PROPOSED RULEMAKING

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 130d]

Nutrient Management Education Grant Program

The Department of Agriculture (Department), Bureau of Plant Industry (Bureau) in consultation with the State Conservation Commission (Commission) and under the specific authority conferred by section 4 of the Nutrient Management Act (act) (3 P. S. § 1704), proposes to establish Chapter 130d (relating to nutrient management education grant program) instituting regulations relating to the Nutrient Management Education Grant Program (NMEGP). The act bestows upon the Commission the power and duty to regulate, administer and enforce specific areas of the act and grants the Commission the power to delegate the administrative and enforcement authority to certain county conservation districts. (3 P. S. § 1704). Section 4(5) of the act (3 P. S. § 1704(5)), directs the Commission to "... develop and implement, in cooperation with the Department of Agriculture, the board, the Cooperative Extension Service and conservation districts, a program to provide education and technical assistance to the agricultural community ..." Under this requirement, the Commission has entered into a Memorandum of Understanding with the Department which, along with other terms and conditions, grants the Department the authority to develop and administer programs such as the NMEGP.

The proposed regulations will delineate the objectives of the NMEGP and the general conditions for obtaining a Nutrient Management Education Grant. In addition, the proposed regulations will establish guidelines for submission, processing and review of NMEGP applications, notification and recordkeeping requirements and enforcement mechanisms.

Background

These proposed regulations are intended to establish guidelines and standardize procedures for the awarding and tracking of Nutrient Management Educational Grants. The purpose of the NMEGP is to provide conservation districts with funds to be used for projects which increase the knowledge and awareness of the act and to assist those who are engaged in production agriculture to comply with the act. The NMEGP was developed by the Department and adopted by the Commission, under section 503(d)(3) of the Conservation and Natural Resources Act (71 P. S. § 1340.503(d)(3)) which directs the Department to "... coordinate and assist in the development, implementation and enforcement of programs adopted by the State Conservation Commission that solely affect production agriculture" and to "... develop programs to assist those engaged in production agriculture to comply with the Nutrient Management Act and to act as ombudsman to help resolve issues related to county conservation districts implementation of State Conservation Commission programs solely affecting production agriculture." Implementation of the NMEGP is also in accordance with section 2(2) of the act (3 P. S. § 1702(2)), which directs the Commission to develop and implement educational and outreach programs in conjunction with the Cooperative Extension Service of the Pennsylvania State University, the Department and the conservation districts.

The NMEGP was first developed and implemented by the Department in 1996. The Department had funds available in its budget for agency staffing to coordinate and assist in the development, implementation and enforcement of programs adopted by the Commission. Having the funds available, the Department endeavored to develop a cost-effective educational program which would comply with the statutory requirements of the act and section 503(d)(3) of the Conservation and Natural Resources Act. The NMEGP has been administered through individual contracts with the conservation districts and a memorandum to the comptroller's office, which delineated the purpose of the NMEGP, the eligibility criteria for grants under the NMEGP, the maximum amount of the grants, the reporting requirements and the application process for grants under the NMEGP.

The core concept of the NMEGP was to provide the maximum educational outreach at the minimum costs. The NMEGP was successful in providing educational and technical assistance to the agriculture community and in disseminating information to assist those engaged in production agriculture to comply with the act. As such, the NMEGP has become a very important component in assuring the success of the act. Therefore, in the interest of continuing to carry out its statutory duties and promoting the development of environmentally sound agricultural practices and plan development, the Department has promulgated these proposed regulations and formalized agreements with the conservation districts. This proposed regulations are intended to establish reasonable guidelines, standards, criteria and procedures for the administration and implementation of the NMEGP.

The major features of the proposed regulations are summarized as follows:

Summary of Major Features

Subchapter A. General Provisions

Proposed § 130d.1 (relating to authority) sets forth the authority under which the Department proposes to establish this chapter.

Proposed § 130d.2 (relating to objectives) states the overall objectives and purpose of the NMEGP.

Proposed § 130d.3 (relating to definitions) sets forth the proposed words and terms to be defined.

Proposed § 130d.4 (relating to funding) establishes the availability of and criteria for Nutrient Management Education Grant funding.

Proposed § 130d.5 (relating to records) establishes the proposed recordkeeping requirements for grant recipients.

Subchapter B. Grant Program

Proposed § 130d.11 (relating to general conditions) sets forth the general requirements for submission of grant proposals. This section also contains default procedures, verification requirements and establishes the Department's right to demand the return of grant funds for failure to verify.

Proposed § 130d.12 (relating to submission of application) sets forth the application process, including limita-

tions on grant awards and eligible uses, and delineating the format of the application.

Proposed § 130d.13 (relating to processing of applications) establishes the procedure which the Department will follow when processing an Educational Grant Program application and delineates the duties of the Committee and the Secretary regarding the processing of Educational Grant Program applications. It also sets forth the deadline for applications.

Proposed § 130d.14 (relating to review criteria) delineates the criteria which the Committee shall use when reviewing and evaluating Educational Grant Program applications. These criteria include applicant eligibility guidelines and application ranking guidelines.

Proposed § 130d.15 (relating to notice of disposition of application) establishes the time period in which the Department will notify an Educational Grant Program applicant of the acceptance or rejection of the application.

Proposed § 130d.16 (relating to grant cancellation and right of recovery) will allow the Secretary to cancel an Educational Grant when a determination is made that the funds are not being used properly. In addition, this section sets forth the Department's right to make a claim for any grant moneys not expended in accordance with the grant agreement, the act or this proposed chapter.

Proposed § 130d.17 (relating to deficits) limits the Department's financial obligation to the amount of the Educational Grant.

Fiscal Impact

Commonwealth

The proposed regulations will impose minimal costs and have minimal fiscal impact upon the Commonwealth. The Department has a statutory duty to develop, implement and enforce programs which provide educational and technical assistance to the agricultural community and to assist those engaged in production agriculture to comply with the act. The Department has a staff position available to oversee the program and has the funds available to administer the NMEGP.

Political Subdivisions

The proposed regulations will impose minimal costs on those conservation districts who are interested in applying for grants. The costs most likely will be associated with the preparation of grant proposals and the recordkeeping requirements for those applicants who are approved to receive grant moneys under the NMEGP.

Private Sector

The proposed regulations will impose no costs and have no fiscal impact upon the private sector. The regulations are is intended to assist those engaged in production agriculture to comply with the act.

General Public

The proposed regulations will impose no costs and have no fiscal impact upon the general public. The regulations are intended to promote environmentally sound agricultural practices which will benefit the general public.

Paperwork Requirements

The proposed regulations will result in increased paperwork requirements for the recipients of Nutrient Management Educational Program Grants. The recipients of the grants will be required to keep detailed records of all Nutrient Management Educational programs, activities and projects undertaken using the grant monies. The Department will incur increased paperwork requirements through tracking and recordkeeping requirements and review of applications related to the NMEGP.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 18, 1998, the Department submitted a copy of these proposed regulations to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Agriculture and Rural Affairs 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 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request. If IRRC has an objection to any portion of the proposed regulations, it will notify the Department within 10 days of the close of the Committees' review 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 regulations, by the Department, the General Assembly and the Governor of objections raised.

Contact Person

Further information is available by contacting the Department of Agriculture, Bureau of Plant Industry, Nutrient Management Educational Grant Program, 2301 North Cameron Street, Harrisburg, PA 17110-9408, Attn: Melanie Wertz, (717) 772-5218. Comments will be received by the Department for 30 days after publication of this notice in the *Pennsylvania Bulletin*.

Effective Date

The proposed regulations will become effective upon final adoption.

SAMUEL E. HAYES,
Secretary

Fiscal Note: 2-113. (1) Nutrient Management Fund; (2) Implementing Year 1997-98 is $50,000; (3) 1st Succeeding Year 1998-99 is $50,000; 2nd Succeeding Year 1999-00 is $50,000; 3rd Succeeding Year 2000-01 is $50,000; 4th Succeeding Year 2001-02 is $50,000; 5th Succeeding Year 2002-03 is $50,000; (4) FY 1996-97 $32,000; FY 1995-96 $N/A; FY 1994-95 $N/A; (7) Planning, Loans, Grants and Technical Assistance; (8) recommends adoption.

Annex A

TITLE 7. AGRICULTURE

PART V. BUREAU OF PLANT INDUSTRY

CHAPTER 130d. NUTRIENT MANAGEMENT EDUCATION GRANT PROGRAM

Subch.
A. GENERAL PROVISIONS
B. GRANT PROGRAM

Subchapter A. GENERAL PROVISIONS

Sec.
130d.1. Authority.
130d.2. Objectives.
130d.3. Definitions.
130d.4. Funding.
130d.5. Records.

§ 130d.1. Authority.

The act bestows upon the Commission the power and duty to regulate, administer and enforce specific areas of

the act. Section 4 of the act (3 P. S. § 1704) grants the Commission the power to delegate this administrative or enforcement authority. The act also requires the Commission, ". . . . to develop and implement, in cooperation with the Department of Agriculture, the board, the Cooperative Extension Service and conservation districts, a program to provide education and technical assistance to the agricultural community . . . ." (3 P. S. § 1704(5)). Under this requirement, the Commission has entered into a Memorandum of Understanding with the Department which, along with other terms and conditions, grants the Department the authority to administer programs such as the NMEGP.

§ 130d.2. Objectives.

It is the intention of the Commission and the purpose of the NMEGP to provide conservation districts with funds to be used for projects which increase the knowledge and awareness of the act, promote the benefits of proper nutrient management techniques and practices and improve farmer participation in nutrient management programs. Funds may also be used for projects that develop improved techniques and practices regarding the handling, storage and application of nutrients or environmentally safe alternative uses of animal manure.

§ 130d.3. Definitions.

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

Act—The Nutrient Management Act (3 P. S. §§ 1701—1718).

Applicant—A conservation district, having an active delegation agreement with the Commission through the Department and submitting an application for a grant under the NMEGP.

Best management practices—A practice or combination of practices determined by the Commission to be effective and practicable (given technological, economic and institutional considerations) to manage nutrients to protect surface water and groundwater taking into account applicable nutrient requirements for crop utilization. The term includes the following:

(i) Conservation tillage.

(ii) Crop rotation.

(iii) Soil testing.

(iv) Manure testing.

(v) Diversions.

(vi) Manure storage facilities.

(vii) Stormwater management practices.

(viii) Nutrient application.

Board—The Nutrient Management Advisory Board created by section 8 of the act (3 P. S. § 1708).

Commission—The State Conservation Commission established by the Conservation District Law (3 P. S. §§ 849—864).

Committee—The Interagency Education Committee, which is comprised of members from the Department, the Board, the Cooperative Extension Service, the DEP, the Natural Resource Conservation Service, Conservation Districts and Vocational Agriculture instructors and is responsible for reviewing all grant applications.

Conservation district or *district*—A county conservation district established under the Conservation District Law.

Cooperative extension—The Cooperative Extension Service of the Pennsylvania State University.

DEP—The Department of Environmental Protection of the Commonwealth.

Department—The Department of Agriculture of the Commonwealth.

Fiscal year—The Commonwealth's fiscal year, running from the first day of July to the last day of June of the following year.

Grant—A Nutrient Management Education Grant.

Nutrient management plan—A written site-specific plan which incorporates best management practices to manage the use of plant nutrients for crop production and water quality protection consistent with the criteria established in sections 4 and 6 of the act (3 P. S. §§ 1704 and 1706).

NMEGP—The Nutrient Management Education Grant Program.

Project—A specific plan set forth on a grant application submitted under the act and this chapter, describing the Nutrient Management Education Program, seminar or field demonstration to be implemented using the grant funds received.

Secretary—The Secretary of the Department.

§ 130d.4. Funding.

Grants shall be awarded annually provided funds have been made available to the Department.

§ 130d.5. Records.

(a) The conservation district shall maintain books, records and other evidence pertinent to expenditures and costs incurred in connection with any grant funded under the NMEGP. The books and records shall be maintained according to generally accepted accounting principles.

(b) Financial records, supporting documents, statistical records and other records pertaining to any grant, shall be retained by the conservation district for 3 years from the expiration date of the grant agreement or completion of the project funded by the grant, whichever occurs latest.

(c) The books, records and documents shall be available for inspection or audit at reasonable times by the Department or it's authorized agent.

Subchapter B. GRANT PROGRAM

Sec.
130d.11. General conditions.
130d.12. Submission of application.
130d.13. Processing of application.
130d.14. Review criteria.
130d.15. Notice of disposition of application.
130d.16. Grant cancellation and right of recovery.
130d.17 Deficits.

§ 130d.11. General conditions.

(a) *Grant agreement*. Only those conservation districts having current and active delegation agreements in effect, with the Commission through the Department, may submit an application for a grant. Upon the Committee's acceptance of an application and the Secretary's approval, the applicant shall sign a grant agreement setting forth the term and amount of the grant and other terms or conditions as the Department and Commission may require.

(b) *Default*. An applicant who fails to abide by the terms and conditions of the grant agreement or this subchapter or the act shall be in default. In the event of a default, the Secretary may cancel the grant and seek

recovery of the grant funds as set forth in § 130d.16 (relating to grant cancellation and right of recovery). The Secretary may waive a default, after consultation with the Committee, in the event of extenuating circumstances.

(c) *Verification*. An applicant receiving a grant shall maintain books, records and other evidence pertaining to costs incurred for expenditures associated with the project funded by the grant. The books and records shall be maintained according to generally accepted accounting principles. Within 30 days of the project completion date specified in the grant agreement, the grant recipient shall submit to the Department written reimbursement requests based on receipts for the project costs. Grant recipients shall provide to the Department a final report, which includes pertinent documentation, appropriate deliverables produced by the project, as well as a narrative report describing the effectiveness of the project, experience gained and knowledge acquired.

(d) *Failure to verify*. If required documentation is not submitted to the Department as described in subsection (c), the Secretary may demand, in writing, the return by the grant recipient of the entire grant sum or a lesser amount, plus appropriate legal interest. The grant recipient shall repay the sum demanded by the Department within 60 days of a written demand.

§ 130d.12. Submission of application.

(a) *Limitations on grant applications and awards.*

(1) *Amount of grant.*

(i) A grant may not exceed $5,000 per fiscal year to any conservation district or to any group of conservation districts submitting a joint application.

(ii) An applicant shall submit one application for each grant project. An applicant may submit more than one application per fiscal year and an applicant may be awarded more than one grant per fiscal year. An applicant may not receive funding for more than $5,000 in any fiscal year.

(2) *Salaries.* Grant funds may not be used to pay the salary expenses of permanent staff. Grant funds may be used to reimburse the applicant for the cost of temporary staff hired specifically and exclusively to administer the project set forth in the grant application.

(b) *Eligible uses.* A grant shall be used only for the specific project, event or activity delineated in the application. A grant shall only be used to fund projects within the geographic boundaries of this Commonwealth. A grant may be awarded for the following types of projects:

(1) Projects related to providing information concerning methods of preventing nutrient pollution of surface water and groundwater.

(2) Educational programs, seminars or field demonstrations designed to increase the knowledge and awareness of nutrient management regulations, promote the benefits of proper nutrient management techniques and practices or disseminate information regarding the most recent developments in techniques and technologies related to best management practices.

(3) Projects which assist farmers with the development of nutrient management plans which meet the requirements of the act.

(4) Projects which can be replicated throughout this Commonwealth.

(5) Projects which encourage program participation in a cost-effective manner.

(6) Any project determined by the Department to assist in the implementation and acceptance of the act.

(c) *Format of application*. A proposal for a grant will not be considered unless the following information is included:

(1) A cover page containing the project title, organization name, address and phone number, name of the local project coordinator, amount of money being requested and the date of the proposal's submission.

(2) A summary of the project including objectives, target audiences, staff dedicated to the project and other agencies or groups assisting with the project.

(3) A detailed project description including steps involved to complete the project, estimated completion dates, persons responsible for completion of the various steps and methods or procedures that will be used to carry out the project.

(4) A reasonable and accurate statement of the project's estimated cost. This statement shall contain a separate detailed breakdown of the personnel and materials costs, including a separate breakdown on equipment, travel, printing, supplies and other expenses anticipated to be associated with the project. The applicant shall provide documentation or financial statements available to support the estimated project costs.

(5) If temporary staff is being hired to administer the project, a breakdown including hiring and release dates, salaries to be paid, time to be allotted to administering the project and duties and responsibilities of the temporary staff.

(6) A description of the project evaluation criteria and a discussion of how the proposed project meets those criteria as well as a discussion of the methods which will be used to evaluate the success of the project.

§ 130d.13. Processing of application.

(a) *Competitive program*. The NMEGP is a competitive program. Grant requests and related documents shall be received by the Department and will be reviewed by the Committee and the Secretary. These requests shall be reviewed in accordance with the grant proposal and grant ranking factor requirements outlined in this subchapter.

(b) *Committee.* The Committee will review completed grant applications and supporting documentation and has the power to recommend approval, approval with special conditions or rejection of applications and to recommend issuance of grants in accordance with the general considerations and eligibility criteria of the act.

(c) *Secretary*. The Secretary will review the recommendations made by the Committee and will have final authority to accept or reject the recommendations. The Secretary may also impose restrictions or special conditions upon the issuance of a grant.

(d) *Incomplete or inaccurate applications*. If an application is found to be incomplete or inaccurate, final processing of the application may be discontinued or additional data may be requested. If additional data is requested, processing of the application will cease until the requested data is supplied by the applicant. When additional data has been requested, the Committee or the Secretary will terminate the processing of an incomplete

application when the additional data is not supplied within 30 days of the request.

(e) *Deadline for applications*. Applications for grants shall be submitted to the Department by March 1 of the year preceding the fiscal year in which the proposed project will be administered.

§ 130d.14. Review criteria.

(a) The evaluation of the application by the Committee shall be based on the following criteria:

(1) *Applicant's eligibility*. To be eligible for a grant under this chapter, the applicant shall be:

(i) A conservation district with an active delegation agreement with the Commission through the Department.

(ii) A conservation district possessing the resources and sufficiently educated, trained or experienced personnel to carry out the Nutrient Management Program or Project proposed in the grant application and guarantee that it will participate in the project for the duration of the grant period.

(2) *Ranking of the application*. When reviewing and ranking an application, the following factors will be used:

(i) The relevance of the project to education and outreach regarding the act.

(ii) The innovativeness of the project.

(iii) The scope of the project and the number of people who will be affected by the project as described in the proposal.

(iv) The value to the agricultural community of the project described in the proposal.

(v) The ability of the applicant to provide matching funds or other financial contributions to the project.

(vi) The extent to which each project impacts upon farmers or producers within this Commonwealth.

(vii) The value to those who work directly with farmers and producers.

(viii) Whether the applicant has been, in whole or in part, the recipient of another grant under the act within the same fiscal year.

(ix) Whether other local, county, regional or State organizations are participating in the project or can use the material developed from the project.

(x) The anticipated cost of the project and resource utilization.

§ 130d.15. Notice of disposition of application.

An applicant will be notified by the Department within 30 days after receipt of an application of a decision to reject or approve the grant, unless the application is incomplete, in which case the Committee will follow the actions prescribed in § 130d.13(d) (relating to processing of application). Notice will be sent by regular mail to the address indicated by the applicant on the grant proposal. An approved applicant will receive a grant agreement, which shall be executed by the applicant and the Department. Funds will be provided based on a reimbursement request upon completion of the project. Grant money shall be used within the dates indicated on the grant agreement.

§ 130d.16. Grant cancellation and right of recovery.

A grant may be canceled by the Department if the Secretary determines the grant funds are not being spent in accordance with the terms and conditions of the grant agreement, the act or this chapter. The Department has the right to make a claim for and receive from the grant recipient moneys not expended in accordance with the grant agreement, the act or this chapter and may demand the return of the grant sum, or a portion thereof, plus legal interest thereon.

§ 130d.17. Deficits.

The Department's financial obligation is limited to the amount of the grant. The Department is not responsible for funding cost overruns incurred by a grant recipient.

[Pa.B. Doc. No. 98-1599. Filed for public inspection October 2, 1998, 9:00 a.m.]

INSURANCE DEPARTMENT

[31 PA. CODE CH. 84a]

Minimum Reserve Standards for Individual and Group Health and Accident Insurance Contracts

The Insurance Department (Department) proposes to amend Chapter 84a (relating to minimum reserve standards for individual and group health and accident insurance contracts) to read as set forth in Annex A, under the authority of sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412) and sections 301.1 and 311.1 of The Insurance Department Act of 1921 (40 P. S. §§ 71.1 and 93).

Purpose

The purpose of the proposed amendments is to update the chapter by clarifying and modifying the minimum standards for an insurance company in calculating financial reserves for a health and accident insurance contract. The proposed amendments also modify the minimum contract reserve standards for long-term care insurance.

A Department notice, dated July 7, 1994, clarified the applicability of of Chapter 84a to contracts issued prior to October 23, 1993. The proposed rulemaking incorporates some minimum standards for reserves provided in the notice and also changes other requirements regarding minimum standards for reserves.

Most of the proposed amendments were patterned after the amendments to the National Association of Insurance Commissioners' (NAIC) Minimum Reserve Standards For Individual and Group Health Insurance Contracts Model Regulation adopted by the NAIC after October 23, 1993.

In developing the proposed rulemaking, comments were solicited and received from the Insurance Federation of Pennsylvania, Inc (IFP). Comments from this organization were taken into consideration in preparing the proposed amendments to Chapter 84a.

Explanation of Regulatory Requirements

The following is a description of the significant features of the changes contained in the proposed rulemaking:

Section 84a.3 (relating to definitions) was modified to add definitions of "operative date" and "rating block."

Section 84a.6 (relating to contract reserves) establishes minimum standards for contract reserves and defines the contracts that are subject to the minimum standards.

Additionally, the proposed amendments to Chapter 84a permit the use of termination rates that exceed mortality table rates for all contracts. Also, new termination standards are established for individual long-term care contracts and group certificates issued on and after January 1, 1999. The proposed rulemaking clarifies that the minimum standard requirements of Chapter 84a may be applied to a block of contracts, instead of on a per contract basis. Additionally, a minimum standard is established for contracts providing a nonforfeiture benefit. Finally, the proposed rulemaking clarifies the applicability of Chapter 84a to contracts issued prior to October 23, 1993.

Appendix A (relating to specific standards for morbidity, interest and mortality) establishes the minimum standards for morbidity, interest and mortality used in calculating claim, premium and contract reserves. The morbidity standards for group contract health and accident insurance benefits are being modified to clarify that the standards apply to group certificates instead of group policy contracts. The interest standards were modified to clearly identify the interest rate requirement in calculating minimum reserves. The Appendix is amended to clarify the mortality standards for individual contracts and group certificates issued prior to October 23, 1993, and to establish a new mortality standard for long term care individual contracts and group certificates issued on and after January 1, 1999.

Affected Parties

The proposed amendments to Chapter 84a will apply to life insurance companies, property and casualty insurance companies and fraternal benefit societies marketing health and accident insurance in this Commonwealth.

Fiscal Impact

State Government

There will be no increase in cost to the Department due to the adoption of the proposed modifications to Chapter 84a. As part of its solvency surveillance responsibilities the Department currently reviews the methodology used by an insurance company to calculate health and accident reserves to ensure that the reserves are adequate and comply with the minimum standard requirements. The proposed revisions and clarifications of the minimum standards will not create additional staff time to perform the analysis.

General Public

Since the proposed amendments to Chapter 84a concern the solvency requirements applied to insurance companies, the public will benefit from a financially sound insurance industry in the ability of insurers to fulfill their contractual obligations.

Political Subdivisions

The proposed amendments will not impose additional costs on political subdivisions. However, because the proposed rulemaking promotes stability in the insurance industry in this Commonwealth, political subdivisions' tax revenues would benefit as a result of fewer insurer insolvencies. Fewer insolvencies would result in less unemployment and would increase incentives for insurers to market new insurance products in this Commonwealth.

Private Sector

The proposed amendments to Chapter 84a may have some fiscal impact on insurers. To the extent that reserves for business issued prior to October 23, 1993, do not comply with the minimum standard reserve requirements, an insurance company will need to increase the reserves. The proposed amendments to the minimum contract reserve standards that apply specifically to long-term care insurance will not affect current business. These amendments apply only to contracts issued after the adoption of this proposed rulemaking. There may be some expense incurred by an insurance company in modifying the reserve calculation system to comply with amended minimum reserve standards.

Paperwork

The adoption of this proposed rulemaking will not impose additional paperwork on the Department or the insurance industry. The clarifications and new requirements of the amendments apply to the reserve calculations but will not result in additional paperwork.

Effective/Sunset Date

The proposed rulemaking will become effective upon final adoption and publication in the *Pennsylvania Bulletin* as final rulemaking. No sunset date has been assigned.

Contact Person

Questions or comments concerning this proposed rulemaking may be addressed in writing to Peter J. Salvatore, Regulatory Coordinator, 1326 Strawberry Square, Harrisburg, PA 17120, within 30 days of the publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 23, 1998, the Department submitted a copy of these proposed amendments 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 submitting the proposed amendments, 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." A copy of that material is available to the public upon request.

If IRRC has objections to any portion of the proposed amendments, it will notify the Department within 10 days of the close of the Committees' review 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 the Department, the Governor and the General Assembly to review these objections before final publication of the amendments.

M. DIANE KOKEN,
Insurance Commissioner

Fiscal Note: 11-190. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 31. INSURANCE

PART IV. LIFE INSURANCE

CHAPTER 84a. MINIMUM RESERVE STANDARDS FOR INDIVIDUAL AND GROUP HEALTH AND ACCIDENT INSURANCE CONTRACTS

§ 84a.1. Purpose.

This chapter implements sections 301.1 and 311.1 of The Insurance Department Act of **[one thousand nine hundred and twenty-one] 1921** (40 P. S. §§ 71.1 and

93) which authorize the Commissioner to promulgate regulations specifying appropriate reserve standards.

§ 84a.3. Definitions.

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

* * * * *

***Department*—The Insurance Department of the Commonwealth.**

* * * * *

Long-term care insurance—An insurance contract advertised, marketed, offered or designed to provide coverage for at least 12 consecutive months for each covered person on an expense incurred, indemnity, prepaid or other basis; for functionally necessary or medically necessary diagnostic, preventive, therapeutic, rehabilitative, maintenance or personal care services, provided in a setting other than an acute care unit of a hospital:

(i) The term includes a policy or rider **[which] that** provides for payment of benefits based upon cognitive impairment or the loss of functional capacity.

(ii) The term does not include an insurance contract which is offered primarily to provide basic Medicare supplement coverage, basic hospital expense coverage, basic medical-surgical expense coverage, hospital confinement**[,]** indemnity coverage, major medical expense coverage, disability income coverage, accident only coverage, specified disease **coverage** or specified accident coverage **[or limited benefit health and accident coverage]**.

Modal premium—The premium paid on a contract based on a premium term **[which] that** could be annual, semiannual, quarterly, monthly or weekly. For example, if the annual premium is $100 and if, instead, monthly premiums of $9 are paid**,** the modal premium is $9.

* * * * *

***Operative date*—The effective date of the approval by the Commissioner for an insurer to use the 1980 CSO Mortality Table to calculate nonforfeiture values and reserves for life insurance contracts.**

* * * * *

***Rating block*—A grouping of contracts based on common characteristics, such as a policy form or forms having similar benefit designs.**

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§ 84a.4. Claim reserves.

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(b) *Minimum standards for claim reserves of disability income benefits.*

* * * * *

(2) Minimum standards with respect to morbidity are those specified in Appendix A; except that, at the option of the insurer:

* * * * *

(ii) For group disability income claims with a duration from date of disablement of more than 2 years but less than 5 years, reserves may, with the approval of the Commissioner, be based upon the insurer's experience for which the insurer maintains underwriting and claim administration control if the experience is considered credible. For an insurer's experience to be considered credible, the insurer shall be able to provide claim termination patterns over no more than 6 years reflecting at least 5,000 claim terminations during the third through fifth claim durations on reasonably similar applicable policy forms. Reserve tables based on credible experience shall be adjusted regularly to maintain reasonable margins. **[Demonstrations may be required by the Commissioner based on published literature.] The Commissioner, based on published literature, may require demonstrations.** The request for approval of a plan of modification to the reserve basis shall include the following:

* * * * *

(d) *Claim reserve methods.* **[Generally accepted or] A** reasonable actuarial **[methods] method** or combination of methods may be used to estimate claim liabilities. The methods used for estimating liabilities generally may be aggregate methods, or various reserve items may be separately valued. Approximations based on groupings and averages may also be employed. Adequacy of the claim reserves shall be determined in the aggregate.

§ 84a.6. Contract reserves.

(a) *General requirements.*

(1) Contract reserves are required for the following:

* * * * *

(ii) The individual and group contracts with respect to which, due to the gross premium pricing structure at issue, the value of the future benefits at any time exceeds the value of any appropriate future valuation net premiums at that time. **This evaluation may be applied on a rating block basis if the total premiums for the block were developed to support the total risk assumed and expected expenses for the block each year, and an actuary certifies the premium development. The actuary should state in the certification submitted to the Department with the reserve valuation data that premiums for the rating block were developed so that each year's premium was intended to cover that year's costs without any prefunding. If the premium is also intended to recover costs for any prior years, the actuary shall also disclose the reasons for and magnitude of the recovery.** The values specified in this subsection shall be determined on the basis specified in subsection (b).

[(2) Contract reserves are not required for the following:

(i) Contracts which cannot be continued after 1 year from issue.

(ii) Contracts already in force on October 23, 1993, for which no contract reserve was required under the standards in effect prior to October 23, 1993.

(3)] (2) * * *

[(4)] (3) * * *

(b) *Minimum standards for contract reserves.*

(1) *Morbidity or other contingency.*

* * * * *

(ii) Contracts for which tabular morbidity standards are not specified in Appendix A shall be valued using tables established for reserve purposes by a qualified actuary and acceptable to the Commissioner. **The mor-**

bidity tables shall contain a pattern of incurred claim costs that reflect the underlying morbidity and may not be constructed for the primary purpose of minimizing reserves.

(iii) If a morbidity standard specified in Appendix A is on an aggregate basis, the morbidity standard may be adjusted **to a select and ultimate basis** to reflect the effect of insurer underwriting by policy duration. The adjustments shall be appropriate to the underwriting and be acceptable to the Commissioner.

* * * * *

(3) *Termination rates.*

(i) Termination rates used in the computation of reserves shall be on the basis of a mortality table as specified in Appendix A except as noted in **[subparagraph] subparagraphs** (ii) **and (iii)**.

(ii) **[Under contracts for which premium rates are not guaranteed, and when the effects of insurer underwriting are specifically used by policy duration in the valuation morbidity standard or for return of premium or other deferred cash benefits total] Total** termination rates may be used at ages and durations when these exceed specified mortality table rates, but not in excess of the lesser of 80% of the total termination rate used in the calculation of the gross premiums or 8%.

(iii) For long-term care individual contracts and group certificates issued on and after January 1, 1999, termination rates in addition to the specified mortality table rates may be used. The termination rates other than mortality may not exceed the following:

(A) For policy years 1 through 4, the lesser of 80% of the voluntary lapse rate used in the calculation of gross premiums and 8 %.

(B) For policy years five and later, the lesser of 100% of the voluntary lapse rate used in the calculation of gross premiums and 4%.

(4) *Reserve method.*

* * * * *

(ii) For long-term care insurance, the minimum reserve is the reserve calculated **[on the 1-year full preliminary term method.] as follows**:

(A) For individual contracts and group certificates issued before October 23, 1993, reserves calculated on the 2-year preliminary term method.

(B) For individual contracts and group certificates issued on or after October 23, 1993, reserves calculated on the 1-year preliminary term method.

(iii) For return of premium or other deferred cash benefits **in individual contracts and group certificates issued prior to October 23, 1993,** the minimum reserve is the reserve calculated **on the 2-year preliminary term method [as follows:]**

(iv) For return of premium or other deferred cash benefits in individual contracts and group certificates issued on or after October 23, 1993, the minimum reserve is the reserve calculated as follows:

(A) * * *

(B) * * *

[(iv)] (v) * * *

* * * * *

(6) *Nonforfeiture benefits.* The contract reserve on a policy basis may not be less than the net single premium for the nonforfeiture benefits at the appropriate policy duration, when the net single premium is computed according to the specifications in this section.

* * * * *

(d) *Tests for adequacy and reasonableness of contract reserves.*

* * * * *

(2) If a company has a contract or a group of related similar contracts, for which future gross premiums will be restricted **[by contract]** so that the future gross premiums reduced by expenses for administration, commissions and taxes will be insufficient to cover future claims, the company shall establish contract reserves for the shortfall in the aggregate.

APPENDIX A

SPECIFIC STANDARDS FOR MORBIDITY, INTEREST AND MORTALITY

I. MORBIDITY.

* * * * *

(b) Minimum morbidity standards for valuation of specified group contract health and accident insurance benefits are as follows:

(1) Disability income benefits due to accident or sickness.

(i) *Contract reserves.*

(A) **[Contracts] Certificates** issued prior to January 1, 1993: The same basis, if any, as that employed by the insurer as of January 1, 1993.

(B) **[Contracts] Certificates** issued on or after January 1, 1993: The 1987 Commissioners Group Disability Income Table (87CGDT).

(ii) *Claim reserves.*

(A) For claims incurred on or after January 1, 1993: The 1987 Commissioners Group Disability Income Table (87CGDT).

(B) For claims incurred prior to January 1, 1993: **[Use of the 87CGDT is optional] Claim reserves are to be determined as provided in § 84a.4(c)(2) (relating to claim reserves).**

(2) Other group contract benefits.

(i) *Contract reserves.* For other group contract benefits, morbidity assumptions are to be determined as provided in **[the reserve standards] § 84a.6(b)(1)(ii) (relating to contract reserves).**

(ii) *Claim reserves.* For benefits other than disability, claim reserves are to be determined as provided in **[the standards] § 84a.4(c)(2)**.

II. INTEREST

(a) *Contract reserves.*

(1) The maximum interest rate is the maximum rate permitted by **[law] section 301 of The Insurance Department Act of 1921 (40 P. S. § 71)** in the valuation of whole life insurance issued on the same date as the health and accident insurance contract **and with a guarantee duration of more than 20 years.**

(b) *Claim reserves.*

(1) For claim reserves on policies that require contract reserves, the maximum interest rate is the maximum rate permitted by **[law] section 301 of The Insurance Department Act of 1921,** in the valuation of whole life insurance issued on the same date as the claim incurral date **and with a guarantee duration equal to the maximum benefit period**.

(2) For claim reserves on policies not requiring contract reserves, the maximum interest rate is the maximum rate permitted by **[law] section 301 of The Insurance Department Act of 1921** in the valuation of single premium immediate annuities issued on the same date as the claim incurral date, reduced by 100 basis points.

III. MORTALITY

(a) For individual contracts and group certificates issued prior to the insurer's operative date, the mortality basis used shall be according to a table permitted by law for the valuation of whole life insurance issued on the same date as the health and accident insurance individual contract or group certificate.

(b) For individual contracts and group certificates issued on or after the insurer's operative date and prior to January 1, 1989, the mortality basis shall be according to either the 1958 CSO Mortality Table or the 1980 CSO Male and Female Mortality Tables, but without use of selection factors.

[(a) Except as provided in] (c) Unless subsection **[(b)] (d) applies**, the mortality basis used **for individual contracts and group certificates issued on or after January 1, 1989, except long-term care individual contracts and group certificates issued on or after January 1, 1999,** shall be according to a table, but without use of selection factors, permitted by law for the valuation of whole life insurance issued on the same date as the health and accident insurance contract. **For long-term care individual contracts and group certificates issued on or after January 1, 1999, the mortality basis used shall be the 1983 Group Annuity Mortality Table without projection.**

[(b)] (d) Other mortality tables adopted by the National Association of Insurance Commissioners (NAIC) and promulgated by the Commissioner may be used in the calculation of the minimum reserves if appropriate for the type of benefits and if approved by the Commissioner. The request for approval shall include the proposed mortality table and the reason that the standard specified in subsection **[(a)] (c)** is inappropriate.

[Pa.B. Doc. No. 98-1600. Filed for public inspection October 2, 1998, 9:00 a.m.]

[31 PA. CODE CH. 64]

Private Passenger Automobile Policy Forms

The Insurance Department (Department) proposes to delete Chapter 64 (relating to private passenger automobile policy forms), to read as set forth in Annex A. The Department is publishing this proposed rulemaking under the authority of sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412); section 354 of The Insurance Company Law of 1921 (40 P. S. § 477b); and sections 4 and 5 of the Unfair Insurance Practices Act (40 P. S. §§ 1171.4 and 1171.5). Chapter 64 sets forth detailed readability requirements for the approval of automobile insurance policies including application of the Flesch Scale testing procedure.

Purpose

The purpose of this proposed rulemaking is to delete Chapter 64 and eliminate obsolete and redundant regulations which do not serve any compelling public interest. Adopted in 1975, the chapter requires insurers licensed to do business in this Commonwealth to provide auto insurance policies that are understandable to a person of average intelligence and education. The chapter is limited to private passenger auto insurance policies. The chapter requires the insurer to file auto policy forms that are simply written, clearly worded, legible, use simple words and avoid complex sentences and which include an index at the beginning of the form. The chapter further requires specific standards for policy structure, printing, margins and related legibility requirements. The chapter is unnecessary because its requirements duplicate present statutory requirements and the specific standards of the Flesch Test are unduly burdensome.

Specifically, this chapter duplicates existing authorities governing the filing of insurance policy forms. The Department has the existing authority to review property and casualty policy forms prior to use under section 354 of The Insurance Company Law.

Further, the attempt to prevent specific auto insurance policy abuses by regulation is not necessary because statutory authority to regulate unfair practices in the business of insurance exists under the Unfair Insurance Practices Act (40 P. S. §§ 1171.1—1171.15).

Sections 4 and 5 of the Unfair Insurance Practices Act address unfair, deceptive practices or misrepresentation by any person or company engaged in the business of insurance. The existing authorities provide a basis for the Department's disapproval of an insurance policy which is not understandable to a person of average intelligence or education. Finally, the sections requiring policies to make use of specific typeface and conform to highly complex readability standards by means of the application of the Flesch Scale testing procedure are unduly burdensome.

External Comments

Comments regarding this proposed rulemaking were solicited from the various trade associations representing the insurance industry in this Commonwealth. Comments were received from the Insurance Federation of Pennsylvania, Inc.

Fiscal Impact

The proposed deletion of Chapter 64 is expected to result in a slight reduction in business cost for the property and casualty insurance industry. By deleting

this chapter, the readability testing requirement will be eliminated. Currently each auto form filed with the Department is accompanied by Flesch Test analysis and readability score. This analysis will no longer be performed and submitted. A conservative estimated savings to the insurance industry is $100,000 annually. This is based on the average of 4,000 auto policy forms filed annually.

Paperwork

The proposed deletion of Chapter 64 is expected to decrease paperwork requirements for the affected parties because the deletion eliminates unnecessary reporting requirements for the insurance industry.

Affected Parties

The proposed deletion of Chapter 64 will affect all insurers who are licensed to sell property and casualty insurance in this Commonwealth.

Effectiveness/Sunset Date

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

Contact Person

Questions or comments regarding the proposed rulemaking may be addressed in writing to Peter J. Salvatore, Regulatory Coordinator, 1326 Strawberry Square, Harrisburg, PA 17120, within 30 days following the publication of this notice in the *Pennsylvania Bulletin*.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 23, 1998, the Department submitted a copy of this rulemaking 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 proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the agency in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of that material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed rulemaking, it will notify the Department within 10 days of the close of the Committees' review 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 the agency, the Governor and the General Assembly to review these objections before final publication of the rulemaking.

M. DIANE KOKEN,
Insurance Commissioner

Fiscal Note: 11-147. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 31. INSURANCE

PART II. AUTOMOBILE INSURANCE

CHAPTER 64. (Reserved)

(*Editor's Note*: The Department is proposing to delete the existing text of §§ 64.1—64.14 and Appendix A, which currently appears at 31 Pa. Code pages 64-1—64-8, serial pages (131427), (131428), (146453), (146454) and (131431)—(131434) to read as set forth in Annex A.).

§§ 64.1—64.14. (Reserved).

[Pa.B. Doc. No. 98-1601. Filed for public inspection October 2, 1998, 9:00 a.m.]

[31 PA. CODE CHS. 35, 123 AND 124]
Surplus Lines Insurance

The Insurance Department (Department) proposes to delete Chapter 35 and 123 (relating to surplus lines agents) and adopt Chapter 124 (relating to surplus lines insurance) to read as set forth in Annex A. The rulemaking is proposed under the authority of Article XVI of the Insurance Company Law (act) (40 P. S. §§ 991.1601—991.1625). The proposed rulemaking sets forth duties and requirements relating to surplus lines agents, producing brokers and surplus lines insurers transacting business in this Commonwealth.

Purpose

The surplus lines insurance market is intended to provide coverage for nonstandard or unique risks that do not fit the underwriting guidelines of insurers licensed to transact business in the market for standard or traditional insurance coverages (admitted insurers). Surplus lines insurance may be procured through licensed surplus lines agents (surplus lines licensees) from insurers that appear on a list of eligible surplus lines insurers published by the Department. A surplus lines licensee may place coverage as a result of being contacted directly by a consumer or in response to a request from another insurance broker (producing broker) who is dealing directly with the consumer.

The Commonwealth's surplus lines laws and regulations were adopted to establish a system of regulation that permits orderly access to surplus lines insurance in this Commonwealth with reputable and financially sound insurers and provides for adequate protections in the insurance marketplace. The Commonwealth's initial Surplus Lines Insurance Law (act of January 24, 1966, 1965 (P. L. 1509, No. 531)) was replaced by Article XVI of the act in 1992. The purpose of this rulemaking is to replace the regulations adopted under the authority of the initial Surplus Lines Insurance Law with updated regulations consistent with Article XVI of the act.

Explanation of Regulatory Requirements

Section 124.1 (relating to definitions) defines key terms used to identify the types of insurers that fall within the scope of the chapter and other terms needed to supplement the definitions in section 1602 of the act (40 P. S. § 991.1602). The definitions clarify terms used in the chapter without unnecessary duplication of definitions in the act.

Section 1608 of the act (40 P. S. § 991.1608) requires that insureds be given written notice when all or part of their insurance is placed with a nonadmitted insurer (an eligible surplus lines insurer or other insurer that is not authorized and not licensed to do business in this Commonwealth). The notice must be provided at the time an insured is presented with a quotation and must advise the insured that: (1) the nonadmitted insurer is not licensed by the Department and is subject to only limited regulation; and (2) losses will not be covered by the State guaranty fund if the insurer becomes insolvent. Section

124.2 (relating to notice to insured) requires that the notice be substantially similar in content to that in section 1608 of the act and prominently printed on the first page of the quotation. These provisions are intended to assure that this important information is clearly and accurately conveyed to consumers before they purchase surplus lines insurance.

Section 1618 of the act (40 P. S. § 991.1618) specifically provides that a surplus lines licensee who is granted binding or underwriting authority by an eligible surplus lines insurer is subject to regulations promulgated by the Department. Section 124.3(a) (relating to conditions of binding authority) prohibits a surplus lines licensee from exercising binding authority without a properly executed written contract with the eligible surplus lines insurer that sets forth the terms, conditions and limitations of the surplus lines licensee's binding authority. In addition, § 124.3(a) lists the minimum provisions required in binding authority contracts. These minimum requirements are intended to assure that a contract clearly defines the limits of the surplus lines licensee's authority and either expressly prohibits the licensee from delegating that authority or, if the contract permits delegation, requires the licensee to obtain the insurer's written approval prior to delegating binding authority. Section 124.4(b) and (c) requires that executed copies of the contracts or any instruments delegating authority granted under the contracts be maintained in this Commonwealth and available for examination by the Department for at least 5 years following termination. These retention requirements provide the Department with the access needed to determine compliance with the regulations.

Section 1612(a) of the act (40 P. S. § 991.1612(a)) requires the surplus lines licensee to deliver the insurance contract to the insured or the producing broker upon placing surplus lines insurance. If the insurance contract is not immediately available, the licensee may deliver a cover note, binder or other evidence of insurance that contains at least the information required in section 1612(a) of the act. Section 124.4 (relating to evidence of insurance) requires the surplus lines licensee to deliver the contract or other evidence of insurance within 15-calendar days after either binding the coverage or receiving notice from the insurer that it has assumed the risk. The 15-day requirement establishes a clearly defined time frame for delivery of the contract or other evidence of insurance under section 1612 of the act.

Section 124.4(c) requires the contract or other evidence of insurance to contain a service of process clause with language substantially similar to the language in that subsection. The clause is intended to facilitate compliance with section 1624 of the act (40 P. S. § 991.1624) providing for service of process in actions against surplus lines insurers. Specifically, section 1624(a) of the act requires the contract or other evidence of insurance to contain a provision stating the substance of that section and designating the person on whom process shall be served.

Section 1604(2) of the act (40 P. S. § 991.1604(2)) sets forth three criteria, at least one of which must be satisfied before a surplus lines licensee may place coverage with an eligible surplus lines insurer. Section 1604(2)(i) of the act, the first criterion, permits placement of surplus lines insurance when the full amount or kind of insurance cannot be obtained from admitted insurers, if a diligent search has been made among the admitted insurers who are writing, in this Commonwealth, coverage comparable to the coverage being sought. Section 124.5 (relating to diligent search of admitted insurers) establishes the minimum duties and requirements that apply to producing brokers and surplus lines licensees in conducting a diligent search of the licensed market.

Current declaration forms required under section 1609(a)(1)(i) of the act (40 P. S. § 991.1609(a)(1)(i)) to be executed by the producing broker (or by the surplus lines licensee when acting as the producing broker) require the producing broker to identify at least three admitted insurers which have declined to insure the risk. Section 124.5(a)(1) will permit a producing broker who has less than three agent appointments to obtain declinations from less than three admitted insurers. While brokers may be appointed by admitted insurers to act as agents, they are not required to maintain appointments. The provisions for less than three declinations have been included in the regulation to recognize that a producing broker with less than three agent appointments may not be able to obtain at least three declinations. In addition, § 124.5(a)(5) permits a producing broker to assume that an admitted insurer has declined a risk if the insurer fails to respond within 5 business days of the broker's request.

Section 124.5(a)(3) requires the producing broker to create a written record of a declination of coverage, either by obtaining a written declination from the insurer or creating a written record to document an oral declination. Section 124.5(a)(4) lists the information required to be included in a written record created to document an oral declination. This documentation is an important part of the record of insurance contracts placed in the surplus lines market under section 1609(a)(1)(i) of the act.

Section 124.5(b) refers to the statutory duties imposed on surplus lines licensees in the conduct of a diligent search of the licensed market. Specifically, the licensee is required to file a written declaration of the licensee's lack of knowledge of how the coverage could have been procured from admitted insurers. In addition, if a surplus lines licensee acts as both the producing broker and the surplus lines licensee, the licensee must also execute the declaration form applicable to the producing broker. These references have been included in the regulation to integrate and clarify the various statutory duties related to a diligent search of admitted insurers when coverage is placed in the surplus lines market under section 1604(2)(i) of the act.

Section 124.5(c) establishes qualification requirements for persons authorized to decline coverage on behalf of admitted insurers. The person must be a full-time employe of the admitted insurer with underwriting responsibility or a full-time employe of an underwriting manager for the insurer. In addition, § 124.5(d) prohibits declinations from being obtained from an affiliate of an admitted insurer that has already declined the risk and also prohibits surplus lines insurance from being placed with an affiliate of a declining insurer, except when the affiliated insurers are independent of each other as defined in § 124.5(d)(3). These restrictions are needed to assure that a proper diligent search is made of the admitted market before coverage is placed in the surplus lines market under the criterion in section 1609(a)(1)(i) of the act.

Section 1604(2)(ii) of the act permits coverage to be placed in the surplus lines market if no admitted insurers are writing coverage comparable to the coverage being sought. Under this second criterion for placement of surplus lines insurance, the Insurance Commissioner has published an export list of the coverages declared to be generally unavailable in the admitted market. (See 27

Pa.B. 2795 (June 7, 1997).) Section 124.6 (relating to export list coverages) clarifies that the diligent search requirement in section 1604(2)(i) of the act and related reporting requirements do not apply to the placement of coverage that appears on the export list. Within 45 days of placing coverage that appears on the export list, § 124.6(c) requires the surplus lines licensee to file a copy of the declaration page of the policy or other evidence of insurance with the Department.

Section 1604(2)(iii) of the act, the third criterion under which coverage may be placed in the surplus lines market, permits coverage to be placed in the surplus lines market if it is a unique form of coverage not available in the admitted market. Section 124.7 (relating to unique forms of coverages) requires the surplus lines licensee to file a declaration reporting these transactions in a form prescribed by the Department within 45 days of placing the coverage. The filing requirements relating to export list and unique forms of coverage will allow the Department to monitor the placement of these coverages in the surplus lines market.

Section 1615(b)(4) of the act (40 P. S. § 991.1615(b)(4)) requires a surplus lines licensee to file with the Department and maintain a surety bond in the amount of at least $50,000. The bond is to be conditioned that the surplus lines licensee will conduct business in accordance with Article XVI of the act and will promptly remit the taxes as provided by law. Section 1621 of the act (40 P. S. § 991.1621) imposes a 3% tax on all premiums charged for insurance placed with an eligible surplus lines insurer or other nonadmitted insurer. The surplus lines licensee is responsible for the collection of the 3% tax from the insured or the producing broker at the time of delivery of the initial contract or other evidence of insurance. On or before January 31 each year, the surplus lines licensee is required to file a report of all transactions during the previous calendar year with the tax due for those transactions. Section 124.8(a) (relating to surplus lines licensee bond requirements) requires a bond in the amount of at least $50,000 for the initial term of a license. Section 124.8(b) requires the amount of the bond for renewal of a license to be based on the total amount of the licensee's taxable surplus lines premiums for the preceding calendar year, as determined by a table in § 124.8(b). These requirements are needed to assure that the required minimum amount of a licensee's bond is commensurate with the licensee's obligation to remit the 3% premium tax.

Section 124.9 (relating to requirements to qualify as an eligible surplus lines insurer) sets forth requirements that insurers must meet to be considered under section 1605(b) of the act (40 P. S. § 991.1605(b)) for placement on the Department's list of eligible surplus lines insurers. In addition to the requirements of Article XVI of the act, the insurer must be licensed in its domiciliary jurisdiction to transact the kinds of insurance it proposes to provide in this Commonwealth. The insurer also must have been engaged in transacting surplus lines insurance in at least one jurisdiction, or have been an affiliate of an admitted insurer, for the 3 years immediately preceding the insurer's application for inclusion on the Department's list. Under section 1605(a)(2)(i) of the act (40 P. S. § 991.1605(a)(2)(i)) an alien insurer is required to maintain an irrevocable trust fund in the United States in an amount not less than currently required by the National Association of Insurance Commissioners (NAIC) for the protection of all policyholders in the United States. Section 124.9(3) requires alien insurers to provide evidence of their inclusion on the list of alien insurers that have met the NAIC's criteria. The qualifications in the regulation are consistent with the eligibility requirements in section 1605 of the act and assure that insurers transacting surplus lines business in this Commonwealth are reputable and financially sound.

Section 124.10 (relating to eligible surplus lines insurer filing requirements) lists the information that must be included in applications by foreign and alien insurers for consideration for inclusion on the Department's list of eligible surplus lines insurers. After placement on the Department's list, the insurers are required to provide the Department with any updates to the information within the time frames provided in § 124.10(b) and (d). The information required in this section will enable the Department to assess the financial condition of applicants and determine whether the applicants satisfy the requirements of Article XVI for the act and the regulations, including the trust fund requirements applicable to alien insurers.

External Comments

In drafting this updated rulemaking, the Department requested comments from the Pennsylvania Surplus Lines Association, surplus lines associations in 12 other states, The Insurance Federation of Pennsylvania, Inc., the Professional Insurance Agents Association, the Independent Insurance Agents of Pennsylvania and a number of firms appointed as United States contacts for alien surplus lines insurers. The comments received in response to the Department's request were considered in the development of this proposed rulemaking.

Fiscal Impact

The reporting, recordkeeping and qualification requirements in Chapter 124 will impose no significant costs on surplus lines licensees, producing brokers or surplus lines insurers transacting business in this Commonwealth. Department costs associated with the review of applications and reports filed under Chapter 124 will not increase as a result of this proposed rulemaking. The chapter will have a beneficial fiscal impact by eliminating current costs imposed on regulated parties and the Department related to the filing and review of binding authority contracts. The chapter will serve to enhance the protection of Commonwealth revenues by imposing minimum bonding requirements consistent with premium tax liability. The chapter will not impact on costs to political subdivisions. While the chapter has no immediate fiscal impact on the general public, the general public will benefit to the extent that adoption of the chapter enhances the efficiency and effectiveness of the Commonwealth's regulation of surplus lines insurance under Article XVI of the act.

Paperwork

Chapter 124 eliminates filing requirements related to binding authority contracts. The chapter will require producing brokers to maintain records to demonstrate that a diligent search of licensed insurers was made before coverage is placed in the surplus lines market. These recordkeeping requirements provide guidance to producing brokers in efforts to conduct a proper search of the licensed market and enhance compliance with the statutory conditions that must be met before coverage in placed in the surplus lines market. The requirements will also enhance the Department's ability to monitor transactions in the surplus lines market.

Persons Regulated

This proposed rulemaking applies to all surplus lines agents, producing brokers and surplus lines insurers transacting business in this Commonwealth.

Contact Person

Questions or comments regarding this proposed rulemaking may be addressed in writing to Peter J. Salvatore, Regulatory Coordinator, Office of Special Projects, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429, within 30 days following the publication of this notice in the *Pennsylvania Bulletin*.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 23, 1998, the Department submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Insurance and the Senate Committee on Banking and Insurance. In addition to submitting this proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the agency in compliance with Executive Order 1996-1. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed amendments, it will notify the Department within 10 days of the close of the Committees' review 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 regulations by the Department, the General Assembly and the Governor of objections raised.

M. DIANE KOKEN,
Insurance Commissioner

Fiscal Note: 11-170. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 31. INSURANCE

PART I. GENERAL PROVISIONS

CHAPTER 35. (Reserved)

(*Editor's Note*: The Insurance Department proposes to delete Chapter 35, §§ 35.1—35.4, 35.11—35.13, 35.21 and 35.22 as set forth at 31 Pa. Code pps. 35-1 to 35-7, serial pps. (195127) to (195133).)

§§ 35.1—35.4 (Reserved).

§§ 35.11—35.13. (Reserved).

§ 35.21. (Reserved).

§ 35.22. (Reserved).

PART VIII. MISCELLANEOUS PROVISIONS

CHAPTER 123. (Reserved)

(*Editor's Note*: The Insurance Department proposes to delete Chapter 123, §§ 123.1, 123.4, 123.11, 123.12, 123.21, 123.31—123.42 and 123.51—123.63 as set forth at 31 Pa. Code pps. 123-1 to 123-14, serial pps. (227532) to (227544).)

§ 123.1. (Reserved)

§ 123.4. (Reserved).

§ 123.11. (Reserved).

§ 123.12. (Reserved).

§ 123.21. (Reserved).

§§ 123.31—123.42. (Reserved).

§§ 123.51—123.63. (Reserved).

CHAPTER 124. SURPLUS LINES INSURANCE

Sec.

§ 124.1. Definitions.

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

Act—Article XVI of The Insurance Company Law of 1921 (40 P. S. §§ 991.1601—991.1625).

Alien insurer—An insurer incorporated or organized under the laws of a foreign nation or of a province or territory other than a state or a territory of the United States or the District of Columbia.

Binding authority—The authority delegated to a surplus lines licensee by an eligible surplus lines insurer to obligate the eligible surplus lines insurer to accept a particular risk.

Commissioner—The Insurance Commissioner of the Commonwealth.

Department—The Insurance Department of the Commonwealth.

Eligible surplus lines insurer list—The most recent list of eligible surplus lines insurers published by the Department under section 1605(b) of the act (40 P. S. § 991.1605(b)).

Foreign insurer—An insurer, other than an alien insurer, not incorporated or organized under the laws of the Commonwealth. For purposes of this chapter, the term also includes a United States branch of an alien insurer which branch is not entered through and licensed to transact insurance or reinsurance in this Commonwealth.

(b) Unless the context otherwise requires, other terms found in this chapter are used as defined in the act.

§ 124.2. Notice to insured.

The written notice required to be given to the insured under section 1608 of the act (40 P. S. § 991.1608) shall be:

(1) Substantially similar in content to that set forth in section 1608(1) and (2) of the act.

(2) Prominently printed on the first page of the quotation.

§ 124.3. Conditions of binding authority.

(a) A surplus lines licensee may not exercise binding authority in this Commonwealth on behalf of an eligible surplus lines insurer unless there is in force a written contract executed by all parties to the contract setting forth the terms, conditions and limitations governing the exercise of binding authority by the surplus lines licensee. The written contract shall, at a minimum, contain the following:

(1) A description of the classes of insurance for which the surplus lines licensee holds binding authority.

(2) The geographical limits of the binding authority.

(3) The maximum dollar limitations on the binding authority for any one risk for each class of insurance.

(4) The maximum policy period for which the surplus lines licensee may bind a risk.

(5) A prohibition against delegation of binding authority by the surplus lines licensee or, if the binding authority is delegable by the surplus lines licensee, a prohibition against delegation of binding authority by the surplus lines licensee without the prior written approval of the eligible surplus lines insurer.

(6) A provision in the following or substantially similar language:

> It is understood and agreed that all insurance placed pursuant to this agreement on risks resident, located, or to be performed in this Commonwealth, shall be effected and written in accordance with Article XVI of the Act of May 17, 1921, P. L. 682, No. 284 (40 P. S. Section 991.1601—991.1625).

(b) An executed copy of the written contract shall be maintained by the surplus lines licensee in its office in this Commonwealth. The copy shall be available at all reasonable times for examination by the Department without notice for at least 5 years following termination of the contract.

(c) If a surplus lines licensee, who is qualified under this chapter to exercise binding authority on behalf of the eligible surplus lines insurer, delegates binding authority to any other surplus lines licensee, the instrument delegating binding authority shall specifically identify the binding authority agreement between the delegating surplus lines licensee and the eligible surplus lines insurer. An executed copy of the instrument delegating binding authority shall be maintained by both the surplus lines licensee delegating binding authority and the surplus lines licensee to whom the authority is delegated in their offices in this Commonwealth. The copy shall be available at all reasonable times for examination by the Department without notice for at least 5 years following termination of the contract.

§ 124.4. Evidence of insurance.

(a) Section 1612 of the act (40 P. S. § 991.1612) requires the surplus lines licensee, upon placing surplus lines insurance, to deliver the contract of insurance to the insured or to the producing broker. A cover note, binder or other evidence of insurance shall be delivered by the surplus lines licensee if the contract of insurance is not immediately available.

(b) Delivery of the contract or other evidence of insurance by the surplus lines licensee shall occur within 15 calendar days after:

(1) Coverage has been bound by the surplus lines licensee, if the surplus lines licensee holds binding authority on behalf of the eligible surplus lines insurer.

(2) The surplus lines licensee has received written notification from the eligible surplus lines insurer or other nonadmitted insurer that it has assumed the risk, if the surplus lines licensee does not hold binding authority on behalf of the eligible surplus lines insurer.

(c) Under section 1624 of the act (40 P. S. § 991.1624), a contract or other evidence of insurance delivered by the surplus lines licensee shall contain a service of process clause substantially similar to the following:

SERVICE OF PROCESS CLAUSE

> It is agreed that in the event of the failure of the Insurer(s) or Underwriter(s) herein to pay any amount claimed to be due hereunder, the Insurer(s) or Underwriter(s) herein, at the request of the Insured (or reinsured), will submit to the jurisdiction of any court of competent jurisdiction within the United States of America and will comply with all requirements necessary to give such court jurisdiction, and all matters arising hereunder shall be determined in accordance with the law and practice of such court. It is further agreed that in any such action instituted against any one of them upon this contract, Insurer(s) or Underwriter(s) will abide by the final decision of such court or of any appellate court in the event of an appeal.
>
> Service of process shall be made pursuant to the procedures provided by 42 Pa.C.S. Ch. 53 Subch. B (relating to interstate and international procedure). When making service of process by mail, such process shall be mailed to _____. The above-named is authorized and directed to accept service of process on behalf of the Insured(s) or Underwriter(s) in any such action or upon the request of the insured (or reinsured) to give a written undertaking to the insured (or reinsured) that it or they will enter a general appearance for the Insurer(s) or Underwriter(s) in the event such an action shall be instituted.
>
> Further, pursuant to any statute of any state, territory or district of the United States of America, which makes provisions therefor, the Insured(s) or Underwriter(s) hereby designates the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute or his successor or successors in office, as the true and lawful attorney upon whom any lawful process may be served in any action, suit or proceeding instituted by or on behalf of the insured (or reinsured) or any beneficiary hereunder arising out of his contract of insurance (or reinsurance), and hereby designates the above-named as the person on whom such process or a true copy thereof shall be served.

§ 124.5. Diligent search of admitted insurers.

Under section 1604(2)(i) of the act (40 P. S. § 991.1604 (2)(i)), surplus lines insurance may be procured through a surplus lines licensee from nonadmitted insurers if a diligent search is made among the admitted insurers who are writing, in this Commonwealth, coverage comparable to the coverage being sought. The following minimum requirements and conditions apply to the conduct of a diligent search among admitted insurers under section 1604(2)(i) of the act.

(1) Under section 1609(a)(1)(i) of the act (40 P. S. § 991.1609(a)(1)(i)), the producing broker shall execute and forward to the surplus lines licensee a written statement, in a form prescribed by the Department, declaring that a diligent effort to procure the desired coverage from admitted insurers was made.

(i) At a minimum, the producing broker shall obtain declinations from admitted insurers with which the producing broker holds agent appointments and which are writing, in this Commonwealth, coverage comparable to the coverage being sought in accordance with the following table:

Number of Agent Appointments	*Number of Required Declinations*
0	1
1	1
2	2
3 or more	3

(ii) A producing broker who obtains less than three declinations shall attach a notarized statement, affirming the number of agent appointments held, to the declaration form required under section 1609(a) of the act.

(iii) A producing broker who obtains a declination from an admitted insurer shall either obtain the declination in writing from the admitted insurer or create a written record of an oral declination by the admitted insurer. A written record of an oral declination shall be made by the person who initially received the declination or by another person working for the business from information transmitted by the person who received the declination. A declination shall be obtained from the admitted insurer or recorded by the producing broker at or near the time of receipt of the declination and maintained in the regular course of business.

(iv) A written record documenting an oral declination shall include:

(A) The name, office location and phone number of the admitted insurer or firm acting in the capacity of underwriting manager for the admitted insurer.

(B) The name and position of the person contacted.

(C) The date of contact.

(D) An explanation of the declination.

(v) If an admitted insurer fails to respond within 5 business days after first being contacted by the producing broker, the producing broker may assume that the insurer has declined to write the risk. The producing broker shall create a written record of the contact, including the manner in which contact was made and the information required under subparagraph (iv)(A)—(C).

(2) Under section 1609(a)(2) of the act, the surplus lines licensee shall file with the Department a written declaration of the licensee's lack of knowledge of how the coverage could have been procured from admitted insurers and shall simultaneously file the written declaration of the producing broker required under section 1609(a)(1) of the act. Under section 1609(a)(3) of the act, if the surplus lines licensee acts as both the producing broker and surplus lines licensee in a particular transaction, the surplus lines licensee is required to execute the declarations required under section 1609(a)(1) and (2) of the act.

(3) A declination of coverage by an admitted insurer shall be made by a person who is a full-time employe of the admitted insurer and who has underwriting responsibility for that admitted insurer or by a full-time employe of a firm acting in the capacity of underwriting manager for the admitted insurer.

(4) For purposes of this paragraph, the term "affiliate" is used as defined in section 1401 of The Insurance Company Law of 1921 (40 P. S. § 991.1401).

(i) A declination may not be obtained from an admitted insurer which is an affiliate of an admitted insurer from which a declination has already been obtained.

(ii) Surplus lines insurance may not be placed with a nonadmitted insurer that is an affiliate of an admitted insurer from which a declination has been obtained.

(iii) The restrictions in paragraph (1)(i) and (ii) do not apply if the affiliated insurers write independently of each other using separate and independently developed underwriting criteria and marketing plans, and for underwriting purposes, compete with each other for the same type of coverage or class of insurance.

§ 124.6. Export list coverages.

(a) Under section 1604(2)(ii) of the act (40 P. S. § 991.1604(2)(ii)), the Commissioner may create and maintain an export list of insurance coverages for which the full amount or kind of insurance cannot be obtained from admitted insurers.

(b) The diligent search requirement of section 1604(2)(i) of the act and the reporting requirements of section 1609(a) of the act (40 P. S. § 991.1609(a)) do not apply to the placement of an insurance coverage which appears on the export list.

(c) Within 45 calendar days after the placement of an insurance coverage which appears on the most recent export list published by the Commissioner, the surplus lines licensee shall file with the Department or its designee a copy of the declaration page of the policy, cover note, binder or other evidence of insurance delivered by the surplus lines licensee in accordance with section 1612(a) of the act (40 P. S. § 991.1612(a)) with the word "EXPORT" stamped in red letters in the upper right hand corner.

§ 124.7. Unique forms of coverages.

Under section 1604(2)(iii) of the act (40 P. S. § 1604(2)(iii)), surplus lines insurance may be procured through a surplus lines licensee from nonadmitted insurers if the kind of insurance sought to be obtained from admitted insurers requires a unique form of coverage not available in the admitted market. Within 45-calendar days after a unique form of coverage has been placed, the surplus lines licensee shall file with the Department or its designee, a written declaration reporting the transaction in a form prescribed by the Department.

§ 124.8. Surplus lines licensee bond requirements.

(a) The bond required under section 1615(b)(4) of the act (40 P. S. § 991.1615(b)(4)) to be maintained concurrent with the term of a surplus lines agent's license shall be in the amount of at least $50,000 for the initial term of the license.

(b) The amount of the bond required for renewal of a surplus lines agent's license shall be based on the total taxable surplus lines premium volume of the surplus lines agent during the preceding calendar year as reported to the Department of Revenue under section 1621 of the act (40 P. S. § 991.1621) and determined by using the following table:

Total Taxable Surplus Lines Premium Volume	*Required Minimum Amount of Bond*
$0—$1,999,999	$50,000
$2,000,000—$3,999,999	$100,000
$4,000,000—$5,999,999	$150,000
$6,000,000—$7,999,999	$200,000
$8,000,000—and over	3% of the total taxable surplus lines premium volume of the surplus lines licensee during the preceding calendar year or other amount acceptable to the Commissioner.

§ 124.9. Requirements to qualify as an eligible surplus lines insurer.

(a) To be considered for placement on the most recent eligible surplus lines insurer list, a nonadmitted insurer shall meet the requirements of the act and this chapter. The nonadmitted insurer shall meet the following requirements:

(1) Be currently licensed as an insurer in the state or country of its domicile for the kinds of insurance which it proposes to provide in this Commonwealth.

(2) Have been either engaged in doing the business of surplus lines insurance in one or more jurisdictions for at least 3 years immediately preceding the filing of an application to be an eligible surplus lines insurer; or be an affiliate of an admitted insurer which has been so admitted for at least 3 years immediately preceding seeking approval to do business in this Commonwealth.

(b) In addition to the requirements in subsection (a), an alien insurer shall provide documentation evidencing its inclusion on the most recent quarterly listing of nonadmitted alien insurers which have met the criteria in the plan of operation adopted by the National Association of Insurance Commissioners International Insurers Department, or successor organization.

§ 124.10. Eligible surplus lines insurer filing requirements.

(a) A request to consider a foreign nonadmitted insurer for placement on the Department's eligible surplus lines insurer list shall be made in writing by a surplus lines licensee and shall include the following:

(1) *Charter*. A copy of the charter of the nonadmitted insurer or similar document and any amendments, additions and deletions thereto certified by the corporate secretary of the nonadmitted insurer.

(2) *Certificate of authority*. A copy of the certificate of authority of the insurer or similar document setting forth its authority to issue policies and insure risks in the jurisdiction in which the insurer is incorporated, formed or organized.

(3) *Financial statement*.

(i) A copy of the latest annual financial report or statement of the insurer signed by the officers of the insurer and filed with the insurance regulatory authority or other governmental authority in the jurisdiction in which the insurer is incorporated, formed or organized. The copy shall include all supplemental reports, exhibits and schedules required as part of the annual statement filing and shall be certified as provided under section 1605(3) of the act (40 P. S. § 991.1605(3)).

(ii) A copy of each subsequent quarterly financial report or statement of the insurer signed by the officers of the insurer and filed with the insurance regulatory authority or other governmental authority in the jurisdiction in which the insurer is incorporated, formed or organized.

(4) *Report of examination*. A copy of the most recent report of examination of the insurer conducted by the insurance regulatory authority or similar governmental authority requiring the examination and certified by the proper official of that authority.

(5) *Biographical information*. Biographical data for each officer, director, person in managerial control, and like individual on a form provided by the Department.

(6) *Kind of insurance*. A written statement by an officer of the insurer identifying the kinds of insurance coverages the insurer intends to write and the types of risks the insurer intends to insure in this Commonwealth.

(7) *Designee for service of process*. A written designation of the name of the individual employed by the insurer or other appropriate representative to whom all lawful process shall be mailed. The designee shall maintain a legal residence, domicile or office in the United States.

(8) *Additional information*. Additional information as may be required by the Commissioner to determine whether the insurer meets the standards and requirements of the act and this chapter.

(b) After placement on the eligible surplus lines insurer list, a foreign insurer shall submit to the Department through a surplus lines licensee:

(1) Changes or additions, or both, to the information in subsection (a)(7) within 10-calendar days of the occurrence.

(2) Changes or additions, or both, to the information in subsections (a)(1) and (5) within 30-calendar days of the occurrence.

(3) A certified copy of the information in subsection (a)(3)(i) within 30-calendar days after the date required for filing in its domiciliary jurisdiction. A copy of the information in subsection (a)(2) shall accompany the filing.

(4) A copy of the information in subsection (a)(3)(ii) within 45-calendar days from the close of the quarter for which the report is prepared.

(5) A certified copy of the information in subsection (a)(4) within 30-calendar days of the date it became a public document.

(6) Additional items as may be required by the Commissioner to determine whether the insurer continues to meet the standards under the act.

(c) A request to consider an alien nonadmitted insurer for placement on the Department's eligible surplus lines insurer list shall be made in writing by a surplus lines licensee and shall include the following:

(1) *Charter*. A copy of the charter of the insurer or similar document and any amendments, additions and deletions thereto certified by the corporate secretary of the insurer.

(2) *Certificate of authority*. A copy of the certificate of authority of the insurer or similar document setting forth its authority to issue policies and insurer risks in the jurisdiction in which the insurer is incorporated, formed or organized.

(3) *Annual financial statement*.

(i) Two copies of the latest annual financial report of the insurer signed by the officers of the insurer and filed with the insurance regulatory authority or other governmental authority in the jurisdiction in which the insurer is incorporated, formed or organized. One copy of the financial report or statement shall be expressed in language and currency of the place of incorporation, formation or organization of the insurer and the other copy prepared and expressed in the English language and United States currency at the current rate of exchange as of the statement date. Certification of the financial report or statement shall be in accordance with section 1605(3) of the act (40 P. S. § 991.1605(3)).

(ii) A copy of the latest annual financial statement of the insurer in the standard reporting format prescribed by the National Association of Insurance Commissioners' International Insurers Department, or successor organization.

(4) *Trust fund agreement.*

(i) A copy of the trust fund agreement concerning the trust fund which the insurer maintains in the United States in either a National bank or a member of the Federal Reserve System in an amount as set out in the act for the protection of all of its policyholders in the United States, consisting of cash, securities, letters of credit or investments of substantially the same character and quality as those which are eligible investments for admitted insurers authorized to write like kinds of insurance in this Commonwealth.

(ii) The trustees of the trust fund shall give written verification of the amount initially deposited and presently on deposit by the insurer in the trust fund. The trustees shall immediately give written notification to the Department at any time the trust fund deposit is less than the minimum requirement as provided for in section 1605(a)(2)(i) of the act.

(5) *Biographical sketches.* Biographical data for each officer, director, person in managerial control, and like individual on a form provided by the Department.

(6) *Kind of insurance.* A written statement by an officer of the insurer identifying the kinds of insurance coverages the insurer intends to write and the types of risks the insurer intends to insure in this Commonwealth.

(7) *Designee for service of process.* A written designation of the name of the individual employed by the insurer or other appropriate representative to whom all lawful process shall be mailed. The designee shall maintain a legal residence, domicile or office in the United States.

(8) *Additional information.* Additional information as required by the Commissioner to determine whether the insurer meets the standards and requirements of the act and this chapter.

(d) After placement on the eligible surplus lines insurer list, an alien insurer shall submit the following to the Department through a surplus lines licensee:

(1) Changes or additions, or both, to the information in subsection (c)(7) and (4)(i) within 10-calendar days of the occurrence.

(2) Changes or additions, or both, to the information in subsection (c)(1) and (5) within 30-calendar days of the occurrence.

(3) A certified copy of the information in subsection (c)(3)(i) within 30-calendar days after the date required for filing in its domiciliary jurisdiction. A copy of the information in subsection (c)(2), (3)(ii) and (4)(ii) shall accompany the filing.

(4) Additional items as required by the Commissioner to determine whether the insurer continues to meet the standards under the act.

[Pa.B. Doc. No. 98-1602. Filed for public inspection October 2, 1998, 9:00 a.m.]

STATE BOARD OF EDUCATION

[22 PA. CODE CHS. 14, 16 AND 342]

Gifted Education; Special Education Services and Programs

The State Board of Education (Board) proposes to delete the gifted education provisions of Chapters 14 and 342 (relating to special education services and programs) and add a new Chapter 16 (relating to gifted education) to read as set forth in Annex A, under the authority of sections 1371, 2601-B and 2602-B of the Public School Code of 1949 (24 P. S. §§ 13-1371, 26-2601-B and 26-2602-B).

These proposed amendments set forth requirements and procedures for the identification of, and delivery of services and programs to, students who are mentally gifted and therefore require specially designed instruction.

Purpose

The existing rules governing gifted education are in Chapters 14 and 342. These chapters govern all children with exceptionalities including those children with disabilities who are protected under the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400—1485). Therefore, under current rules, the disability-specific mandates of Federal law and regulations are intertwined with and become requirements for students who are gifted in this Commonwealth. Many of the disability-specific mandates are unnecessary for the proper education of gifted students, and may limit the ability of local school districts to implement effective gifted education programs. The separation of gifted education from Chapters 14 and 342 does not alter statutory protections for gifted education, nor creates a need to relitigate established case law in this Commonwealth as it pertains to students who are gifted.

The provisions of proposed Chapter 16 are sufficient to govern the gifted education services and programs. Thus, no accompanying standards are being promulgated and sections specific to gifted education in standards Chapter 342 are proposed to be deleted.

Requirements

The proposed amendments maintain most of the requirements from Chapters 14 and 342, with modifications necessary to create a distinction between gifted education and special education. Continuing requirements include provisions for individualized education programs, multidisciplinary team, multidisciplinary evaluation, personnel requirements, placement in private schools, procedural safeguards, exceptions for experimental programs, duties and responsibilities of the Department and planning requirements for gifted education. Major differences between existing regulations and proposed regulations include the following sections:

§ 16.7 (relating to special education). This section clarifies that the new chapter of regulations does not diminish a student's rights under Chapters 14 and 342 or the Individuals with Disabilities Education Act. However, for students who are both gifted and eligible for special education, there is no need for school districts to attempt to implement the requirements of Chapter 16 and Chapters 14 and 342. Chapters 14 and 342 take precedence in these situations, and a student's needs may be met using the procedures therein.

§ 16.21 (relating to general). Similar to §§ 14.21 and 342.21, this section requires each school district to have a system for locating and identifying students who are thought to be gifted and in need of specially designed instruction. The system includes public awareness activities as part of the screening and evaluation process. However, the system is not explicitly prescribed as under §§ 14.22—14.24 and §§ 342.22—342.24 (relating to public awareness; comprehensive screening; and instructional supplies), so that districts have discretion to develop and implement these systems to meet their own unique needs.

§ 16.22 (relating to gifted multidisciplinary evaluation). Similar to §§ 14.25 and 342.25 (relating to multidiciplinary evaluation), this section provides procedures for conducting evaluations of students who are thought to be gifted. This section refers to an evaluation of a gifted student as a gifted multidisciplinary evaluation. To reduce the number of evaluations, parent requests for evaluation are limited to one request per school term.

§ 16.41 (relating to general). Similar to §§ 14.41, 14.42, 342.41 and 342.42, this section sets forth requirements regarding educational placement to ensure that educational placement is based on a gifted student's needs and that a student benefits from that educational placement. To increase local flexibility, this new chapter does not require placement by level of intervention and contains no class size restrictions.

Chapters 14 and 342 are proposed to be amended by deleting gifted education provisions in §§ 14.1, 14.2, 14.24, 14.25, 14.38, 14.67, 342.1, 342.25, 342.38 and 342.42.

Affected Parties

Proposed Chapter 16 will benefit Commonwealth students who are, or thought to be, gifted; their parents; and school districts and other education agencies which must comply with the regulations.

Cost and Paperwork Estimates

The proposed amendments will impose no additional cost or revenue loss to the Commonwealth. The proposed amendments will not require any additional reports or paperwork requirements. None of the regulatory requirements in the proposed chapter are new for school districts, and, in fact, a number of regulatory requirements have been removed or reduced as noted previously. For example, routine reevaluations of the approximately 85,000 identified gifted students currently required every 2 years, cost an average of $250 per student. Eliminating the requirements for reevaluation every 2 years, assuming that reevaluations are requested for 20% of gifted students, could reduce costs to school districts by approximately $16.8 million over 3 years. Moreover, considerable staff time could be redirected to teaching and other services for students.

Effective Date

These proposed amendments will become effective upon final publication in the *Pennsylvania Bulletin*.

Sunset Date

The effectiveness of proposed Chapter 16 will be reviewed by the Board every 4 years in accordance with the Board's policy and practice respecting all regulations promulgated by the Board. Thus, no sunset date is necessary.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 23, 1998, the Board submitted a copy of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Committees on Education. In addition to submitting the proposed amendments, the Board has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Board in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under section 5(d) of the Regulatory Review Act, if the Committees have objections to any portion of the proposed amendments, they will notify the Board within 20 days of the close of the public comment period. Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed amendments, it will notify the Board within 10 days of the close of the Committees' 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 amendments, by the Board, the General Assembly and the Governor of objections raised.

Public Comments and Contact Person.

Interested persons are invited to submit written comments, suggestions or objections regarding this proposal to Peter H. Garland, Executive Director of the State Board of Education, 333 Market Street, Harrisburg, PA 17126-0333 within 30 days following publication in the *Pennsylvania Bulletin*.

Persons with disabilities needing an alternative means of providing public comment may make arrangements by calling Dr. Garland at (717) 787-3787 or TDD (717) 787-7367.

Alternative formats of the proposed amendments (such as braille, large print, a cassette tape) can be made available to members of the public upon request to Dr. Garland at the telephone and TDD numbers listed previously.

PETER H. GARLAND,
Executive Director

Fiscal Note: 6-266. No fiscal impact; (8) recommends adoption. This proposed rulemaking will result in a significant savings to school districts.

Annex A

TITLE 22. EDUCATION

PART I. STATE BOARD OF EDUCATION

Subpart A. MISCELLANEOUS PROVISIONS

CHAPTER 14. SPECIAL EDUCATION SERVICES AND PROGRAMS

GENERAL PROVISIONS

§ 14.1. Definitions.

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

* * * * *

Exceptional student—**[A student who meets one of the following criteria:**

(i)] An eligible student.

[(ii) A student other than an eligible young child who is gifted as set forth in Chapter 342.

(iii) A student receiving special education and related services as a gifted and talented school-aged person under Chapter 13 prior to July 1, 1990.

(iv) A school age child in a detention home.]

* * * * *

§ 14.2. Purpose.

* * * * *

(d) To provide services and programs efficiently, the Commonwealth will delegate operational responsibility to its school districts. Each school district shall, by direct service or through arrangement with other agencies, provide the following:

* * * * *

[(8) An education for gifted students which enables them to participate in acceleration or enrichment programs, or both, as appropriate, and to receive services according to their intellectual and academic abilities.]

* * * * *

SCREENING AND EVALUATION PROCESS

§ 14.24. Instructional support.

(a) This section does not apply to students **[who are thought to be gifted, to students]** beyond the sixth grade who are thought to be eligible, to students attending nonpublic schools who are thought to be exceptional or to young children not yet of kindergarten age or not enrolled in a public school program.

* * * * *

§ 14.25. Multidisciplinary evaluation.

* * * * *

(c) A multidisciplinary evaluation shall be initiated if one of the following applies:

* * * * *

(5) The student is **[thought to be gifted, the student is]** beyond the sixth grade and thought to be eligible, the student attends a nonpublic school and is thought to be exceptional or the young child thought to be eligible is not yet of kindergarten age or not enrolled in a public school program.

IEP

§ 14.38. Planned courses.

Planned courses for exceptional students shall be conducted under Chapter 5 (relating to curriculum), this chapter and Chapter 342 (relating to special education services and programs). Planned courses shall include provisions for:

* * * * *

[(5) Development of curricula for gifted students which include acceleration, enrichment, or both, as appropriate.]

PROCEDURAL SAFEGUARDS

§ 14.67. Independent educational evaluation.

(a) The parents of an eligible student or eligible young child or student or young child thought to be eligible have the right to obtain an independent educational evaluation of the student or young child, subject to subsections (b)—(f). **[The parents of students who are gifted or thought to be gifted have the right to obtain an independent educational evaluation of the student subject to subsections (b)—(e).]**

* * * * *

(*Editor's Note*: Chapter 16 is proposed to be added. It is printed in regular type to enhance readability.)

CHAPTER 16. GIFTED EDUCATION

GENERAL PROVISIONS

SCREENING AND EVALUATION

GIEP

EDUCATIONAL PLACEMENT

PROCEDURAL SAFEGUARDS

IMPLEMENTATION SCHEDULE

GENERAL PROVISIONS

§ 16.1. Definitions.

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

Agency—An intermediate unit, school district, area vocational technical school, State-operated program or facility, or other public or private organization providing educational services to gifted students or students thought to be gifted.

Chapter 5—The State Board of Education regulations as adopted under statutory authority in the School Code.

Educational placement—The overall educational environment in which gifted education is provided to a gifted student.

GIEP—Gifted Individualized Education Program.

GMDT—Gifted Multidisciplinary Team.

Gifted education—Specially designed instruction to meet the needs of a gifted student that is:

(i) Conducted in the classroom or in other settings.

(ii) Provided in an instructional or skill area.

(iii) Provided at no cost to the parents.

(iv) Provided under the authority of a school district, directly, by referral or by contract.

(v) Provided by an agency.

(vi) Individualized to meet the educational needs of the student.

(vii) Reasonably calculated to yield meaningful educational benefit and student progress.

(viii) Provided in conformity with a GIEP.

Gifted Multidisciplinary Evaluation—A systematic process of testing, assessment and other evaluative processes used by a team to develop a recommendation about whether or not a student is gifted or needs gifted education.

Gifted student—A student who is exceptional under section 1371 of the School Code (24 P. S. § 13-1371) because the student meets the definition of mentally gifted in this section, and needs specially designed instruction beyond that required in Chapter 5 (relating to curriculum). The term applies only to students who are of "school age" as defined under § 11.12 (relating to school age).

Instructional setting—A classroom or other setting in which gifted students are receiving gifted education.

Mentally gifted—Outstanding intellectual and creative ability the development of which requires specially designed programs or support services, or both, not ordinarily provided in the regular education program. This term includes a person who has an IQ of 130 or higher and when multiple criteria defined by the Department indicate gifted ability. Determination of gifted ability will not be based on IQ score alone. A person with an IQ score lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability. Determination of mentally gifted shall include an assessment by a certified school psychologist.

Parents—A natural or adoptive parent or parents, a guardian or guardians, one or more persons acting as the parent or parents of a student.

Party—A parent or school district.

Regular classroom—A specific instructional grouping within the regular education environment.

Regular education environment—The regular classroom and other instructional settings in which students without a need for gifted education receive instructional programs and the full range of supportive services normally provided to these children. Within the regular education environment, regular and gifted education shall be provided to a gifted student when deemed appropriate by the student's GIEP.

School Code—The Public School Code of 1949 (24 P. S. §§ 1-101—27-2702).

School day—A day in which school is in session.

Screening and evaluation process—The systematic determination of whether or not a student is gifted or needs gifted education.

Social work services in school—Preparing a social or developmental history of a child who is gifted, group and individual counseling with the child and family, working with problems in a child's living situation (home, school and community) that affect the child's adjustment in school, and mobilizing school and community resources to enable the child to learn effectively.

Specially designed instruction—Adaptations or modifications to the general curriculum, instruction, instructional environments, methods, materials or a specialized curriculum for students who are gifted. These adaptations or modifications must go beyond the services and programs that the student would receive as part of a general education and be unique to the educational needs of each student.

Support services—Services required under § 16.33 (relating to support services) to assist a gifted student to benefit from gifted education. Examples of the term include:

(i) Psychological services.

(ii) Social work services.

(iii) Parent counseling and education.

(iv) Counseling services.

(v) Transportation to and from gifted programs to classrooms in buildings operated by the school district.

§ 16.2. Purpose.

(a) This chapter specifies how the Commonwealth will meet its obligations to suspected and identified gifted students who require gifted education to reach their potential. It is the intent of the Board that gifted students be provided with quality gifted education services and programs. Achieving this purpose will require mutual efforts by the Commonwealth, school districts, other agencies and parents.

(b) The Board acknowledges that students who are gifted and therefore need specially designed instruction are considered to be children with exceptionalities under section 1371 of the School Code (24 P. S. § 13-1371(1)). The creation of this chapter and the separation of gifted education from Chapters 14 and 342 is not intended to circumvent the statutory protections afforded to gifted students by the School Code, nor is it the Board's intent to create a need to relitigate case law already established in this Commonwealth pertaining to gifted students. It is the Board's intent to draw a clear distinction between gifted education as required in the Commonwealth and special education as required by Federal law. To accomplish this, the Board has removed or changed references to terms and concepts which are clearly linked to special education as prescribed under the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400—1485). This chapter is intended to strike a proper balance between necessary regulatory protections and maximum local control.

(c) The Commonwealth, through the Department, will provide general supervision of services and programs provided under this chapter.

(d) The Department will disseminate information about and promote the use of promising practices and innovative programs to meet the needs of gifted students.

(e) To provide services and programs efficiently, the Commonwealth will delegate operational responsibility to its school districts. Each school district shall, by direct service or through arrangement with other agencies, provide the following:

(1) Services and programs planned, developed and operated for the identification and evaluation of each gifted student.

(2) Gifted education for each gifted student which is based on the unique needs of the student, not solely on the student's classification.

(3) Gifted education for gifted students which enables them to participate in acceleration or enrichment pro-

grams, or both, as appropriate, and to receive services according to their intellectual and academic abilities and needs.

§ 16.3. Experimental programs.

(a) The Secretary may approve exceptions to this chapter for the operation of experimental programs that are anticipated to improve student achievement and that meet certain unique programmatic needs of gifted students. School entities shall submit an annual application for approval of those programs. The application shall:

(1) Include provision for the involvement of parents, administrators and professionals in the design and ongoing review of performance.

(2) Include provisions for annually evaluating the program as to whether it benefits student achievement.

(3) Demonstrate that it has met other criteria established by the Secretary.

(b) When an experimental program has been approved for 3-consecutive years and has resulted in improved student achievement under subsection (a), annual application is not needed for the program to continue to operate.

(c) The Secretary may terminate an experimental program for failing to meet the objectives established in the application or for noncompliance with State law or regulations not specifically waived in the Secretary's approval of the experimental program under subsection (a).

(d) The Secretary will report annually to the Board regarding applications for experimental programs under this section and the disposition of the applications.

§ 16.4. Strategic plans.

(a) Each school district's strategic plan developed under Chapter 5 (relating to curriculum) shall include procedures for the education of all gifted students who are residents of the district under section 1302 of the School Code (24 P. S. § 13-1302). The strategic plan shall be developed to ensure the support of the implementation of plans developed under subsection (b).

(b) Each agency shall provide, as the Department may require, reports of students, personnel and program elements, including the costs of the elements, which are relevant to the delivery of gifted education.

§ 16.5. Personnel.

(a) Professional personnel shall consist of certified individuals responsible for identifying gifted students and providing gifted education in accordance with Article XI of the School Code (24 P. S. §§ 11-1101—11-1192) and this title.

(b) Paraprofessional personnel consist of individuals who work under the direction of professional personnel as defined in this chapter. The duties and training of the paraprofessional staff shall be determined by the employing agency.

(c) A school district and intermediate unit shall provide, under section 1205.1 of the School Code (24 P. S. § 12-1205.1), in-service training for gifted and regular teachers, principals, administrators and support staff persons responsible for gifted education.

§ 16.6. General supervision.

(a) Educational programs for gifted students administered within this Commonwealth are considered to be under the general supervision of the Department and shall meet the provisions of this chapter.

(b) The Department will ensure that appropriate and responsible fiscal oversight and control is maintained over the development and provision of gifted education in accordance with this chapter providing for fiscal accountability and prudent management.

(c) The Board will review this chapter at least every 4 years to ensure consistent interpretation and application of this chapter.

§ 16.7. Special education.

(a) Nothing in this chapter is intended to reduce the protections afforded to students who are eligible for special education as provided for under Chapters 14 and 342 (relating to special education services and programs; and special education services) and the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400—1485).

(b) If a student is determined to be both gifted and eligible for special education, the procedures in Chapter 14 and 342 take precedence.

(c) For students who are gifted and eligible for special education, it is not necessary for school districts to conduct separate screening and evaluations, develop separate IEPs or use separate procedural safeguards processes to provide for a student's needs as both a gifted and an eligible student.

SCREENING AND EVALUATION PROCESS

§ 16.21. General.

(a) Each school district shall adopt and use a system to locate and identify all students residing within the district's jurisdiction who are thought to be gifted and in need of specially designed instruction.

(b) Each school district shall conduct awareness activities to inform the public of gifted education services and programs and the manner by which to request these services and programs.

(c) Each school district shall determine the student's needs through a screening and evaluation process which meets the requirements of this chapter.

§ 16.22. Gifted multidisciplinary evaluation.

(a) Prior to conducting an initial gifted multidisciplinary evaluation, the school district shall comply with the notice and consent requirements under §§ 16.61 and 16.62 (relating to notice; and consent).

(b) Referral for gifted multidisciplinary evaluation shall be made when the student is suspected of being gifted and not receiving an appropriate education under Chapter 5 (relating to curriculum) and one or more of the following apply:

(1) A request for evaluation has been made by the student's parents under subsection (c).

(2) The student is thought to be gifted because the school district's screening of the student indicates high potential consistent with the definition of mentally gifted or a performance level which exceeds that of other students in the regular classroom.

(3) A hearing officer or judicial decision orders a gifted multidisciplinary evaluation.

(c) Parents who suspect that their child is gifted may request a gifted multidisciplinary evaluation of their child at any time, with a limit of one request per school term. The request shall be in writing. If a parental request is made orally to school personnel, the personnel shall

inform the parents that the request shall be made in writing and shall provide the parents with a form for that purpose.

(d) Parental consent or, if consent is not obtained, the order of a hearing officer or court shall be obtained prior to the conduct of any part of an initial gifted multidisciplinary evaluation consistent with §§ 16.61—16.65 (relating to procedural safeguards).

(e) Multidisciplinary evaluations shall be conducted by GMDTs. The GMDT shall be formed on the basis of the student's needs and shall be comprised of the student's parents, a certified school psychologist, persons familiar with the student's educational experience and performance, one or more of the student's current teachers, persons trained in the appropriate evaluation techniques and, when possible, persons familiar with the student's cultural background. A single member of the GMDT may meet two or more of the qualifications specified in this subsection.

(f) Gifted multidisciplinary evaluations shall be sufficient in scope and depth to investigate information relevant to the student's suspected giftedness, including academic functioning, learning strengths and educational needs.

(g) The multidisciplinary evaluation process shall include information from the parents or others who interact with the student on a regular basis, and may include information from the student if appropriate.

(h) The following protection-in-evaluation measures shall be considered when performing an evaluation of students suspected of being exceptional:

(1) No one test or type of test may be used as the sole criterion for determining that a student is or is not gifted.

(2) Intelligence tests yielding an IQ score may not be used as the only measure of aptitude for students of limited English proficiency, or for students of racial-, linguistic- or ethnic-minority background.

(3) Tests and similar evaluation materials used in the determination of giftedness shall be:

(i) Selected and administered in a manner that is free from racial and cultural bias and bias based on disability.

(ii) Selected and administered so that the test results accurately reflect the student's aptitude, achievement level or whatever other factor the test purports to measure.

(iii) Professionally validated for the specific purpose for which they are used.

(iv) Administered by certified professional employes or certified school psychologists under instructions provided by the producer of the tests and sound professional practice.

(v) Selected and administered to assess specific areas of educational need and ability and not merely a single general IQ.

(i) The GMDT shall prepare a written report which brings together the information and findings from the evaluation or reevaluation concerning the student's educational needs and strengths. The report shall make recommendations as to whether the student is gifted and in need of specially designed instruction, shall indicate the bases for those recommendations, and shall indicate the names and positions of the members of the GMDT.

(j) To recommend that a student who has been evaluated is a gifted student, the GMDT shall conclude that the student needs specially designed education and meets the criteria for eligibility as defined in § 16.1 (relating to definitions).

(k) The following timeline applies to the completion of gifted multidisciplinary evaluations:

(1) Each district shall establish and implement procedures to complete a gifted multidisciplinary evaluation for a student referred for evaluation within 45 school days after receiving parental permission for an initial evaluation, after notifying the parents of a reevaluation or after receiving an order of a court or hearing officer to conduct a multidisciplinary evaluation.

(2) An evaluation report shall be completed within 10 school days after completion of the gifted multidisciplinary evaluation.

(3) Within 5 school days after its completion, a copy of the evaluation report shall be delivered to the parents of the student.

§ 16.23. Gifted multidisciplinary reevaluation.

(a) Gifted students shall be reevaluated before a change in educational placement is recommended for the student and when the conditions under § 16.22(b)(1) or (3) (relating to gifted multidisciplinary evaluations) are met. In addition, gifted students may be reevaluated at any time under a recommendation by the GIEP team.

(b) Reevaluations shall be developed in accordance with the requirements concerning evaluation in this chapter.

(c) Reevaluations shall include a review of the student's GIEP, a determination of which instructional activities have been successful, and recommendations for the revision of the GIEP.

GIEP

§ 16.31. General.

(a) A GIEP is a written plan describing the education to be provided to a gifted student. The initial GIEP shall be based on and be responsive to the results of the evaluation and shall be developed and implemented in accordance with this chapter.

(b) If a gifted student moves from one school district in this Commonwealth to another, the new district shall implement the existing GIEP to the extent possible or shall provide the services and programs specified in an interim GIEP agreed to by the parents until a new GIEP is developed and implemented in accordance with this section and §§ 16.32 and 16.33 (relating to GIEP; and support services) and until the completion of due process proceedings under §§ 16.61—16.65 (relating to procedural safeguards).

(c) Every student receiving gifted education provided for in a GIEP developed prior to _____ (*Editor's Note*: The blank refers to the effective date of adoption of this proposal) shall continue to receive the gifted education under that GIEP until the student's GIEP is revised.

(d) Every student receiving gifted education prior to _____ (*Editor's Note*: The blank refers to the effective date of adoption of this proposal) shall continue to receive gifted education unless a GIEP team determines that the student no longer needs gifted education.

§ 16.32. GIEP.

(a) Each school district shall establish and implement procedures to appoint a GIEP team to review the recommendations of the GMDT and, if the GIEP team determines a student is gifted, to develop a GIEP for the

student. The GIEP shall be developed at the GIEP meeting and based on data and information presented at that meeting.

(b) The GIEP team, in accordance with the requirements of this chapter shall, based upon the evaluation report, develop an initial GIEP for a student it determines to be a gifted student, and arrive at a determination of educational placement. Revisions to GIEPs, changes in educational placement or continuation of educational placement for a student determined to be a gifted student shall be made by the GIEP team based upon a review of the student's GIEP and instructional activities which have been successful, as well as on information in the most recent evaluation.

(c) Each GIEP team shall include persons who meet the following qualifications:

(1) One or both of the student's parents.

(2) The student, if 16 years of age or older, or if younger and the parents choose to have the student participate.

(3) A representative of the district, who will serve as the chairperson of the GIEP team, who is knowledgeable about the availability of resources of the district, and who is authorized by the district to commit those resources.

(4) One or more of the student's current teachers.

(5) Other individuals at the discretion of either the parents or the district.

(d) The school district shall establish and implement procedures designed to ensure that the parents of the gifted student are offered the opportunity to be present at each GIEP team meeting. These procedures shall include the following: documented phone calls, letters and certified letters with return receipts. Agencies shall maintain documentation of their efforts to encourage parents to attend. By including them in the invitation, the following shall be considered reasonable efforts to ensure parent participation in the GIEP meeting:

(i) The purpose, time and location of the meeting.

(ii) The names of the persons expected to attend.

(iii) The educational rights available to protect the student and parent, in language which is clear and fully explains all rights.

(iv) That a determination will be made at the meeting as to whether or not the student is gifted.

(v) That if the student is determined to be gifted, a GIEP will be developed.

(vi) Notifying the parent and other persons who will be attending early enough to ensure that the parent will have an opportunity to attend.

(e) The GIEP of each gifted student shall be based on the GMDT's recommendations and shall contain the following:

(1) A statement of the student's present levels of educational performance.

(2) A statement of annual goals and short-term learning outcomes which are responsive to the learning needs identified in the evaluation report.

(3) A statement of the specially designed instruction and support services to be provided to the student.

(4) Projected dates for initiation and anticipated duration of gifted education.

(5) Appropriate objective criteria, assessment procedures and timelines for determining, on at least an annual basis, whether the goals and learning outcomes are being achieved.

(6) The names and positions of GIEP team participants and the date of the meeting.

(f) A copy of the GIEP shall be provided to the parents, along with a notice of parental rights under §§ 16.61—16.65 (relating to procedural safeguards).

(g) The following timeline governs the preparation and implementation of GIEPs:

(1) A GIEP shall be developed within 30 calendar days after issuance of a GMDT's written report.

(2) The GIEP of each student shall be implemented in accordance with § 16.62(5) (relating to consent).

(3) GIEP team meetings shall be convened at least annually, or more frequently if conditions warrant, as well as following an evaluation or reevaluation. A GIEP team meeting shall also be convened at the request of a GIEP team member, the parent, the student or the school district.

§ 16.33. Support services.

(a) The GIEP team, during the development, review or revision of a GIEP, shall determine whether the gifted student needs one or more support services.

(b) The GIEP team shall conclude that transportation to and from school or to and from a site other than the school, psychological services, social work services, parent counseling and education, or another service is a support service if the GIEP determines that one of the following criteria has been met:

(1) The service is an integral part of an educational objective of the student's GIEP, without which the GIEP cannot be implemented.

(2) The service is needed to ensure the student benefits from or gains access to a gifted education program.

EDUCATIONAL PLACEMENT

§ 16.41. General.

(a) The GIEP team shall base educational placement decisions on the gifted student's needs.

(b) Districts may use administrative and instructional strategies and techniques in the provision of gifted education for gifted students which do not require, but which may include, categorical grouping of students. The placement shall:

(1) Enable the provision of appropriate specially designed instruction based on the student's need and ability.

(2) Ensure that the student is able to benefit from the rate, level and manner of instruction.

(3) Provide opportunities to participate in acceleration or enrichment, or both, as appropriate for the student's needs.

(c) Districts shall adopt board policies relating to caseloads and class sizes for gifted students which:

(1) Ensure the ability of assigned staff to provide the services required in each gifted student's GIEP.

(2) Address all the educational placements for gifted students used by the district.

(3) Limit the total number of gifted students which can be on an individual gifted teacher's caseload to a maximum of 75 students.

(d) Gifted educational placement may not be based on one or more of the following:

(1) Lack of availability of placement alternatives.

(2) Lack of availability or efforts to make educational or support services available.

(3) Lack of staff qualified to provide the services set forth in the GIEP.

(4) Lack of availability of space or of a specific facility.

§ 16.42. Parental placement in private schools.

(a) This chapter does not limit the right of parents to have their gifted children educated at private schools completely at private expense.

(b) The home education program of a gifted child shall be governed by sections 1327 and 1327.1 of the School Code (24 P. S. §§ 13-1327 and 13-1327.1).

PROCEDURAL SAFEGUARDS

§ 16.61. Notice.

(a) A school district shall document the provision of written notice to the parents of a gifted student at least 10 school days prior to one or more of the following events:

(1) The school district proposes to conduct a gifted multidisciplinary evaluation or reevaluation of the student.

(2) The school district proposes or refuses to initiate or change the identification, evaluation or educational placement of the student, or proposes or refuses to make significant changes in the GIEP.

(b) A change in the identification, evaluation, educational placement or GIEP of a gifted student may not be made during the pendency of an administrative or judicial proceeding unless agreed to by the parties to the proceeding.

(c) The content of notices to the parents shall be written in language understandable to the general public. If necessary, the content of notices shall be communicated orally in the native language or directly so that the parents understand the content of the notices.

(d) The notice shall include:

(1) A description of the action proposed or refused by the district, an explanation of why the district proposes or refuses to take the action and a description of options the district considered and the reasons why those options were rejected.

(2) A description of each evaluation procedure, type of test, record or report used as a basis for the action.

(3) A description of other factors relevant to the district's action.

(4) A full explanation of the procedural safeguards, including the right to an impartial hearing available to the student or the parents under this chapter.

(e) The notice shall inform the parents of the following:

(1) The addresses and telephone numbers of various organizations which are available to assist in connection with the hearing.

(2) The timelines involved in conducting an evaluation, developing a GIEP, and initiating a hearing.

(3) An outside evaluation submitted by the parents shall be considered.

(4) The information in § 16.63 (relating to impartial due process hearing).

§ 16.62. Consent.

The district shall document that written parental consent is obtained prior to:

(1) Conducting an initial multidisciplinary evaluation.

(2) Initially placing a gifted student in a gifted program.

(3) Disclosing to unauthorized persons information identifiable to a gifted student.

(4) When completed, the GIEP provided for in § 16.32 (relating to GIEP) shall be presented to the parents, along with a notice of recommended assignment signed by the school district superintendent provided for in § 16.61 (relating to notice) and a notice of parental right to an impartial due process hearing under § 16.63 (relating to impartial due process hearing). The notice shall be presented to the parents in person at the conclusion of the GIEP conference or by certified mail within 5 calendar days after the completion of the GIEP conference.

(5) The parents shall have 10 calendar days to respond to a notice of recommended assignment sent by mail or 5 calendar days to respond to a notice presented in person at the conclusion of a GIEP conference. If the parents receive the notice in person and approve the recommended assignment within 5-calendar days, the school district may not implement the GIEP for at least 5-calendar days, to give the parents an opportunity to notify the district within the 5-day period of a decision not to approve the recommended assignment.

§ 16.63. Impartial due process hearing.

(a) Parents may request an impartial due process hearing concerning the identification, evaluation or educational placement of, or the provision of a gifted education to, a student who is gifted or who is thought to be gifted if the parents disagree with the school district's identification, evaluation or placement of, or the provision of a gifted education to the student.

(b) A school district may request a hearing to proceed with an initial evaluation or an initial educational placement when the district has not been able to obtain consent from the parents or in regard to a matter under subsection (a).

(c) The hearing shall be conducted by and held in the local school district at a place reasonably convenient to the parents. At the request of the parents, the hearing may be held in the evening. These options shall be set forth in the form provided for requesting a hearing.

(d) The hearing shall be an oral, personal hearing and shall be open to the public unless the parents request a closed hearing. If the hearing is open, the decision issued in the case, and only the decision, shall be available to the public. If the hearing is closed, the decision shall be treated as a record of the student and may not be available to the public.

(e) The decision of the hearing officer shall include findings of fact, a discussion and conclusions of law. Although technical rules of evidence will not be followed, the decision shall be based solely upon the substantial evidence presented at the hearing.

(f) The hearing officer shall have the authority to order that additional evidence be presented.

(g) A written transcript of the hearing shall, upon request, be made and provided to parents at no cost.

(h) Parents may be represented by any person, including legal counsel.

(i) A parent or a parent's representative shall be given access to educational records, including any tests or reports upon which the proposed action is based.

(j) A party may prohibit the introduction of evidence at the hearing that has not been disclosed to that party at least 5 days before the hearing.

(k) A party has the right to compel the attendance of and question witnesses who may have evidence upon which the proposed action might be based.

(l) A party has the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(m) The decision of the impartial hearing officer may be appealed to a panel of three appellate hearing officers. The panel's decision may be appealed further to a court of competent jurisdiction. In notifying the parties of its decision, the panel shall indicate the courts to which an appeal may be taken.

(n) The following applies to coordination services for hearings and to hearing officers:

(1) The Secretary may contract for coordination services in support of hearings conducted by local school districts. The coordination services shall be provided on behalf of school districts and may include arrangements for stenographic services, arrangements for hearing officer services, scheduling of hearings and other functions in support of procedural consistency and the rights of the parties to hearings.

(2) If a school district chooses not to utilize the coordination services under paragraph (1), it may conduct hearings independent of the services if its procedures similarly provide for procedural consistency and ensure the rights of the parties. In the absence of its own procedures, a school district which receives a request for an impartial due process hearing shall forward the request to the agency providing coordination services under paragraph (1) without delay.

(3) A hearing officer may not be an employe or agent of a school district in which the parents or student resides, or of an agency which is responsible for the education or care of the student. A hearing officer shall promptly inform the parties of a personal or professional relationship the officer has or has had with any of the parties.

(o) The following timeline applies to due process hearings:

(1) A hearing shall be held within 30-calendar days after a parent's or school district's initial request for a hearing.

(2) The hearing officer's decision shall be issued within 45-calendar days after the parent's or school district's request for a hearing.

(p) Each school district shall keep a list of the persons who serve as hearing officers. The list shall include the qualifications of each hearing officer. School districts shall provide parents with information as to the availability of the list and shall make copies of it available upon request.

§ 16.64. Mediation.

(a) The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

Joint session—A stage of the mediation conference when the mediator meets with the parties and participants together and each party is given an uninterrupted opportunity to present the issues and concerns. The mediator shall help the parties to arrive at a satisfactory resolution to the conflict by encouraging parties to explore the possible solutions.

Mediation—A process whereby parents and agencies involved in a gifted education dispute may obtain the assistance of an impartial mediator in an attempt to reach a mutually agreeable settlement of issues in dispute.

Mediation agreement—A written record of agreement reached by the parties.

Mediation conference—A structured, but informal meeting of the parties and participants with a mediator. The purpose of the conference is to develop a mutually acceptable, written agreement that is binding on the parties.

Mediator—An impartial, neutral person who helps parties involved in a conflict to develop their own solutions to the dispute. The term does not include a person who makes decisions about the conflict for the parties.

Participants—Other persons appearing at the mediation conference on behalf of either party, such as other family members and specialists.

Parties—The parents and designated agency personnel involved in the conflict. Each party shall come to the mediation conference with the authority to commit resources to the resolution agreed upon by the parties.

Private session (caucus)—A private meeting between the mediator and only one of the parties to further clarify that party's position and to explore possible solutions to the conflict. The mediator may not share information from the private session without consent of the party.

(b) If a dispute is resolved through mediation, a written agreement shall be prepared and placed in the child's education record. The agreement shall also be incorporated into the GIEP, if appropriate.

(c) During a mediation conference the mediator shall meet with the parties together in a joint session and individually in private sessions.

(d) Discussions occurring during the mediation session shall be confidential, and no part of the mediation conference shall be recorded.

(e) The mediator may not be called as a witness in future proceedings.

(f) The designated agency involved in the dispute shall send a representative who has the authority to commit resources.

(g) The written mediation agreement is not a confidential document and shall be incorporated into the student's GIEP and is binding on the parties.

(h) The mediation agreement shall be enforceable by the Department.

(i) A GIEP team shall be convened, within 20 school days following the mediation agreement, to incorporate the mediation agreement into the GIEP.

(j) When the mediation conference results in a resolution of the dispute, each party shall receive an executed copy of the agreement at the conclusion of the mediation conference.

(k) Mediation may not be used to deny or delay a party's right to a due process hearing.

§ 16.65. Confidentiality.

Each agency shall protect the confidentiality of personally identifiable information regarding a gifted student or a student thought to be gifted in accordance with section 13(a) of the Family Educational Rights and Privacy Act of 1974 (20 U.S.C.A. § 1232g), 34 CFR Part 99 (relating to family educational rights and privacy) and Chapter 12 (relating to students) and other applicable law.

IMPLEMENTATION

§ 16.71. General.

(a) Students receiving gifted education under Chapters 14 and 342 (relating to special education; and special education services and programs) prior to _____ (*Editor's Note*: The blank refers to the effective date of adoption of this proposal) are entitled to continue to receive gifted education under this chapter.

(b) School districts and agencies shall continue to implement gifted education for students described in subsection (a) until the students have graduated from high school or would no longer be eligible under this chapter.

(c) The Department will assure that this section is implemented.

PART XVI. STANDARDS

CHAPTER 342. SPECIAL EDUCATION SERVICES AND PROGRAMS

§ 342.1. Definitions.

* * * * *

(b) *Additional definitions.* The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

[*Mentally gifted*—Outstanding intellectual and creative ability the development of which requires special services and programs not ordinarily provided in the regular education program. This term includes a person who has an IQ of 130 or higher and when multiple criteria as set forth in Department Guidelines indicate gifted ability. Determination of gifted ability will not be based on IQ score alone. A person with an IQ score lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability. Determination of mentally gifted shall include a full assessment and comprehensive report by a public school psychologist specifying the nature and degree of the ability.]

[(c) *Eligible young child.* The classification of eligible young child includes all of the classifications listed in this section except mentally gifted.]

[(d)] (c) * * *

SCREENING AND EVALUATION PROCESS

§ 342.25. Multidisciplinary evaluation.

(a) Referral for multidisciplinary evaluation shall be made when special education referral criteria have been met and are in accordance with § 14.25 (relating to multidisciplinary evaluation). Referral for multidisciplinary evaluation is indicated when the student is suspected of being exceptional and one or more of the following exist:

[(1) The instructional assessment of the student indicates high potential consistent with the definition of mentally gifted or a performance level which exceeds that of other students in the regular classroom.

(2)] (1) * * *

[(3)] (2) * * *

* * * * *

IEP

§ 342.38. Planned courses.

(a) Curricula for exceptional students shall be designed to:

* * * * *

[(5) Provide higher level thinking skills and advanced content acceleration and enrichment for the gifted.]

* * * * *

EDUCATIONAL PLACEMENT

§ 342.42. Educational placement.

* * * * *

(h) School districts may establish classes for exceptional students in the following categories:

(1) **[*Academic support.*]**

[(i) *Gifted support class.* A class for exceptional students identified as mentally gifted.

(ii)] *Learning support class.* A class for exceptional students whose primary identified need is academic learning.

* * * * *

(j) Class sizes and class loads for assignments for special education services and programs shall conform to the following table:

Caseload and Class Size for Special Education

This chart presents the caseload allowed on a single teacher's rolls; the number in parenthesis is the maximum number of exceptional students in the room with the teacher at one time.

Type of Service	*Itinerant*	*Resource*	*Part-time*	*Full-time*
Academic Support Class:				
[Gifted Support	**15-75(15)**	**12-50(15)**	**10-30(15)**	**10-15(15)]**

* * * * *

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