from the receipt of the written request.

(b) The Commission will require each professional boxer under contract to appear in a bout under its jurisdiction to be examined and certified by a physician appointed by the Commission to be physically sound before being permitted to engage in the bout. The Commission upon its own initiative as a safety precaution may require a professional boxer under its jurisdiction to undergo a general or an ad hoc physical or mental examination, or both, for the purpose of determining whether or not the boxer is fit to continue actively in the profession of boxing.

(c) Whenever a professional boxer considers himself unable by reason of illness or injury to participate in a bout for which he is under contract within the jurisdiction of the Commission, he, or his manager in his behalf, shall promptly notify both the Commission and the promoter of the event of the alleged condition of the boxer and the boxer shall immediately submit written medical verification to the Commission which may, if it deems fit, require the boxer at his own expense to undergo examination by a physician selected by the Commission for further substantiation of the averment of disability.

(d) A boxer shall be considered to have been knocked out in a bout if he is counted out and he shall incur mandatory suspension of 6 weeks. A boxer shall incur automatic suspension of 30 days if he experiences a technical knockout, subject to reduction in appropriate cases to suspension of not less than 25 days in the discretion of the Commission after medical examination and approval. The victim boxer shall furnish satisfactory medical proof of physical well-being in every case of knockout and technical knockout before he is permitted to box again under the jurisdiction of the Commission. The Commission may suspend a professional boxer who is defeated in five consecutive contests, either within or beyond the jurisdiction of the Commission, pending inquiry by the Commission to determine the physical and mental ability of the boxer to continue safely in the boxing profession.

(e) The Commission will not license as a professional boxer an applicant under 18 years of age and the Commission will require conclusive proof of age of a boxer applying for the first time to be so licensed with the Commonwealth. The Commission will not license as a professional boxer an applicant over 36 years of age except by special action by the Commission.

(f) The Commission will not permit a professional boxer to participate in a bout under its jurisdiction without first having signed with a licensed promoter a properly drafted contract covering the participation. If the boxer is under contract to a manager, the manager is also required to sign the contract unless excused by special action of the Commission. This, does not mean that a boxer is not contractually bound by a commitment made in his behalf by his legally constituted manager even though the boxer may not have personally executed the instrument purporting to commit him.

(g) A boxer under the jurisdiction of the Commission may not be under contract to more than one manager at the same time without express approval of the Commission, and the boxer may not be under contract to more than two managers at the same time. A boxer under the jurisdiction of the Commission may not enter into a contract with a manager or combination of managers whereunder the boxer is obligated to the payment of more than the total of 50% of his earnings under the manager or combination of managers.

(h) A boxer whose manager has been suspended by the Commission or whose suspension in another jurisdiction is recognized by the Commission may box in this Commonwealth independently of his managerial contract at the discretion of the Commission and will be permitted to contract individually under the circumstances and to collect the full amount of a purse or other monies due to him. No part of the sum may be held or reserved for the suspended manager.

(i) Professional boxing contests between boxers under contract to the same manager are prohibited without exception.

(j) The Commission may require either or both of the participants in a professional boxing bout to guarantee appearance or the making of agreed weight, or both, by stipulated monetary forfeit to be posted with the Commission in cash or by certified check by a stated time prior to the bout under appropriate circumstances. The Commission may declare the sum posted by him forfeited in whole or in part if a boxer fails to appear or make the agreed weight and the forfeited amount paid to the Commonwealth or to the opposing boxer or partly to the opposing boxer as the Commission in its discretion will decide.

(k) A professional boxer who fails to appear promptly at the time and place set by the Commission for the official weigh-in for a bout in which he is under contract to participate shall be subject to a disciplinary action the Commission sees fit to impose. A professional boxer who fails to appear for a bout in which he is under contract to participate or refuses to participate in a bout having appeared, shall be eligible for a fine, suspension, revocation of license or any or all of these penalties at the discretion of the Commission.

(l) If either or both of the participants in a professional boxing contest fail to satisfactorily put forth serious effort during the bout or persist in foul tactics in the judgment of the referee, the referee shall stop the bout after reasonable warning, disqualify the offending boxer, award the decision of the boxer making serious effort, if any, and direct that compensation due the offending boxer be impounded by the Commission pending outcome of a hearing which the Commission will arrange on the subject.

(m) Participants in professional boxing bouts under the jurisdiction of the Commission shall be shaven clean except that the Commission may sanction the wearing of closely cropped mustaches or religiously required beards, or both, at its discretion.

[Pa.B. Doc. No. 98-375. Filed for public inspection March 6, 1998, 9:00 a.m.]