# RULES AND REGULATIONS

## Title 22—EDUCATION

### PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY

### [22 PA. CODE CH. 121]

### State Grant Program; Early Childhood Education Professional Loan Forgiveness Program

The Pennsylvania Higher Education Assistance Agency (Agency), under authority contained in section 4 of the act of August 7, 1963 (P. L. 549, No. 290) (24 P. S. § 5104); section 1 of the act of January 25, 1966 (P. L. 1546 (1965), No. 541) (24 P. S. § 5151); The Institutional Assistance Grants Act (24 P. S. §§ 5181—5189); and the Urban and Rural Teacher Loan Forgiveness Act (24 P. S. §§ 5191—5197); and the Agriculture Education Loan Forgiveness Act (24 P. S. §§ 5198—5198.7), is amending §§ 121.1, 121.2, 121.7—121.9, 121.21, 121.32, 121.33, 121.42, 121.48 and 121.56 and adding §§ 121.10 and 121.401—121.406.

*Purpose of Regulations*

The changes affect the State Grant Program (24 P. S. § 5152.1); Loan Programs (24 P. S. §§ 5104—5112); and the Early Childhood Education Professional Loan Forgiveness Program (24 P. S. §§ 7103—7106).

*Public Comment*

Written comments, suggestions and objections were solicited within a 30-day period of the publication date. As a result of the comments received from the Independent Regulatory Review Commission (IRRC) and the standing committees, numerous revisions were made to the proposed amendments. The final-form regulations now include language revisions to clarify the meaning of various sections. The revisions do not, however, enlarge the original purpose of the proposed rulemaking.

*Summary of Changes*

*Comments*

1. *Section 121.1—Definitions—Clarity*

*Comment:*

It was requested that the term "Board of Directors" be changed to "Board" in § 121.10(b).

*Response:*

The phrase "Board of Directors" was replaced with the word "Board" in § 121.10. For consistency purposes we also made this change in §§ 121.8, 121.9 and 121.42.

*Comment:*

Section 121.10(b)(2) contains a definition of "borrower."

*Response:*

Definition of "borrower" was added to § 121.1

*Comment:*

Section 121.10(b)(1)(i) contains a definition of "disposable pay."

*Response:*

Although the referenced section was removed from the final version of the regulation as it is part of 20 U.S.C.A § 1095a, which has been incorporated by reference, the definition of "disposable pay" was added to § 121.1 since the term appears elsewhere in the regulations.

*Comment:*

Section 121.10(b)(1)(viii) (which is now § 121.10(b)(2)), does not clearly define "timely request."

*Response:*

The phrase "make a timely request for hearing" was replaced with "request for a hearing within 20 days of the mailing of the notice."

2. *Section 121.10(b)(1)(x) (which is now § 121.10(b)(3)).*

*Comment:*

Written and oral requests for a hearing—clarity.

*Response:*

The first sentence was restructured into two sentences as suggested.

By way of further response, a "written hearing" is conducted by review of written documents submitted by both the borrower and the Agency. The hearing examiner reviews all exhibits and written statements offered and then issues his ruling based on the hearing examiner's review of the documents without any oral testimony.

3. *Section 121.10(b)(1)(xi) (which is now § 121.10(b)(4)) and (xii).*

*Comment:*

Issuance of an order of withholding—clarity.

*Response:*

The phrase "from the date of receipt of the borrower's hearing request" was added to the last sentence of § 121.10(b)(1)(xi) (which is now § 121.10(b)(4)). Subparagraph (xii) was removed from the final version of the regulation as it is part of 20 U.S.C.A. § 1095a.

*4. Section 121.10(b)(1)(xiii) (which is now § 121.10 (b)(5)).*

*Comment:*

Hearing examiners—clarity.

*Response:*

The phrase "including an administrative law judge" was deleted.

5. *Section 121.10(b)(1)(xix)—(xxi) (which is now § 121.(b) (11)—(13)).*

*Comment:*

Hearing procedures—clarity. Questions were received regarding who rules on exceptions, the hearing examiner or the Board of Directors: Does the hearing examiner issue a proposed report or a final report? And, finally, are proceedings before the Board of Directors considered the last stage in the adjudicatory process or the first level of administrative appeal?

*Response:*

The hearing examiner issues a proposed final order. The proposed order is then reviewed and accepted or rejected by the Board. Proceedings before the Board of Directors are considered the last stage in the adjudicatory process.

6. *Section 121.10(b)(1)(i), (vi) and (xxii).* Wage garnishment procedures involving employers—clarity.

*Comment:*

A subsection should be created titled "employer provisions."

*Response:*

This was no longer necessary with the incorporation by reference of 20 U.S.C.A § 1095a.

*Comment:*

A question was received regarding whether the "garnishment notice" mentioned in subsection (b)(1)(ix) is another term used for the "order of withholding" mentioned in subparagraph (viii).

*Response:*

The term "garnishment notice" was replaced with the term "order of withholding."

*Comment:*

A subsection should be created relating to Agency actions with employers.

*Response:*

A new subsection (c) was created.

7. *Section 121.10(b)(1)(ii)—(v).*

Borrower rights—clarity

*Comment:*

A question was received regarding whether the opportunities offered by the borrower in subparagraphs (iii)—(v) are included in the written notice described in subparagraph (ii).

*Response:*

Subparagraphs (iii)—(v) were removed as they are no longer necessary with the incorporation by reference of 20 U.S.C.A § 1095a. The answer to this question is, however, that the information is indeed included in the written notice.

8. *Section 121.10*

*Comment:*

Need and clarity. Incorporate by reference section 488A of the Higher Education Act of 1995 (20 U.S.C.A. § 1095a), rather than recite portions of the statutory provision.

*Response:*

20 U.S.C.A. § 1095a was incorporated by reference as suggested and the repeated portions of the statutory provisions of the regulation were removed.

121.10(b)(1)(i) has been removed as it corresponds to 20 U.S.C.A § 1095a(a)(1)
121.10(b)(1)(ii) has been removed as it corresponds to 20 U.S.C.A § 1095a(a)(2)
121.10(b)(1)(iii) has been removed as it corresponds to 20 U.S.C.A § 1095a(a)(3)
121.10(b)(1)(iv) has been removed as it corresponds to 20 U.S.C.A § 1095a(a)(4)
121.10(b)(1)(v) has been removed as it corresponds to 20 U.S.C.A § 1095a(a)(5)
121.10(b)(1)(vi) has been removed as it corresponds to 20 U.S.C.A § 1095a(a)(6)
121.10(b)(1)(vii) has been removed as it corresponds to 20 U.S.C.A § 1095a(a)(7)
121.10(b)(1)(ix) has been removed as it corresponds to 20 U.S.C.A § 1095a(c)
121.10(b)(1)(xii) has been removed as it corresponds to 20 U.S.C.A § 1095a(b)
121.10(b)(1)(xxii) has been removed as it corresponds to 20 U.S.C.A § 1095a(a)(8)

9. *Section 121.33—Approved Program of Study in Higher Education Grant Program*

*Comment:*

Comments were received from the House Education Committee and Montgomery County Community College regarding the percentage of classroom instruction time needed for course eligibility for a State grant recipient.

*Response:*

We continue to monitor all available sources of information in this regard and will adjust the percentage as soon as it is deemed appropriate.

10. *Section 121.401—Application of Existing Agency Regulations*

*Comment:*

Need and clarity.

*Response:*

The phrase "except those provisions inconsistent with this subchapter" has been removed. The reference to Subchapter B has also been deleted.

11. *Section 121.403—Loan Forgiveness*

*Comment:*

Clarity

*Response:*

The phrase "in accordance with the procedures established by the Agency" was replaced with "to the lender/servicer in March and September." Additionally, the requirements for time periods and maximum amounts have been structured as subsections within the section.

12. *Section 121.406—Lottery*

*Comment:*

Economic impact and clarity. A question was received regarding how the applicant will know what Agency requirements must be met to be eligible for the lottery.

*Response:*

The phrase "Agency requirements" was replaced with § 121.402 in § 121.406(b). This refers the applicant to the eligibility requirements.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 28, 1998, the Agency submitted a copy of the notice of proposed rulemaking, published at 28 Pa.B. 1535, IRRC and to the House Education Committee and the Senate Education Committee for review and comment.

In compliance with section 5(c), the Agency also provided IRRC and the Committees with copies of all comments received as well as other documentation. In preparing this final-form regulations the Agency has considered the comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the House and Senate Education Committees on June 14, 2000. IRRC met on June 22, 2000, and approved the final-form regulations in accordance with section 5(c) of the Regulatory Review Act.

*Findings*

The Agency finds that:

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

(2) The amendments adopted by this order are necessary and appropriate for the administration of the act.

*Order*

The Agency, acting under its authorizing statute, therefore, orders that:

(a) The regulations of the Agency 22 Pa. Code Chapter 121, are amended by amending § 121.1, 121.2, 121.7—121.9, 121.21, 121.32, 121.33, 121.42, 121.48, 121.56 and by adding §§ 121.10 and 121.401—121.406 to read as set forth in Annex A.

(b) The Agency shall submit this order and Annex A to the Office of Attorney General for approval as required by law.

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

(d) This order shall be effective upon publication in the *Pennsylvania Bulletin*.

MICHAEL H. HERSHOCK,
*President and Chief Executive Officer*

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 3534 (July 8, 2000).)

**Fiscal Note**: Fiscal Note 58-23 remains valid for the final adoption of the subject regulations.

## Annex A

## TITLE 22. EDUCATION

## PART VIII. HIGHER EDUCATION ASSISTANCE AGENCY

## CHAPTER 121. STUDENT FINANCIAL ASSISTANCE

## Subchapter A. GENERAL PROVISIONS

### § 121.1. Definitions.

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

*Academic term*—Semester, trimester or quarter.

*Academic year*—A period that begins on the first day of classes or examinations and that is a minimum of 30 weeks of instructional time during which, for an undergraduate educational program, a full-time student is expected to complete at least 24 semester or trimester hours or 36 quarter hours at a school which measures program length in credit hours or at least 900 clock hours at a school which measures program length in clock hours.

*Agency* or *PHEAA*—The Pennsylvania Higher Education Assistance Agency.

*Board*—The Board of Directors of the Agency.

*Borrower*—All endorsers on loans authorized by this chapter.

*Disposable pay*—That part of the borrower's compensation from an employer remaining after the deduction of any amounts required by law to be withheld.

*Emergency action*—Immediate action undertaken against institutions by the President and Chief Executive Officer in a manner consistent with § 121.31(d) (relating to approved institutions in Federal Stafford Loan and Federal PLUS Loan Programs) to withhold the processing of loan applications of the institution; and in a manner consistent with § 121.191(d) (relating to administrative loan collection review procedures) against a lending institution to withhold the processing of loan applications for students borrowing through the institution.

*Federal Consolidation Loan*—A loan made in accordance with section 428C of the Higher Education Act of 1965 (20 U.S.C.A. § 1078-3).

*Federal Family Education Loan (FFEL) Program*—The loan program (formerly called the Guaranteed Student Loan (GSL) Program) authorized by Title IV-B of the Higher Education Act of 1965 (20 U.S.C.A. §§ 1071—1087-2), including the Federal Stafford Loan, Federal PLUS, Federal Supplemental Loans for Students (Federal SLS) and Federal Consolidation Loan Programs, in which lenders use their own funds to make loans to enable students or their parents to pay the costs of the student's attendance at eligible institutions.

*Federal PLUS Loan*—A loan made in accordance with section 428B of the Higher Education Act of 1965 (20 U.S.C.A. § 1078-2).

*Federal Stafford Loan*—A loan made in accordance with section 428, if subsidized, or section 428H, if unsubsidized, of the Higher Education Act of 1965 (20 U.S.C.A. §§ 1078 and 1078-8).

*Full-time basis (except for purposes of the Federal Stafford Loan and Federal PLUS Loan Programs)*—The equivalent of 12 semester credits or 450 clock hours of instruction per academic term. If the schedule of a program of study offered on a clock-hour basis does not permit the equivalent of 450 clock hours of instruction per term, full-time enrollment shall be defined as 24 clock hours of instruction per week.

*Full-time basis (for purposes of the Federal Stafford Loan and Federal PLUS Loan Programs Only)*—To be considered enrolled on a full-time basis, a student shall be carrying a full-time academic work load (other than by correspondence) as determined by the institution under a standard applicable to the students enrolled in a particular educational program. The student's work load may include any combination of courses, work, research or special studies that the institution considers sufficient to classify the student as a full-time student. For undergraduate students, an institution's minimum standard shall equal or exceed one of the following minimum requirements:

(i) Twelve semester hours or 12 quarter hours per academic term in an educational program using a semester, trimester or quarter system.

(ii) Twenty-four semester hours or 36 quarter hours per academic year in an educational program using credit hours but not using a semester, trimester or quarter system or the prorated equivalent for a program of less than 1 academic year.

(iii) Twenty-four clock hours per week for an educational program using clock hours.

(iv) A series of courses or seminars that equals 12 semester hours or 12 quarter hours in a maximum of 18 weeks.

(v) The work portion of a cooperative education program in which the amount of work performed is equivalent to the academic work load of a full-time student.

(vi) Other requirements as prescribed by Federal regulations.

*Guaranteed Student Loan Program*—A Federal loan guaranty program administered by the Agency that enables qualified students to secure long-term educational loans to meet the costs of postsecondary education. On July 23, 1992, the Higher Education Amendments of 1992 (Pub. L. No. 102-325), changed the name of the program to The Federal Family Education Loan Program. Whenever the term is used in this chapter, it refers to and shall be regarded as, "The Federal Family Education Loan Program."

*Guardian*—For purposes of determining domicile, a person other than a parent with whom an applicant has lived and in whose continuous direct care and control the applicant has been for a period of at least 2 years.

*Half-time basis*—At least 1/2 the work load of a full-time student, except all students enrolled solely in an eligible program of study by correspondence cannot be considered more than half time.

*Hearing examiner*—A neutral third party, not an employe or staff member of the Agency, appointed by a designated Agency official to conduct hearings on Agency matters, consider written materials, weigh the evidence presented and issue impartial decisions.

*Parent (for purposes of borrowing under the Federal PLUS Loan Program)*—A student's mother or father or legal guardian. An adoptive parent is considered to be the person's mother or father.

*President and Chief Executive Officer*—The President and Chief Executive Officer of the Agency.

*Quarter*—A period of approximately 11 weeks normally comprising 1/3 of the academic year.

*SAT*—The College Entrance Examination Board's Scholastic Assessment Test.

*Semester*—A period of approximately 17 weeks normally comprising 1/2 of the academic year.

*Trimester*—A period of approximately 15 weeks normally comprising 1/2 of the academic year.

*Veteran*—A person who engaged in active service in the United States Army, Navy, Air Force, Marines or Coast Guard or was a cadet or midshipman at one of the service academies and was released under a condition other than dishonorable, or will be by June 30 of the academic year for which the application is made, or who was a National Guard or Reserve enlistee who was activated for duty. ROTC students, cadets or midshipmen currently attending the service academies, National Guard or Reserve enlistees who were not activated for duty, or those currently serving in the United States Armed Forces and will continue to serve through June 30 of the academic year for which application is made are not considered veterans.

**§ 121.2. Citizenship.**

To be eligible for a Federal Family Education Loan, a student or parent borrower shall be, on or before the date of filing the loan guaranty application, one of the following:

(1) A citizen or National of the United States.

(2) A permanent resident alien of the United States, a temporary resident who intends to become a United States citizen or resident, or a refugee in the United States for other than a temporary purpose. For the purposes of this paragraph, the United States includes the 50 states, the District of Columbia, Puerto Rico, Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands and the Northern Mariana Islands.

**§ 121.7. Notice of denial and preliminary review procedures.**

(a) If the Agency staff determines that eligibility for financial assistance should be denied, the applicant or recipient shall be notified in writing of the determination, the grounds therefor, and his right to appeal from the decision of the Agency staff.

(b) All appeals from the decisions of the Agency staff will be reviewed initially by an Administrative Review Committee composed of staff personnel of the Agency designated by the President and Chief Executive Officer. The Administrative Review Committee may grant eligibility in cases it deems proper. This subsection supersedes 1 Pa. Code § 35.20 (relating to appeals from actions of the staff).

(c) When the Agency through its Administrative Review Committee denies an applicant or recipient eligibility for financial assistance, the applicant or recipient may obtain a review of the Agency's determination by the Committee on Appeals. The Committee on Appeals will determine whether or not the applicant or recipient is eligible for financial assistance.

(d) An appeal to the Committee on Appeals shall be filed on or before the 60th day after the date on which notification of the determination by which he is aggrieved was delivered personally to the applicant or recipient or mailed to him at his last known post office address. The Committee on Appeals may waive this requirement in its discretion.

(e) The appeal shall be filed in the offices of the Agency at Harrisburg, and shall include the following information:

(1) The name, address and Social Security number of the applicant or recipient.

(2) The date of the decision being appealed.

(3) The reasons for appeal.

(4) The signature of the applicant or recipient.

(f) Use of the prescribed appeal form is not mandatory to initiate an appeal. Any written notice that may reasonably be construed as a request for an appeal, delivered or mailed to a authorized representative or to any office of the Agency within the prescribed 60-day appeal period, advising that the applicant or recipient is aggrieved and apparently desires a review of the determination denying him financial assistance, shall be deemed to initiate and constitute an appeal. Thereafter, the applicant or recipient shall perfect the appeal by filing a completed appeal form within a reasonable time after instructions for filing the appeal form have been delivered or mailed to him at his last known post office address. The date of initiation of an appeal delivered by mail, either on the prescribed appeal form or by any other form of written communication, will be determined from the postmark appearing upon the envelope in which the appeal form or written communication was mailed.

(g) Appeal forms may be obtained from any local field office of the Agency or at the offices of the Agency at Harrisburg. Assistance in completing and filing the appeal form can be obtained at any local field office of the Agency or at the offices of the Agency in Harrisburg.

**§ 121.8. Applicant and recipient appeals and hearings.**

(a) An applicant or recipient who is aggrieved by a determination of the Committee on Appeals denying him eligibility for financial assistance may file an appeal to the Board.

(b) An appeal to the Board shall be filed on or before the 15th day after the date on which notification of the determination by which he is aggrieved was delivered personally to the applicant or recipient or mailed to him at his last known post office address.

(c) Use of the prescribed appeal form is not mandatory to initiate an appeal. Any written notice that may reasonably be construed as a request for an appeal, delivered or mailed to a duly authorized representative or to any office of the Agency within the prescribed 15-day appeal period, advising that the applicant or recipient is aggrieved and apparently desires a review of the determination denying him financial assistance, will be deemed to initiate and constitute an appeal. Thereafter, the applicant or recipient shall perfect the appeal by filing a completed appeal form within a reasonable time after instructions for filing the appeal form have been delivered or mailed to him at his last known post office address. The date of initiation of an appeal delivered by mail, either on the prescribed appeal form or by any other form of written communication, will be determined from the postmark appearing upon the envelope in which the appeal form or written communication was mailed.

(d) The appeal may be heard by the Board or, at its direction, by a hearing examiner appointed by the Chairperson of the Board of the Agency or, in the event of the unavailability of the Chairperson, by the Vice Chairperson of the Board of the Agency from a list maintained by the President and Chief Executive Officer. The hearing examiner or the Board will schedule the appeal promptly for hearing and give the applicant or recipient at least 7 days' notice of the hearing. The notice will specify the date, hour and place of hearing.

(e) Hearings will be held at the offices of the Agency in Harrisburg. During the hearing, the applicant or recipient will be given the opportunity to submit testimony or evidence, or both, in support of his contentions. The applicant or recipient will also have the right to present oral and written argument and to cross-examine any witnesses offered by the Agency. This subsection supplements 1 Pa. Code § 35.126 (relating to presentation by the parties).

(f) Where a hearing examiner has been appointed, he shall prepare or cause the preparation of a verbatim transcript of the hearing, develop findings of fact and conclusions of law, and forward these directly to the Board for review and final decision. This subsection supplements 1 Pa. Code §§ 35.131 and 35.202 (relating to recording of proceedings; and proceedings in which proposed reports are prepared).

(g) The Board will make an order or determination as appears just and proper from the evidence submitted.

(h) Notice of the decision of the Board will be mailed promptly to the applicant or recipient at his last known post office address.

(i) Where the decision of the Board is in favor of the applicant or recipient, he shall be eligible for retroactive financial assistance payments for the period during which such assistance was temporarily delayed.

(j) The decision of the Board on an appeal will become final 10 days after the date thereof. Within 30 days after the decision of the Board becomes final, the applicant or recipient may file an appeal therefrom with Commonwealth Court.

**§ 121.9. Administrative loan collection review procedures.**

(a) This section implements the administrative loan collection review process authorized by the act of April 29, 1982 (P. L. 365, No. 102) (24 P. S. § 5104.3).

(b) Administrative loan collection procedure for those loans which are held by the Agency and which are not reinsured by the United States Secretary of Education is as follows:

(1) A borrower served with a statement of claim shall file a response thereto within 30 days of receipt of the statement of claim. The statement of claim shall inform the borrower of the nature and the amount of the indebtedness, the intention of the Agency to initiate proceedings to collect the debt through garnishment and an explanation of the rights of the borrower under the law. The response shall set forth all defenses and objections which the borrower has to the statement of claim and any objections or defenses not so presented will be deemed to have been waived. The response shall admit or deny all averments contained in the statement of claim. An averment in a statement of claim will be deemed to be denied only if proof thereof is demanded and the borrower states either that:

(i) After reasonable investigation, the borrower is without knowledge or information sufficient to form a belief as to the truth of the averment.

(ii) The borrower is without that knowledge or information because the means of proof are within the exclusive control of an adverse party or hostile person.

(2) When a borrower files a response to a statement of claim filed in the records of the Agency, the borrower will be afforded an opportunity to enter into a written agreement with the Agency, under terms agreeable to the head of the Agency or a designee, to establish a repayment schedule. The borrower will be afforded a hearing if he does not want to enter into a repayment schedule.

(3) Hearings will be conducted by a hearing examiner appointed by the Chairperson of the Board of the Agency or, in the event of the unavailability of the Chairperson, by the Vice Chairperson of the Board of the Agency from a list maintained by the President and Chief Executive Officer and will be held at the offices of the Agency in Harrisburg. The time of the hearing will be fixed by the Agency within a reasonable time, as soon as convenient, after the receipt of the borrower's response, allowing at least 15 days' notice to be given to the borrower and the borrower's attorney, if an attorney has entered an appearance on behalf of the borrower. Notice of the hearing will be sent to the borrower by the hearing examiner, specifying the time and place for hearing. If a borrower wishes to request postponement of a hearing, the borrower shall contact the hearing examiner and provide the hearing examiner with valid reasons for the request. The hearing examiner may approve or disapprove the request in the examiner's discretion.

(4) The borrower shall have the following rights during the hearing:

(i) To present testimony and arguments in person.

(ii) To be represented by an attorney.

(iii) To confront and cross-examine adverse witnesses.

(iv) To examine all documents and records used by the Agency at the hearing. Copies of materials from the files of the Agency relevant to the hearing shall be provided at a reasonable time prior to the day of the hearing upon request without charge to the borrower.

(v) To have the Agency prove its claim by a preponderance of the evidence.

(5) A request for a hearing may be dismissed by the hearing examiner when it is withdrawn by a borrower in a writing submitted to the hearing examiner. If a borrower fails to appear at a scheduled hearing without good cause as determined by the hearing examiner, the request for a hearing will be considered abandoned and will be dismissed with prejudice by the hearing examiner.

(6) The hearing examiner will have the following powers and duties:

(i) To administer oaths.

(ii) To question witnesses presented by the Agency or the borrower.

(iii) To hear the evidence submitted, review the documents presented, consider the arguments and prepare a report.

(iv) To recommend in the report a proposed adjudication and order, supported by findings of fact and conclusions of law.

(v) To provide copies of the report to the President and Chief Executive Officer of the Agency and to the borrower or the borrower's attorney of record within 60 days of the hearing.

(7) The proceedings of a hearing will be conducted in the following order:

(i) The hearing examiner will state the purpose of the hearing, the procedure to be followed, and the manner in which the report will be transmitted to the parties.

(ii) The Agency will present its case.

(iii) The borrower or the borrower's attorney may cross-examine each witness.

(iv) The borrower or the borrower's attorney will present the borrower's case.

(v) The Agency may cross-examine each witness presented by the borrower.

(vi) The hearing examiner may question any witness at any time.

(8) The borrower and the President and Chief Executive Officer of the Agency shall each have the right to file exceptions to the hearing examiner's report within 15 days after the service of a copy of the report. Failure to file exceptions within the time allowed shall constitute a waiver of all objections to the report.

(9) Upon consideration of the record, the hearing examiner's report, and any exceptions and briefs filed by the borrower and the President and Chief Executive Officer of the Agency, the Board will enter a final order.

(10) Any form of written communication to the Agency that may be reasonably construed as exceptions, advising that the borrower is aggrieved and desires a review of the hearing examiner's report, will be deemed exceptions to the proposed report sufficient to initiate and constitute an appeal to the Board.

(11) When the Board receives notice of an appeal, it will place the appeal on the meeting agenda of the Board at such time in the future as the Board has received a stenographic record of the hearing before the hearing examiner and has had an opportunity to review the record. The Board may delegate to the review committee, comprised of three or more Board members designated by the Chairperson of the Board, the responsibility to review the record and hearing examiner's report to the Board and to make a recommendation for action by the Board. The review committee will provide an opportunity for the borrower and the Agency to present oral argument, when requested, before rendering a recommendation for action by the Board. The Board will make the final order as appears to it just and proper.

(12) Notice of the entry of a final order by the Board will be mailed promptly to the borrower at the borrower's last known post office address. The President and Chief Executive Officer may transfer the record and the order of default to the court of common pleas of the district in which the borrower resides or, when residence within this Commonwealth cannot be ascertained, to the Court of Common Pleas of Dauphin County, to be entered as a judgment.

(13) Within 30 days of the mailing date set forth in the notice of the final order by the Board the borrower who is aggrieved by the final order may appeal the order to the court of common pleas of the district in which the borrower resides or the Court of Common Pleas of Dauphin County. Within 20 days after entry of judgment, the borrower may apply to the court in which the judgment is entered to set aside such judgment.

(14) If no appeal is filed, the Agency may execute upon the wages, salaries or commissions in the hands of an employer or other person including the borrower when self-employed by serving a notice of its intent on the borrower and a notice of execution on the employer. The notice of execution shall include the following:

(i) The total amount to be collected from the borrower.

(ii) That the amount to be remitted to the Agency for a given pay period shall be limited to 10% of the borrower's disposable pay, that being any pay remaining after the deduction of any amounts required by law to be withheld.

(iii) That the employer is not required to vary its normal pay and disbursement cycles in order to comply with paragraph (2).

(iv) That the employer will be held liable for a civil penalty equivalent to the amount of the notice of execution for wages not properly withheld after receipt of the notice of execution.

(15) This section affects 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) as follows:

(i) Subsection (b)(1) supersedes 1 Pa. Code § 35.14 (relating to orders to show cause).

(ii) Subsection (b)(3) supersedes 1 Pa. Code §§ 35.105 and 35.185 (relating to notice of nonrulemaking proceedings; and designation of presiding officers). Subsection (d) supplements 1 Pa. Code § 31.26 (relating to service on attorneys).

(iii) Subsection (b)(4)(i)—(iii) supplements 1 Pa. Code § 35.126 (relating to presentation by the parties); subsec-

tion (b)(4)(iv) supersedes 1 Pa. Code § 35.169 (relating to copies to parties and agency).

(iv) Subsection (b)(6)(i)—(iii) supplements 1 Pa. Code § 35.187 (relating to authority delegated to presiding officers); subsection (b)(6)(iv) supersedes 1 Pa. Code § 35.205 (relating to contents of proposed reports); subsection (b)(6)(v) supersedes 1 Pa. Code § 35.207 (relating to service of proposed reports).

(v) Subsection (b)(7) supplements 1 Pa. Code § 35.125 (relating to order of procedure).

(vi) Subsection (b)(8) supersedes 1 Pa. Code § 35.211 (relating to procedure to except to proposed report).

(vii) Subsection (b)(9) supplements 1 Pa. Code § 35.226 (relating to final orders).

(viii) Subsection (b)(11) supersedes 1 Pa. Code § 35.214 (relating to oral argument on exceptions).

**§ 121.10. Administrative wage garnishment procedures for Federal loans.**

(a) This section implements and incorporates by reference the Federal administrative wage garnishment process authorized under section 488A of the Higher Education Act of 1965 (20 U.S.C.A. § 1095a) and 34 CFR 682.410(b)(10) (relating to fiscal, administrative, and enforcement requirements).

(b) Loan collection procedure for those loans which are held by the Agency and which qualify as loans under the Federal Family Education Loan Program (FFELP) are as follows:

(1) If the Agency decides to garnish the disposable pay of a borrower who is not making payments on a loan held by the Agency, on which the United States Secretary of Education (Secretary) has paid a reinsurance claim, it shall do so in accordance with the procedures in section 488A of the Higher Education Act of 1965.

(2) Unless the Agency receives information that justifies a delay or cancellation of the order of withholding, it will send an order of withholding to the employer within 20 days after the borrower fails to request a hearing within 20 days of the date of mailing of the notice, or if a timely request for a hearing is made by the borrower, within 20 days after a final decision is made by the Agency to proceed with garnishment.

(3) The Agency will provide a hearing if the borrower submits a written request for a hearing on the existence or amount of the debt or the terms of the repayment schedule. The borrower may request an oral hearing or a written hearing. The time and location of the hearing will be established by the Agency. An oral hearing may, at the borrower's option, be conducted either in-person or by telephone conference. Telephonic charges are the responsibility of the Agency.

(4) If the borrower's written request is received by the Agency on or before the 15th day following the borrower's receipt of the notice the Agency may not issue an order of withholding until the borrower has been provided the requested hearing. For purposes of this subsection, in the absence of evidence to the contrary, a borrower will be considered to have received the notice 5 days after it was mailed by the Agency. The Agency will provide a hearing to the borrower in sufficient time to permit a decision to be rendered within 60 days from the day of receipt of the borrower's hearing request.

(5) The hearing examiner appointed by the Agency to conduct the hearing may be any qualified individual not under the supervision or control of the President and Chief Executive Officer of the Agency and have the power and duty to:

(i) Administer oaths.

(ii) Question witnesses presented by the Agency or by the borrower.

(iii) Hear evidence submitted, review the documents presented, consider arguments and prepare a report.

(iv) Recommend in the report a proposed adjudication and order, supported by findings of fact and conclusions of law.

(v) Provide copies of the report to the President and Chief Executive Officer of the Agency and to the borrower or the borrower's attorney of record at the earliest practicable date, but not later than 60 days after the Agency's receipt of the borrower's hearing request.

(6) The proceedings of a hearing will be conducted in the following order:

(i) The hearing examiner will state the purpose of the hearing, the procedure to be followed, and the manner in which the report will be transmitted to the parties.

(ii) The borrower or the borrower's attorney will present the borrower's case.

(iii) The Agency may cross-examine each witness presented by the borrower.

(iv) The Agency will present its case.

(v) The borrower or the borrower's attorney may cross-examine each witness presented by the Agency.

(vi) The hearing examiner may question any witness at any time.

(7) The borrower and the President and Chief Executive Officer of the Agency will each have the right to file exceptions to the hearing examiner's report within 15 days after the service of a copy of the report. Failure to file exceptions within the time allowed shall constitute a waiver of all objections to the report.

(8) The period of time may, for good cause, be extended upon motion made before the expiration of the 15-day time period and filed with the hearing examiner.

(9) The period of time may be extended upon motion made after the expiration of the 15-day time period where reasonable grounds are shown for failure to act. The motion shall be filed with the hearing examiner.

(10) Requests for the extension to time in which to file briefs shall be filed with the hearing examiner at least 5 days before the time fixed for filing the briefs.

(11) Upon consideration of the record, the hearing examiner's report, and any exceptions and briefs filed by the borrower and the President and Chief Executive Officer of the Agency, the Board will enter a final order.

(12) When the Board receives notice of an appeal, it will place the appeal on the meeting agenda of the Board after the Board has reviewed a stenographic record of the hearing before the hearing examiner. The Board may delegate to the review committee, comprised of three or more Board members designated by the Chairperson of the Board, the responsibility to review the record and hearing examiner's report to the Board and to make a recommendation for action by the Board. The review committee will provide an opportunity for the borrower and the Agency to present oral argument, when requested by either party, before rendering a recommendation for

action by the Board. Oral argument may be conducted either in-person or by telephone conference. Telephonic charges are the responsibility of the Agency. The Board will make a final order that is just and proper.

(13) Notice of the entry of a final order by the Board will be mailed promptly to the borrower at the borrower's last known post office address.

(c) The agency will sue any employer for any amount that the employer, after receipt of the order of withholding provided by the Agency, fails to withhold from wages owed and payable to an employe under the employer's normal pay and disbursement cycle.

(d) This section affects 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) as follows:

(1) Subsection (b)(3) supersedes 1 Pa. Code § 35.105 (relating to notice of nonrulemaking proceedings).

(2) Subsection (b)(5)(i)—(iii) supplements 1 Pa. Code § 35.187 (relating to authority delegated to presiding officers); subsection (b)(5)(iv) supersedes 1 Pa. Code § 35.205 (relating to contents of proposed reports); subsection (b)(5)(v) supersedes 1 Pa. Code § 35.207 (relating to service of proposed reports).

(3) Subsection (b)(6) supplements 1 Pa. Code § 35.125 (relating to order of procedure).

(4) Subsection (b)(7) supersedes 1 Pa. Code § 35.211 (relating to procedure to except to proposed reports).

(5) Subsection (b)(8)—(10) supersedes 1 Pa. Code § 31.15(a) (relating to extensions of time) and supplements 1 Pa. Code Chapter 35, Subchapter D (relating to motions).

(6) Subsection (b)(11) supplements 1 Pa. Code § 35.226 (relating to final orders).

(7) Subsection (b)(12) supersedes 1 Pa. Code § 35.214 (relating to oral argument on exceptions).

## SECONDARY SCHOOL GRADUATION

### § 121.21. Requirement for higher education grant applicants.

(a) A State higher education grant applicant shall be a graduate of or attending an approved secondary school, or be a recipient of a Commonwealth secondary school diploma

(b) An approved secondary school shall be any public or private secondary school, located in this Commonwealth or elsewhere, including foreign institutions and United States schools overseas, which in the judgment of the Department of Education provides a course of instruction at the secondary level and maintains standards of instruction substantially equivalent to the standards of instruction of the public high schools located in this Commonwealth.

(c) For purposes of the State Higher Education Grant Program, an approved secondary school shall also include any home education program that is accredited by any home schooling accreditation agency approved by the Department of Education. If the home education program lacks the requisite accreditation, certification by the appropriate local school official attesting that the home education program is in compliance with section 1327.1 of the Public School Code of 1949 (24 P. S. § 13-1327.1) shall be submitted to the Agency by the appropriate local school official.

## EDUCATIONAL INSTITUTIONS

### § 121.32. Approved institution in higher education grant program.

(a) To be eligible for a State higher education grant, an applicant shall enroll in a program approved under § 121.33 (relating to approved program of study in Higher Education Grant Program) and shall attend an institution of higher education approved by the Agency for enrollment of grant recipients under the State Higher Education Grant Program

(b) To be approved, an institution shall be other than a school of theology or a theological seminary as determined by the Agency, shall be located in the United States, the Canal Zone, Puerto Rico, the Virgin Islands, American Samoa or Guam and shall comply with the following:

(1) If the institution is a college or university located within this Commonwealth, the institution shall be approved by the Department of Education and shall be accredited or a recognized candidate for accreditation with an accrediting body recognized by the Council for Higher Education Accreditation; if the college or university located outside this Commonwealth, the institution shall be degree-granting, shall be operated not-for-profit and shall be fully accredited by the regional institutional accrediting body recognized by the Council for Higher Education Accreditation responsible for accreditation in the state where the college or university is conducting its educational program.

(2) If the institution is a hospital school of nursing located within this Commonwealth, the institution shall be initially, provisionally or fully approved by the State Board of Nursing and shall be accredited by the National League for Nursing; if located outside this Commonwealth, the institution shall be accredited by the National League for Nursing.

(3) If the institution is a trade, technical or business school located within this Commonwealth, the institution shall be approved by the Department of Education or shall currently be, and shall have been throughout the preceding 24 months, licensed by the State Board of Private Licensed Schools and shall be accredited by an accrediting body recognized by the Council for Higher Education Accreditation, except that this requirement for licensure and accreditation may be waived by the President and Chief Executive Officer for branch campuses of an institution that has been operating satisfactorily in this Commonwealth for 2 years or more; if the institution is located outside this Commonwealth, it shall be degree-granting, shall be operated not-for-profit and shall be fully accredited by the regional institutional accrediting body recognized by the Council for Higher Education Accreditation responsible for accreditation in the state where the institution is conducting its educational program.

(4) The institution shall have executed an Assurance of Compliance with section 602 of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000d-1 (1974)) and filed it with the United States Secretary of Education.

(5) The institution shall have executed and filed with the Agency an agreement on a form provided by the Agency to report or advise the Agency if the institution has knowledge of the name and address of Commonwealth resident students who are recipients of Agency-administered aid who have been convicted in a court of record of a criminal offense which under the laws of the United States or of the Commonwealth would constitute a felony committed after October 29, 1969. Institutional

knowledge shall be facts contained in the academic, disciplinary or financial student records of the institution and facts known to the dean of students, director of financial aid and president of the institution or persons occupying these positions by whatever titles designated by the institution.

(6) When a change in ownership of an approved institution occurs, the new owner shall notify the Agency in writing of the change in ownership within 30 days of the effective date of the change. The new owner shall execute and file with the Agency an agreement on a form provided by the Agency to assume responsibility for repayment of State grant funds to the Agency or payment of State grant funds to eligible students, as designated by the Agency, made necessary by the failure of the previous owner to follow Agency procedures and requirements. An institution that fails to execute this agreement will be required to wait 24 months before being considered for approval in the State Grant Program.

(7) The institution shall comply with such other administrative requirements as the Agency may legally promulgate, as shall be set forth in the State Grant Certification Procedures and the State Grant Program Policy Manual which will be made available to institutions on an annual basis.

(c) Approved institutions for an academic year shall be those on record as of the preceding August 1 for the ensuing academic year.

(d) Approval of an institution after August 1 will become effective the following August 1 with two exceptions:

(1) To be effective for the ensuing summer term, approval shall be obtained prior to May 1.

(2) In the light of the particular circumstances related to the institution's approval and the funding and application processing conditions of the Agency, the President and Chief Executive Officer may make the approval effective on a date prior to August 1.

(e) The President and Chief Executive Officer may suspend the processing of aid request forms of State grant applicants or cease further disbursement of State grant funds to an approved institution, or both, when, in the judgment of the President and Chief Executive Officer, the institution's compliance with the conditions required for approval or the institution's continued eligibility or operation is in question and the action is deemed necessary to protect the interests of the student aid applicants, the Commonwealth or the Agency. This subsection may also be invoked upon a change in ownership, administration or directorship of the institution.

(f) An institution's approved status may be terminated by the President and Chief Executive Officer when any of the conditions required for approval cease to be met.

(g) In suspending or withdrawing the approval of an institution, the President and Chief Executive Officer may authorize continuation of eligibility determination and grant disbursement for State grant renewal applicants.

### § 121.33. Approved program of study in higher education grant program.

To be eligible for a State higher education grant, an applicant shall enroll in a program of study approved by the Agency and offered by an institution approved by the Agency under § 121.32 (relating to approved institutions in Higher Education Grant Program) for participation in the State Higher Education Grant Program. An approved program of study shall comply with the following:

(1) An approved program of study shall be a program of instruction of at least 2 academic years which shall be the equivalent of at least 60 semester credit hours or at least 1,800 clock hours of instruction (1,500 clock hours in the case of programs leading to the associate degree in specialized technology or the associate degree in specialized business offered by institutions of higher education located within this Commonwealth) except that, other than for those community college programs which are measured in credit hours, programs not leading to a degree shall be measured in clock hours, with at least 30 semester credit hours or 900 clock hours earned through instruction within the classroom, and shall be presented over a calendar of at least 15 months.

(2) An approved program of study shall require that at least 50% of the credits needed for completion of the program at the approved institution be earned through instruction within the classroom.

(3) If offered at a trade, technical or business school located within this Commonwealth, an approved program of study shall be approved by the Department of Education or by the State Board of Private Licensed Schools.

(4) An approved program of study shall be on the approved list as of August 1 for the ensuing academic year. Approval after August 1 will become effective the following August 1 with two exceptions:

(i) To be effective for the ensuing summer term, approval must be obtained prior to May 1.

(ii) In the light of the particular circumstances related to the approval of the program of study and the funding and application processing conditions of the Agency, the President and Chief Executive Officer may make the approval effective on a date prior to August 1.

## Subchapter B. HIGHER EDUCATION GRANT PROGRAM

### § 121.42. Submission of applications.

(a) Applications will be considered only if submitted on or prior to the deadline date announced by the Agency for each group specified in § 121.41 (relating to grouping of applicants). Applications will be accepted after the established deadline, funds permitting, when received from applicants in the following categories, except applicants who have been supplied with an application by the Agency in sufficient time to have had a reasonable opportunity to submit the application to the Agency prior to the deadline:

(1) Veterans and current and former members of the Peace Corps, VISTA, and other similar organizations.

(2) Applicants who have suffered a loss in expected family assistance through the death, disability or retirement of a major wage earner of the family.

(3) Applicants who have suffered a loss in expected family assistance through a major wage earner's separation—as defined by the Agency—or divorce, or through a change in the employment status of a major wage earner of the family.

(b) If, in the case of applications accepted from students included in the categories mentioned in subsection (a), the release from active duty, death, disability, retirement, change of employment status, separation or divorce, as the case may be, occurred on or after January 1 immediately preceding the start of the academic year for

which aid is requested, the applications will be processed, funds permitting, in accordance with the following schedule:

(1) *Quarter schedule institutions.* Applications from students attending institutions with quarter schedules will be considered in accordance with the following dates of reception:

(i) Received prior to February 1—full-year consideration.

(ii) Received on or after February 1 and prior to April 1—two-term consideration.

(iii) Received on or after April 1—no consideration for the current academic year.

(2) *Semester schedule institutions.* Applications from students attending institutions with semester schedules will be considered in accordance with the following dates of reception:

(i) Received prior to February 1—full-year consideration.

(ii) Received on or after February 1 and prior to April 1—one-semester consideration.

(iii) Received on or after April 1—no consideration for the current academic year.

(c) Applications which are accepted from students included in the categories mentioned in subsection (a), but not eligible under the terms of subsection (b) will, funds permitting, be processed, after consideration of those applicants designated in subsection (b), for the term or terms designated by the Agency.

(d) The President and Chief Executive Officer may authorize the setting aside of deadlines for other categories of applicants when in the judgment of the President and Chief Executive Officer the setting aside of the deadline will facilitate administration of the State Higher Education Grant Program in accordance with the policies established by the Board of the Agency and will promote equitable program results. Any determination made by the President and Chief Executive Officer under this subsection will be reduced to writing, which writing will delimit the category and give an estimate of the number of applicants for the particular processing year which is expected to fall within the category. A copy of this writing will be furnished to each member of the Board of the Agency.

(e) Exceptional cases involving applicants who submit an application after the established deadline will be reviewed and appropriate resolution of the question relating to setting aside the deadline and the term of eligibility will be taken by the Administrative Review Committee or the Committee on Appeals in turn.

**§ 121.48. Limitation on payment of grants.**

The Agency will not make payment of, or further payment on, an existing State higher education grant on the basis of an inquiry or request received after August 1 of the calendar year next commencing following the academic year for which the payment is sought unless the President and Chief Executive Officer specifically directs that payment be made to prevent grave hardship

**§ 121.56. Year abroad program.**

A recipient shall be eligible to receive an award for a Year Abroad Program which shall provide the recipient with equivalent credit for the academic terms involved in the program as the recipient would earn at the approved institution of higher learning and which requires the recipient to pay the educational costs to the institution. Exceptions to the requirement that educational costs be paid to the approved institution may be made by the President and Chief Executive Officer

## Subchapter N. EARLY CHILDHOOD EDUCATION PROFESSIONAL LOAN FORGIVENESS PROGRAM

Sec.
121.401. Application of existing agency regulations.
121.402. Qualified applicant.
121.403. Loan forgiveness.
121.404. Employment.
121.405. Approved child-care facility.
121.406. Lottery.

**§ 121.401. Application of existing agency regulations.**

(a) The following higher education grant sections contained in Subchapter A (relating to general provisions) apply to applicants in the Early Childhood Education Professional Loan Forgiveness Program:

(1) Section 121.1 (relating to definitions).

(2) Section 121.3 (relating to discrimination prohibited).

(3) Section 121.4(a) (relating to denial of eligibility to loan defaulters).

(4) Section 121.6 (relating to denial of eligibility for financial assistance).

(5) Section 121.7 (relating to notice of denial and preliminary review procedures).

(6) Section 121.8 (relating to applicant and recipient appeals and hearings).

**§ 121.402. Qualified applicant.**

A qualified applicant in the Early Childhood Education Loan Forgiveness Program is a person who meets the following requirements:

(1) Has successfully completed an undergraduate program at an accredited college or university.

(2) Has a bachelor's degree and has obtained Pennsylvania State Early Childhood Education Certification (nursery through third grade), or an associate's degree in Early Childhood or Child Development.

(3) Has borrowed through the Agency-administered Guaranteed Student Loan Programs.

(4) Is a resident of this Commonwealth.

(5) Executes a sworn affidavit, under penalty of perjury, that he does not have a delinquent payment owing to any Commonwealth agency.

(6) Receives an annual salary of less than $18,500 for the employment period for which loan forgiveness is requested.

(7) Has submitted a completed application by the filing deadline designated by the Agency.

**§ 121.403. Loan forgiveness.**

Qualified applicants who are selected for the program in accordance with the Early Childhood Loan Forgiveness Act (24 P. S. §§ 7101—7106) are eligible for payment by the Agency of a portion of the debt incurred by the applicant through the Agency-administered Guaranteed Student Loan Programs for the education necessary to successfully complete the specified bachelor's degree or associate's degree programs.

(1) For each 12-month employment period designated by the Agency that the applicant is a full-time profes-

sional in an approved Commonwealth child-care facility, the Agency may forgive a proportional part of the applicant's loan so that the loan may be entirely forgiven over 4 years of full-time employment in an approved child-care facility.

(2) For a graduate with a bachelor's or associate's degree in the specified areas, no more than $2,500 shall be forgiven in any year, and no more than $10,000 shall be forgiven for any applicant.

(3) Payments shall be made to the lender/servicer in March and September.

(4) A loan forgiveness award may not be made for a loan that is in default at the time of the application.

**§ 121.404. Employment.**

An applicant selected for the Early Childhood Education Professional Loan Forgiveness Program is required to submit documentation the Agency may require as proof that those child-care professionals are working as full-time professionals in approved child-care facilities in this Commonwealth for the 12-month employment period designated by the Agency for loan forgiveness. Each child-care professional is required to submit documentation of eligibility as the Agency may require.

**§ 121.405. Approved child-care facility.**

An "approved child-care facility" is defined as a child day-care center or group day-care home located in this Commonwealth which is subject to and in compliance with 55 Pa. Code (relating to public welfare).

**§ 121.406. Lottery.**

(a) Loan forgiveness awards shall be made to the extent that funds are appropriated by the General Assembly and are sufficient to cover administration of the program. If funding is insufficient to fully fund administration and eligible applicants, the Agency shall utilize a random lottery system for determining which applicants receive loan forgiveness awards.

(b) When a random lottery is required, the lottery shall include only those records that are complete and eligible in accordance with § 121.402 (relating to qualified applicant) at the time the lottery is conducted.

[Pa.B. Doc. No. 00-1317. Filed for public inspection August 4, 2000, 9:00 a.m.]

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# Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

## STATE BOARD OF CERTIFIED REAL ESTATE APPRAISERS

## [49 PA. CODE CH. 36]

## Qualifications for Certification

The State Board of Certified Real Estate Appraisers (Board), by this order, amends §§ 36.11 and 36.12 (relating to residential real estate appraiser; and general real estate appraiser) to read as proposed at 29 Pa.B. 5727 (November 6, 1999).

The amendments (1) reflect revised Federal education and experience requirements for appraiser certification that became effective by operation of law under the Real Estate Appraisers Certification Act (REACA) (63 P. S. §§ 457.1—457.19), on January 1, 1998; (2) adopt the National Uniform Standards of Appraisal Practice as a mandatory course for appraiser certification; (3) track revised scope of practice language that was added to the REACA effective September 3, 1996; and (4) make editorial changes.

*Statutory Authority*

Section 5(2) of the REACA (63 P. S. § 457.5(2)), authorizes the Board to adopt regulations necessary to carry out the provisions of the REACA.

*Fiscal Impact and Paperwork Requirements*

The amendments will have no fiscal impact on the Commonwealth or its political subdivisions. While the amendments reflect increased education and experience requirements for applicants for residential or general certification, the amendments will have no fiscal impact on those applicants because the increased requirements have already taken effect by operation of law.

The amendments will not create new paperwork requirements for the Commonwealth, its political subdivision or the private sector. Prior to January 1, 1998, the Board amended its application forms and instructions to reflect the increased education and experience requirements.

*Compliance with Executive Order 1996-1*

In accordance with Executive Order 1996-1 (relating to regulatory review and promulgation), the Board solicited preproposal comments from the major trade associations representing the real estate appraising industry in this Commonwealth.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on November 6, 1999, the Board submitted a copy of proposed rulemaking, published at 29 Pa.B. 5727, following which the Board entertained public comment for 30 days. The Pennsylvania Association of Realtors submitted comments in support of the amendments.

The amendments were reviewed during proposed rulemaking by the Independent Regulatory Review Commission (IRRC), the Senate Consumer Protection and Professional Licensure Committee, and the House Professional Licensure. None of these bodies recommended changes to the amendments.

On May 3, 2000, the Board submitted proposed amendments to IRRC and the House and Senate Committees. Under authority of sections 5(g) and 5.1(d) of the Regulatory Review Act (71 P. S. §§ 745.5(g) and 745.5a(d)), the amendments were approved by the House Committee on May 16, 2000, deemed approved by the Senate Committee on May 23, 2000, and deemed approved by IRRC on May 24, 2000.

*Additional Information*

Individuals who desire additional information about the amendments are invited to submit inquiries to Cheryl Lyne, Administrator, State Board of Certified Real Estate Appraisers, P. O. Box 2649, Harrisburg, PA 17105-2649. The Board's telephone number is (717) 783-4866.

*Findings*

The Board finds that:

(1) Public notice of the Board's intention to amend Chapter 36, by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202), and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The amendments adopted by this order are necessary and appropriate for the administration of the REACA.

*Order*

The Board, acting under its authorizing statute, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 36, are amended by amending §§ 36.11 and 36.12 to read as set forth at 29 Pa.B. 5727.

(b) The Board shall submit this order and 29 Pa.B. 5727 to the Office of Attorney General and the Office of General Counsel for approval as required by law.

(c) The Board shall certify this order and 29 Pa.B. 5727 and deposit them with the Legislative Reference Bureau as required by law.

(d) The amendments shall take effect upon publication in the *Pennsylvania Bulletin*.

DAVID J. KING,
*Chairperson*

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 2965 (June 10, 2000).)

**Fiscal Note**: Fiscal Note 16A-7010 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 00-1318. Filed for public inspection August 4, 2000, 9:00 a.m.]

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# Title 61—REVENUE

## DEPARTMENT OF REVENUE

## [61 PA. CODE CHS. 55 AND 60]

## Sales and Use Tax; Lawn Care Services

The Department of Revenue (Department), under the authority contained in section 270 of the Tax Reform Code of 1971 (TRC) (72 P. S. § 7270), by this order adopts § 55.6 (relating to lawn care services) and deletes § 60.2 (relating to lawn care services).

*Purpose of Regulation*

This rukemaking provides the Department's interpretation of section 201(k)(17), (o)(15) and (jj) of the TRC (72 P. S. §§ 7201(k)(17), (o)(15) and (jj)) relating to lawn care services.

*Explanation of Regulatory Requirements*

Section 55.6(a) defines the terms "lawn," "lawn care service," "shrubbery" and "tree" for use in that section. Subsection (b) provides that the sale at retail or use of lawn care services performed in this Commonwealth is subject to tax.

Subsection (c) provides examples of taxable lawn care services. Subsection (d) provides examples of services that are not taxable lawn care services. Subsection (e) provides that tax shall be imposed on the total charge for lawn care services. The failure to state charges for lawn care services separately from other nontaxable charges on the same invoice requires the charging of tax on the total invoice amount.

Subsection (f) sets forth exemptions. Paragraph (1) provides that lawn care services are not subject to tax if purchased by qualified institutions of purely public charity, charitable organizations, volunteer fire companies, religious organizations and nonprofit educational institutions, except if used in an unrelated trade or business; the Federal government or its instrumentalities; or the Commonwealth, its instrumentalities or subdivisions, including public school districts. The purchase of lawn care services is subject to tax if purchased by persons engaged in the business of manufacturing, mining, processing, public utility, farming, dairying, agriculture, horticulture or floriculture, as those terms are defined in section 201(k)(8) and (o)(4)(B) of the TRC.

Subsection (f)(2) provides that the vendor of lawn care services may claim the resale exemption upon its purchase of tangible personal property that is transferred to the purchaser or a third party in the performance of the lawn care services. This subsection also provides examples of property that may be purchased for resale when transferred to the purchaser in the performance of lawn care services and examples of property that is taxable when used in the performance of lawn care services.

With the adoption of § 55.6, the Department is deleting the pronouncement set forth in § 60.2.

*Affected Parties*

Providers of lawn care services will be affected by this rulemaking.

*Comment and Response Summary*

Notice of proposed rulemaking was published at 29 Pa.B. 3736 (July 17, 1999). This proposal is being adopted with changes to read as set forth in Annex A.

The Department received one comment during the public comment period. No comments were received from the House Finance Committee or the Senate Finance Committee. The Department received comments from the Independent Regulatory Review Commission (IRRC).

The amendments to the proposed rulemaking in response to the comments from the public and IRRC are as follows:

(1) In its comments, IRRC indicated that the definition of "lawn care service" was not consistent with the statutory definition and suggested that the Department replace its definition with a reference to the statutory definition. The Department amended the definition to mirror the statutory definition; however, the wording of the statute was added because in the Department's opinion, the statutory citation would not provide sufficient guidance to the taxpayers utilizing the regulation.

(2) Both the public commentator and IRRC indicated that it would be helpful if the Department could provide definitions for "shrubbery" and "tree" for use in the regulation. The Department agrees that the definitions are needed and added them to subsection (a). The Department's source for the definitions is *The Manual of Woody Landscape Plants* by Michael A. Dirr.

(3) Subsection (b) states that lawn care services became taxable October 1, 1991. IRRC questioned the necessity of this sentence and suggested that it be deleted from the section. The Department agrees with IRRC's suggestion and deleted the sentence from subsection (b).

(4) Subsection (c) provides a list of examples of taxable lawn care services. Paragraph (11) relates to the overseeding, sodding or grass plugging of lawns. For clarity, IRRC suggested the Department add the word "existing" to clearly distinguish these services from the services described in subsection (d)(1). The Department agrees with IRRC's comment and amended the paragraph accordingly.

(5) IRRC raised two concerns with regard to subsection (f). The first concern relates to the title of the subsection, "exclusions," when the section discusses both exclusions and exemptions. IRRC suggested that the Department create a separate subsection to address exemptions to distinguish them from exclusions. The Department agrees that the use of the two terms could be confusing and amended the title of the subsection as well as the text to alleviate the confusion.

IRRC's second concern relates to the last sentence in subsection (f)(1). The proposed language provided "[T]he manufacturing, mining, processing, public utility, farming, dairying, agriculture, horticulture or floriculture exclusions do not apply." IRRC was not clear on which "exclusions" were being referenced and how comprehensive they were, and suggested the Department reference the pertinent statutory provisions and state that the exclusions do not apply to the tax on lawn care services. To address IRRC's concerns and to clarify the meaning of the sentence, the Department reworded the sentence and added a reference to the applicable statutory provisions.

Revisions initiated during the Department's internal review of the regulation are as follows:

(1) Section 55.6(d) relating to nontaxable lawn care services is amended by adding an additional example in paragraph (8) relating to separately stated charges for leaf raking. In the Department's proposal, leaf raking was not enumerated in the list of taxable services to reflect the change in policy in this area. However, the mere omission from the listing of taxable services without a corresponding affirmation in the listing of nontaxable services could cause confusion; therefore, the Department added the paragraph to clarify the Department's change in policy in this area.

(2) Minor grammatical and stylistic changes were made throughout § 55.6 to improve clarity and readability.

(3) For clarity, the Department amended § 55.6(d)(1) to provide that seeding, sodding and grass plugging done in conjunction with building construction will be presumed to be a new lawn and therefore a nontaxable lawn care service.

Question raised regarding the proposal is as follows:

Both the public and IRRC questioned the application of the Department's proposed definition for "lawn." Specifically, the commentators questioned how to distinguish a lawn from a field. The proposed definition defines lawn to be an area maintained with grass adjacent to a building. The Department chose this language because lawns are normally associated with buildings and fields are not. Thus, the distinguishing characteristic is that the area be associated with a building.

*Fiscal Impact*

The Department determined that the change in policy from the Department's statement of policy (§ 60.2) relating to the exclusion of shrubbery trimming from tax when not performed in conjunction with a taxable lawn care service and the exclusion of leaf raking from the definition of a "lawn care service" as set forth in this rulemaking will result in an estimated revenue loss of approximately $1.2 million for Fiscal Year 1999-00.

*Paperwork*

This rulemaking will require no additional paperwork for the public or the Commonwealth.

*Effectiveness/Sunset Date*

This rulemaking will become effective upon final publication in the *Pennsylvania Bulletin*. This rulemaking is scheduled for review within 5 years of final publication. No sunset date has been assigned.

*Contact Person*

The contact person for an explanation of this rulemaking is Anita M. Doucette, Office of Chief Counsel, PA Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 30, 1999, the Department submitted a copy of the notice of proposed rulemaking, published at 29 Pa.B. 3736, to IRRC and the Chairpersons of the House Committee on Finance and the Senate Committee on Finance for review and comment.

In compliance with section 5(c) of the Regulatory Review Act (71 P. S. § 745.5(c)), the Department also provided IRRC and the Committees with copies of the comments received, as well as other documentation. In preparing this final-form rulemaking, the Department has considered the comments received from IRRC, the Committees and the public.

This final-form rulemaking was deemed approved by the Committees on June 14, 2000, and was approved by IRRC on June 22, 2000, in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)).

*Findings*

The Department finds that:

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

(2) The amendments are necessary and appropriate for the administration and enforcement of the authorizing statute.

*Order*

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 61 Pa. Code Chapters 55 and 60, are amended by adding § 55.6 and deleting § 60.2 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

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

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

ROBERT A. JUDGE, Sr.,
*Secretary*

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 3534 (July 8, 2000).)

**Fiscal Note:** 15-407. (1) General Fund; (2) Implementing Year 1999-00 is $1.2 million; (3) 1st Succeeding Year 2000-01 is $1.2 million; 2nd Succeeding Year 2001-02 is $1.2 million; 3rd Succeeding Year 2002-03 is $1.2 million; 4th Succeeding Year 2003-04 is $1.2 million; 5th Succeeding Year 2004-05 is $1.2 million; (4) 1998-99 Not applicable; 1997-98 Not applicable; 1996-97 Not applicable; (8) recommends adoption. The proposed regulation estimated a $1.1 million revenue loss due to the proposed changes. The increase in the estimated revenue loss for the final regulation represents a recalculation for fiscal year 1999-00 rather than a substantive change from the proposed regulation.

## Annex A

## TITLE 61. REVENUE

## PART I. DEPARTMENT OF REVENUE

## Subchapter B. GENERAL FUND REVENUES

## ARTICLE II. SALES AND USE TAX

## CHAPTER 55. SERVICES

### § 55.6. Lawn care services.

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

*Lawn*—An area maintained with grass adjacent to a building. The term does not include athletic fields, cemeteries, golf courses, fields, parks and public utility or highway right-of-ways.

*Lawn care service*—Providing services for lawn upkeep including fertilizing, lawn mowing, shrubbery trimming or other lawn treatment services.

*Shrubbery*—A woody plant that produces branches or shoots from or near the base.

*Tree*—A woody plant with a main stem and usually having a distinct head.

(b) *Scope*. The sale at retail or use of lawn care services performed in this Commonwealth is subject to tax.

(c) *Examples of taxable services*. The following are examples of taxable lawn care services:

(1) Fertilizing lawns.

(2) Mowing, trimming, cutting or edging lawns.

(3) Dethatching lawns.

(4) Applying herbicides, insecticides or fungicides to lawns.

(5) Raking grass on lawns.

(6) Applying treatments for weed, pest, insect or disease control to lawns.

(7) Watering lawns.

(8) Applying lime to lawns.

(9) Aerating lawns.

(10) Providing lawn evaluation, consultation or soil testing services on lawns, if purchased in conjunction with other lawn care services, regardless of whether the costs of the lawn evaluation, consultation or soil testing services are separately stated on the invoice.

(11) Overseeding, sodding or grass plugging of existing lawns.

(12) Trimming or pruning shrubbery when performed in conjunction with other lawn care services.

(d) *Examples of nontaxable services*. The following are examples of services which are not taxable lawn care services:

(1) Seeding, sodding or grass plugging to establish a new lawn. Seeding, sodding or grass plugging in conjunction with building construction will be presumed to be a new lawn.

(2) Trimming, pruning or fertilizing trees.

(3) Planting or removing shrubbery or trees.

(4) Providing lawn evaluation, consultation or soil testing services, if not purchased in conjunction with other lawn care services.

(5) Designing lawns or landscapes.

(6) Applying herbicides or fungicides to shrubbery, trees, flowers or vegetables.

(7) Maintaining shrubbery, flower or vegetable beds, such as by mulching, tilling, weeding or fertilizing.

(8) Separately stated charges for leaf raking.

(e) *Purchase price*. Tax shall be imposed on the total charge for lawn care services. The failure to separately state charges for lawn care services from other nontaxable charges on the same invoice requires the charging of tax on the total invoice amount.

(f) *Exemptions*.

(1) Lawn care services are not subject to tax if purchased by qualified institutions of purely public charity, charitable organizations, volunteer fire companies, religious organizations and nonprofit educational institutions, except if used in an unrelated trade or business; the Federal government or its instrumentalities; or the Commonwealth, its instrumentalities or subdivisions, including public school districts. The purchase of lawn care services is subject to tax if purchased by persons engaged in the business of manufacturing, mining, processing, public utility, farming, dairying, agriculture, horticulture or floriculture, as those terms are defined in section 201(k)(8) and (o)(4)(B) of the TRC (72 P. S. §§ 7201(k)(8) and (o)(4)(B)).

(2) The vendor of lawn care services may claim the resale exemption upon its purchase of tangible personal property that is transferred to the purchaser or a third party in the performance of the lawn care services. The vendor may also purchase lawn care services from another provider and subsequently resell the services to a purchaser. The vendor may not claim the resale exemption upon its purchase of administrative supplies or the purchase of other taxable services that it may use but not transfer in the performance of its lawn care services.

(i) The following are examples of property that may be purchased exempt for resale when transferred to the purchaser in the performance of lawn care services:

(A) Herbicides, insecticides, fungicides or other chemicals that are applied to lawns.

(B) Grass seed, sod, grass plugs, straw, fertilizers or lime applied to lawns.

(ii) The following are examples of taxable property when used in the performance of lawn care services:

(A) Mowers; edgers; or pruning, dethatching, aerating or mulching equipment, including motor oil and gasoline used in the equipment.

(B) Rakes, shovels or hoes.

(C) Spray applicators.

(D) Testing kits.

(E) Lawn sweepers.

(F) Other tangible personal property and services used in connection with the performance of lawn care services such as invoices, sales receipts, contracts, estimate sheets, confirmations and other similar items.

## CHAPTER 60. SALES AND USE TAX PRONOUNCEMENTS—STATEMENTS OF POLICY

**§ 60.2. (Reserved).**

[Pa.B. Doc. No. 00-1319. Filed for public inspection August 4, 2000, 9:00 a.m.]

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## [61 PA. CODE CHS. 101 AND 125]

## Payments For Employe Welfare Benefit Plans and Cafeteria Plans

The Department of Revenue (Department), under the authority contained in section 354 of the Tax Reform Code of 1971 (TRC) (72 P. S. § 7254), by this order amends §§ 101.1, 101.6, 101.6a and 101.7 and deletes §§ 125.21—125.33 to read as set forth in Annex A.

*Purpose of Rulemaking*

The amendments to §§ 101.1, 101.6, 101.6a and 101.7 are made to explain how employe welfare benefit programs and other wage and salary supplemental programs are taxed and to implement amendments to section 301(d) of the TRC (72 P. S. § 7301(d)) under the act of May 7, 1997 (P. L. 85, No. 7) (Act 7) and the act of April 29, 1998 (P. L. 295, No. 48) (Act 48).

*Explanation of Regulatory Requirements*

The amendments provide employers and employes with a detailed explanation of how nondiscriminatory employe welfare benefit programs such as self-insured medical reimbursement accounts or cafeteria plans are taxed under the Commonwealth's Personal Income Tax. They also provide a detailed explanation of how programs that discriminate in favor of officers, owners and key employes are taxed.

The amendments are also added to notify employers and employes how the provisions of the Personal Income Tax relating to employe compensation in the form of employer-provided facilities or services will be enforced by the Department.

With the adoption of this rulemaking, the Department is deleting the statement of policy in §§ 125.21—125.33. The statement of policy provided the public with an explanation of the Department's policy on payments for employe welfare benefit plans and cafeteria plans pending the adoption of this rulemaking.

*Affected Parties*

Wage earners, employers and tax practitioners/preparers may be affected by the rulemaking in that they will need to know what is subject to withholding and how to complete their tax return.

*Comment and Response Summary*

Notice of proposed rulemaking was published at 28 Pa. B. 1946 (April 25, 1998). This proposal is being adopted with changes as set forth in Annex A.

The Department received one comment from the public during the public comment period. The Department also received comments from the Independent Regulatory Review Commission (IRRC). No comments were received from the Senate and House Finance Committees.

Amendments to the proposed rulemaking in response to comments are as follows:

(1) IRRC suggested that the Department clarify its use of the term "cafeteria plan." In response, the Department amended the definition of "cafeteria plan" to mean only plans qualifying under section 125 of the IRC (26 U.S.C.A. § 125).

(2) IRRC suggested that the terminology "taxable compensation" was redundant and that the regulation be consistent in its references to compensation. The terminology "taxable compensation" has been amended to "compensation" throughout the regulation.

(3) IRRC suggested that the definitions of "employe benefit plan," "employe welfare benefit plan," and "cafeteria plan" in the proposed rulemaking overlap. The definitions have been amended to eliminate the definition of "employe benefit plan." Although cafeteria plans can offer the same benefits as employe welfare benefit plans (such as, health, accident or death plan benefits or dependent care assistance), they can also offer 401(k) plan benefits.

(4) IRRC noted in its comments that the definition of "cafeteria plan" used the undefined term "flexible benefit plans" and suggested that the term be defined in the final rulemaking. The revisions to the definition of "cafeteria plan" previously discussed have addressed this concern.

(5) In response to IRRC's comment and the act of April 23, 1998 (P. L. 239, No. 45) (Act 45), several of the examples set forth in the definition of "employe welfare benefit plan" are deleted.

(6) IRRC recommended that the proposed rulemaking be amended to add definitions of the terms "working condition fringes," "qualified transportation fringes," and "de minimis fringes" for purposes of § 101.6(c)(10) (relating to compensation) and the definition of "poverty income." The terms are eliminated in final-form regulations and will be addressed in a future rulemaking.

(7) IRRC noted that the criteria in the definition of "program covering hospitalization, sickness, disability or death" were confusing and questioned the need for the language. IRRC suggested that if the Department retained the language in the final rulemaking, the Department should explain why the criteria were necessary. The Department recognizes the concern raised by IRRC and deleted the proposed definition and added a new definition for "health, accident or death plan." The definition includes an example to add clarity.

(8) IRRC and a public commentator suggested that the proposed rulemaking be amended to reflect the exclusion of the personal use of an employer's property and employer-provided services under Act 45. The Department acknowledges the need, deletes those provisions in the proposed rulemaking that consider employer provided service or property to be compensation, and adds § 101.6a (relating to fringe benefits in the form of use of property or services) to explain the new exclusions.

(9) IRRC questioned why the Department included the term "collectively bargained" in subsection (c)(9) and recommended that the Department either delete or explain the need for the terminology. Although collectively bargained for supplemental unemployment benefit pay arrangements would seldom be discriminatory, the language has been deleted.

(10) IRRC and a public comment questioned whether the proposed rulemaking referred not only to qualified and unqualified stock options and restricted stock options but also to incentive stock options (ISOs), noting that there is confusion in the community as to whether the current § 101.6(b) includes ISOs. The Department acknowledges that, because the Federal tax treatment of ISOs varies from the Federal treatment of other stock options, it would be helpful to clarify that they are taxed the same as other stock options for Personal Income Tax purposes. The Department amended § 101.6(f) for that purpose.

(11) IRRC recommended that the words "they" and "conditions," in § 101.6(i)(1)(i) and (ii) be clarified. The terminology has been clarified by referencing the payments in question and the requirements of paragraph (1). The word "rules" in paragraph (2) refers to all personal income tax regulatory provisions relating to employer payments for employe welfare benefit plans.

(12) IRRC raised several clarity concerns regarding § 101.6(i)(2) and suggested that the provision should be redrafted. The Department recognizes IRRC's concerns and revised the paragraph accordingly.

(13) IRRC recommended changes to the first, fifth and sixth examples under § 101.6(i)(3). After consideration, the Department deleted paragraph (3) in its entirety.

(14) Section 101.7(f) (relating to receipt of income) is amended in response to IRRC's request for clarity.

(15) IRRC also made a comment relating to the deletion of the Department's statement of policy relating to payments for employe welfare benefit plans and cafeteria plans set forth in §§ 125.21—125.33. IRRC notes that the preamble for the proposed rulemaking did not mention the statement of policy, nor did it indicate that the statement of policy would be deleted upon adoption of the proposal; therefore, IRRC suggested that the statement of policy be deleted upon adoption of rulemaking.

It was the Department's intention to delete §§ 125.21—125.33 with the adoption of this rulemaking; therefore, consistent with IRRC's comment and the Department's intent, language has been added to the regulation which deletes §§ 125.21—125.33 upon the adoption of the rulemaking.

Revisions initiated during the Department's internal review of the regulation are as follows:

(1) Consistent with the Department's deletion of detailed examples throughout the regulation, the example in proposed § 101.6(g)(3) is deleted.

(2) The example in § 101.6(i)(2) was based on the Federal law in effect at the time the proposal was published. The Federal law subsequently changed requiring the deletion of the example.

(3) As part of the amendments to address Act 45, the Department believed it was necessary to add § 101.6(l) to specifically provide that the form of payment of compensation does not affect its taxable status, except as provided in § 101.6a.

(4) Stylistic changes were made throughout this rulemaking for clarity.

Comments that did not result in amendments to the regulation are as follows:

(1) IRRC saw a need to specifically address when benefits will be considered compensation. Although the Department understands that need, the proposed rulemaking takes a different approach to meet it, because there are substantially more categories of taxable benefits than excludible categories. It provides the general rule that all wage and salary supplements are taxable. The term "wage and salary supplement" is broadly defined to include any of the following:

(a) Employer-provided coverage under a plan.

(b) An employer payment to provide benefits under a plan, separation, vacation, holiday or guaranteed pay, reimbursement for personal expenses, and any other amount paid, under an agreement, to one or more of the following:

(i) An independently controlled trust or pooled fund established or maintained for the purpose of funding or providing benefits under the plan.

(ii) An insurance company for the purchase of insurance.

(iii) A third party for the benefit of the employe.

(c) Any benefit under a plan to the extent attributable to plan coverage or contributions by the employer which were not includible in income of the employe.

(d) Any benefit under a plan which is paid by the employer.

The rulemaking also spells out what contributions are deemed to be made by an employer even when deducted from an employe's gross pay. See § 101.6(i). The amendments continue the pattern of spelling out the exceptions, specifically including:

(a) Periodic payments for periods of sickness or disability. See § 101.6(c)(1).

(b) Payments made by an employer or labor union or elective contributions deemed to be made by an employer under a cafeteria plan for a nondiscriminatory health, accident or death plan and program benefits payable on condition of hospitalization, sickness, disability or death under a health, accident or death plan. See § 101.6(c)(6) and (12).

(c) Payments made by an employer or labor union for fringe benefits described in § 101.6a.

(2) In its comments regarding subsection (g), IRRC questioned the relevancy a cafeteria plan has to do with the taxation of vacation benefits and whether it mattered if the vacation benefits are part of a cafeteria plan in order to determine if they are compensation. IRRC suggested the Department explain the intent of this subsection. The inclusion of language relating to vacation benefits in a cafeteria plan was to show that cafeteria plans can cover a multitude of benefits, including vacation benefits.

(3) In its review of § 101.6(c)(5), IRRC questioned how the section would be applied for reimbursements for service or property that involved both personal and business use. The mixed use of property owned by an employe will be addressed in a separate rulemaking. The use of employe-owned property for business use is distinguishable from that addressed by Act 45 which related to the mixed use of property owned or leased by the employer.

(4) With regard to proposed § 101.6(e)(3), now § 101.6(e)(2), IRRC noted that because Federal taxable noncash fringe benefits may include the "personal use of an employer's owned or leased property or of employer provided services," the paragraph needed to be amended to clarify the proper tax treatment for Pennsylvania purposes. In accordance with Act 48, the Department

amended § 101.6(c) by adding paragraph (12). The purpose of paragraph (2) in § 101.6(e) is to advise taxpayers that the Commonwealth will accept the value established for Federal income tax purposes and that no special calculation is required for Pennsylvania tax purposes.

(5) IRRC raised a number of concerns regarding health, accident and death plans. The final-form regulations have been substantially changed to resolve those concerns. However, it is the position of the Department that benefits are not excludible as health, accident or death benefits if they would also be payable under circumstances having no connection with hospitalization, sickness, disability or death. *Bickford v. Commonwealth*, 533 A.2d 822 (Pa.Cmwlth. 1987).

IRRC's final comment suggested that because the Department would be adding new provisions to the proposal resulting from Act 45, it would be beneficial to allow further public comment prior to the submission of the final-form rulemaking. Neither the Regulatory Review Act nor the Commonwealth Documents Law provides for the republication of a proposed rulemaking. However, under the Governor's Executive Order 1996-1, the Department has actively sought input from affected parties including professional associations, business associations, all parties who commented on the proposal as well as IRRC and the Legislative Standing Committees. In addition, this rulemaking is listed in the Department's Agenda of Regulations and will be forwarded to all interested parties upon request. Therefore, the Department believes that its public outreach program sufficiently addresses this concern.

*Fiscal Impact*

The Department has determined that the amendments will have no fiscal impact on the Commonwealth.

*Paperwork*

The amendments will not require additional paperwork for the public or the Commonwealth.

*Effectiveness/Sunset Date*

The amendments will become effective upon final publication in the *Pennsylvania Bulletin*. The rulemaking is scheduled for review within 5 years of final publication. No sunset date has been assigned.

*Contact Person*

The contact person for an explanation of the amendments is Anita M. Doucette, Office of Chief Counsel, PA Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 15, 1998, the Department submitted a copy of the notice of proposed rulemaking, published at 28 Pa.B. 1946, to IRRC and the Chairpersons of the House Committee on Finance and the Senate Committee on Finance for review and comment.

In compliance with section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received, as well as other documentation. In preparing these final-form regulations, the Department has considered the comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the Committees on June 8, 2000, and were approved by IRRC on June 22, 2000, in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)).

*Findings*

The Department finds that:

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

(2) The amendments are necessary and appropriate for the administration and enforcement of the authorizing statute.

*Order*

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 61 Pa. Code Chapter 101, are amended by amending §§ 101.1, 101.6 and 101.7 by adding § 101.6a and by deleting the statements of policy in §§ 125.21—125.33 to read as set forth in Annex A with ellipses referring to the existing text of the regulations.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

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

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

ROBERT A. JUDGE, Sr.,
*Secretary*

(*Editor's Note:* The proposed rulemaking which appeared at 28 Pa.B. 1946 did not include the adoption of § 101.6a included herein. For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 30 Pa.B. 3534 (July 8, 2000).)

**Fiscal Note:** Fiscal Note 15-402 remains valid for the final adoption of the subject regulations.

## Annex A

## TITLE 61. REVENUE

## PART I. DEPARTMENT OF REVENUE

## Subpart B. GENERAL FUND REVENUES

## ARTICLE V. PERSONAL INCOME TAX

## CHAPTER 101. GENERAL PROVISIONS

### § 101.1. Definitions.

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

* * * * *

*Cafeteria plan*—A plan qualifying under section 125 of the IRC (26 U.S.C.A. § 125).

* * * * *

*Discriminatory plan*—A plan that treats highly compensated participants more favorably in coverage, contributions or benefits. In determining whether a cafeteria plan is discriminatory, the special rules of section 125(g) of the IRC apply.

* * * * *

*Employe welfare benefit plan—*

(i) A plan established or maintained to provide to eligible employes or their beneficiaries plan benefits, such as:

(A) Medical, surgical or hospital care or benefits in the event of sickness, accident or disability.

(B) Death benefits.

(C) Scholarships.

(D) Personal expense reimbursements, advancements or allowances such as rental vehicle, dependent care, food or housing allowances.

(ii) The term does not include:

(A) Plans that offer a benefit that defers the receipt of compensation or operate in a manner that enables participants to defer the receipt of compensation.

(B) Plans established or maintained to provide fringe benefits described in § 101.6a (relating to fringe benefits in the form of use of property or services).

* * * * *

*Health, accident or death plan—*

(i) The term means:

(A) An accident, health or term life insurance policy issued by an insurance company.

(B) A self-insured employe welfare benefit plan under which benefits are payable upon hospitalization, sickness, disability or death or for the prevention of sickness or disability.

(ii) The term does not include a program under which benefits are payable either upon hospitalization, sickness, disability, death or for the prevention of sickness or disability; or upon separation from employment or some other contingency.

*Example:* Under A's benefit plan, B qualifies for a lump sum payment equal to 26 weeks' pay upon proof of permanent disability or separation from employment. The plan does not constitute a health, accident or death plan because program benefits are also payable upon separation from employment. Instead, it constitutes a severance pay plan.

*Highly compensated participant—*

(i) A plan participant who is one of the following:

(A) An officer.

(B) A shareholder owning more than 5% of the voting power or value of all classes of stock of the employer.

(C) An individual who, for the preceding taxable year:

(I) Received compensation from the employer in excess of the Federal limitation (after adjustment by the Secretary of the United States Treasury for inflation) set forth in section 414(q)(1)(B) of the IRC (26 U.S.C.A. § 414(q)(1)(B)).

(II) Is in the group consisting of the top 20% of all full-time employes of the employer with at least 3 years of service when ranked on the basis of compensation paid during the taxable year.

(ii) A partner or other self-employed individual.

(iii) A spouse or dependent of a highly compensated individual.

* * * * *

*Plan*—A cafeteria plan or other wage and salary supplemental or replacement program or arrangement established or maintained by an employer or by an employe organization, or by both, for the benefit of eligible employes or their beneficiaries. The term includes temporary or permanent programs or arrangements covering hospitalization, sickness, disability or death, supplemental unemployment benefits, strike benefits, social security or retirement, a trust that forms part of a plan, and a contract of insurance.

* * * * *

*Poverty income—*

(i) For the purpose of determining eligibility for special tax provisions, moneys or property, including interest, gains or income derived from obligations which are statutorily free from State or local taxation under any other act of the General Assembly of the Commonwealth or under the laws of the United States, received of whatever nature and from whatever source derived, but not including the following:

* * * * *

(E) Payments to reimburse actual expenses.

(F) Payments made by employers to labor unions for programs covering hospitalization, sickness, disability or death, supplemental unemployment benefits, strike benefits, social security and retirement.

* * * * *

(iii) The following income may not be included: Social Security and Medicare benefits; periodic payments for sickness and disability; workers' compensation payments; public assistance and relief (welfare); unemployment compensation; reimbursed actual expenses; pensions or annuities, including railroad retirement benefits received by reason of retirement; and military pay received by servicemen for duty in a combat zone.

* * * * *

*Wage or salary supplement—*

(i) Employer-provided coverage under a plan.

(ii) Separation pay, vacation pay, holiday pay, guaranteed pay, reimbursement for personal expenses, an employer payment to provide benefits under a plan and any other amount paid, under an agreement, to one or more of the following:

(A) An independently controlled trust or pooled fund established or maintained for the purpose of funding or providing benefits under the plan.

(B) An insurance company for the purchase of insurance.

(C) A third party for the benefit of the employe.

(iii) Any benefit under a plan to the extent attributable to plan coverage or contributions by the employer which were not includible in income of the employe.

(iv) Any benefit under a plan which is directly paid by the employer.

**§ 101.6. Compensation.**

(a) Compensation includes items of remuneration received by an employe, whether directly or through an agent, in cash or in property, or based on payroll periods or piecework, for services rendered as an employe, agent or officer of an individual, partnership, but not guaranteed payments to a partner for services rendered to the partnership, business or nonprofit corporation, or govern-

ment agency. These items include salaries, wages, commissions, bonuses, stock options, incentive payments, fees, tips, termination or severance payments, rewards, vacation and holiday pay and other wage and salary supplements, tax assumed by the employer, the entire cost of employer-provided coverage provided to a highly compensated participant under any discriminatory employe welfare benefit plan, and other remuneration received for services rendered.

(b) Scholarships, stipends, grants and fellowships shall be taxable as compensation, if services are rendered in connection therewith.

* * * * *

(c) Compensation does not mean or include any of the following:

(1) Periodic payments for periods of sickness or disability paid by or on behalf of an employer under a program or plan unless the payments are regular wages. Additionally, no amount of damages received (whether by suit or agreement and whether as lump sums or as periodic payments) if pain and suffering, emotional distress or other like noneconomic element was, or would have been, a significant evidentiary factor in determining the amount of the taxpayer's damage. No payments made by third-party insurers for periods of sickness or disability would be considered payments of regular wages. A program or plan where any of the following occur would not be considered payment of regular wages:

(i) The periodic payments have no direct relationship to the employe's usual rate of compensation.

(ii) The periodic payments are computed with reference to the nature of the sickness or disability and without regard to the employe's job classification.

(iii) Periodic payments would be reduced by payments arising under Workmen's Compensation Acts, Occupational Disease Acts, Social Security Disability or similar legislation by any government.

(iv) The periodic payments exceed the employe's usual compensation for the period.

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(5) Payments made by employers to employes to reimburse actual expenses allowable as an ordinary, reasonable and necessary business expense.

(6) Payments made by an employer or labor union or elective contributions deemed to be made by an employer under a cafeteria plan for a nondiscriminatory health, accident or death plan.

*Example.*

P is a partnership that is engaged in providing accounting services. On a nondiscriminatory basis, it offers the following fringe benefits to both employes and partners of the firm:

Blue Cross/Blue Shield medical coverage.

Dental and eyeglass coverage with a deductible.

Group term life insurance with coverage up to the equivalent of the employe's annual salary.

P pays the premiums on behalf of all employes and partners for all medical, dental, eyeglass and insurance coverage directly to the insurance carrier or benefit provider. P does not add the premium costs for the benefits to any employe's gross wages and it accounts for the benefit costs as nonsalary fringe benefit expenses. In other words, the value of the benefits are not shown as an addition to any employe's wages on the paystubs furnished to employes.

The plan is not a Federally qualifying cafeteria plan.

Conclusion: For the employes of P the employer-provided hospitalization (Blue Cross/Blue Shield), eyeglass, dental coverage and group life insurance benefits are excludable from compensation and are therefore not subject to withholding. The premiums paid on behalf of the partners, however, are not deductible or excludable from the income of the partnership or the partners.

* * * * *

(9) Payments made by an employer or labor union for a nondiscriminatory supplemental unemployment benefit or strike benefit plan.

(10) Federally excludable benefits provided for the convenience of the employer.

(11) Fringe benefits described in § 101.6a (relating to fringe benefits in the form of personal use of property or services).

(12) Program benefits payable on condition of hospitalization, sickness, disability or death under a health, accident or death plan.

* * * * *

(e) Compensation paid in a medium other than cash shall be valued at its current market value. Compensation paid in the form of employer-provided coverage under an employe welfare benefit plan shall be valued at cost. The cost shall be the total amount of payment made during the year by the employer on account of the plan and plan participant, except in the following situations:

(1) In the case of self-insured insurance plans, the cost shall be the annual cost for financial accounting purposes.

(2) The amount of compensation paid in the form of Federally taxable noncash fringe benefits shall be determined in the same manner as is prescribed by the Internal Revenue Service under Federal statutes and regulations.

(3) In the case of cafeteria plans, amounts specified in the plan document as being available to the participant for the purpose of selecting or purchasing benefits, when so used, shall be included in the total amount of payment made during the year by the employer on account of the plan and plan participant.

(f) Compensation in the form of incentive, qualified, restricted or nonqualified stock options shall be considered to be received:

(1) When the option is exercised if the stock subject to the option is free from any restrictions having a significant effect on its market value.

(2) When the restrictions lapse if the stock subject to the option is subject to restrictions having a significant effect on its market value.

(3) When exchanged, sold or otherwise converted into cash or other property.

(g) The following rules apply if, under a cafeteria plan, plan participants may choose between benefits consisting of cash, additional paid vacation days, and other benefits; or if, outside a cafeteria plan, plan participants can purchase additional paid vacation days:

(1) If additional paid vacation days are elected or purchased and they are used before the next calendar year, the following apply:

(i) The amount of cash foregone in exchange for the paid vacation day is excluded from income.

(ii) The vacation pay is includable in income when paid.

(2) If additional paid vacation days are purchased outside a cafeteria plan and they are not used before the next calendar year, the amount of cash foregone in exchange for the paid vacation days is excludable for Pennsylvania Personal Income Tax purposes only if both of the following apply:

(i) The value of the vacation day cannot be cashed out or used for any other purpose.

(ii) The vacation day cannot be carried over to the next taxable year.

(h) Employer payments to reimburse employes for uninsured medical or dental expenses are taxable as compensation if the employe is assured of receiving (in cash or any other benefit) amounts available but unused for covered reimbursement during the year without regard to whether the employe incurred covered expenses or not. If the amounts available for covered reimbursement cannot be cashed out or used for any other purpose during the taxable year or be carried over to any other taxable year, normal cash compensation that is forgone by an employe under a spending account or otherwise, and credited to a self-insured medical reimbursement account and drawn upon to reimburse the employe for uninsured medical or dental expenses to which section 105(b) of the IRC (26 U.S.C.A. § 105(b)) applies is excludable from tax.

(i) After December 31, 1996:

(1) Payments made after December 31, 1996, for employe welfare benefit plans under a cafeteria plan will be deemed to be an "employer contribution" for Pennsylvania Personal Income Tax purposes if the following apply:

(i) The payments were not actually or constructively received, after taking section 125 of the IRC (26 U.S.C.A. § 125) into account.

(ii) The payments were specified in a written cafeteria plan document as being available to the participant:

(A) For the purpose of selecting or purchasing benefits under a plan.

(B) As additional cash remuneration received in lieu of coverage under a plan.

(iii) The benefits selected or purchased are nontaxable under the IRC when offered under a cafeteria plan.

(iv) The payments made for the plan would be nontaxable under the Pennsylvania Personal Income Tax if made by the employer outside a cafeteria plan.

(2) If the requirements of paragraph (1) are satisfied, cafeteria plan contributions are taxed under such rules as they apply to employer payments for employe welfare benefit plans. However, if the benefits are taxable for Federal Income Tax purposes when offered under a cafeteria plan, the payments will also constitute compensation for Pennsylvania Personal Income Tax purposes. Payments also will constitute compensation if they would be taxable under the Pennsylvania Personal Income Tax if made by the employer outside a cafeteria plan. For example, although not taxable under the IRC, coverage under a dependent care plan providing for the reimbursement of expenses for household or dependent care services would constitute compensation under the Pennsylvania Personal Income Tax because it would be taxable if made by an employer outside a cafeteria plan.

(j) Compensation includes the entire cost of employer-provided coverage provided to a highly compensated participant under any discriminatory employe welfare benefit plan.

(k) Contributions made by an employer for IRC 401(k) plans under a cafeteria plan under which the employe unilaterally may elect to have the employer either make the payments as contributions to a 401(k) plan or other plan on behalf of the employe or to the employe directly in cash are not excludable from the employe's compensation.

(l) Except as provided in § 101.6a (relating to fringe benefits in the form of use of property or services), compensation is taxable regardless of the form of the payment. Examples of taxable forms of payment include:

(1) Cash.

(2) Foreign currency.

(3) A check or other negotiable instrument.

(4) Freely transferable, readily marketable obligations or other cash equivalent.

(5) Tangible property interests, intangible personal property or other rights, claims or things that either:

(i) Can be enforced in courts of equity and transferred and have an ascertainable fair market value.

(ii) Can be reduced to cash or eliminate an expenditure.

(6) A monetary payment in reimbursement of a personal expenditure or to eliminate a personal expenditure.

(7) Below-market rate loans.

(8) A cancellation of indebtedness constituting a quid pro quo or incentive that would be taxable had the amount by which the debt had been forgiven or discharged instead been paid to the debtor in cash or property.

**§ 101.6a. Fringe benefits in the form of use of property or services.**

(a) Remuneration for services received in the form of personal or business use of property is not taxable as compensation if the following requirements are met:

(1) The property belongs to, or is held under a lease by, the employer at the time of use.

(2) No title, interest or estate therein is conferred upon, or vested in, another person.

(b) Examples of property that are excludible from tax if the requirements of subsection (a) are met include:

(1) Educational or training facilities.

(2) Housing or clothing.

(3) Day care facilities.

(4) Passenger cars and commuter highway vehicles.

(5) Aircraft or water craft.

(6) Construction or recreation vehicles.

(7) Athletic facilities or equipment.

(8) Recreational facilities or equipment.

(9) Entertainment facilities or equipment.

(10) Parking facilities.

(11) Eating facilities.

(12) Office facilities or equipment.

(13) Tools, equipment or supplies.

(c) Remuneration for services received in the form of personal or business use of services is not taxable as compensation if either:

(1) The service is provided or supplied directly by the employer or a co-employe.

(2) Rights to the service were procured beforehand by the employer.

(d) Examples of services that are excludible from tax if the requirements of subsection (c) are met include:

(1) The operation of an eating facility.

(2) Transportation in a commuter highway vehicle.

(3) Air or rail transportation of passengers or cargo.

(4) Parking.

(5) Education or training.

(6) Legal, medical, accounting or other professional or technical services or assistance, including adoption assistance.

(7) Day care services or assistance.

(8) Dependent care assistance.

(9) A tuition reduction provided to an employe or his dependents or to a teaching and research assistant.

(e) Remuneration for services received in the form of consumption of a consumable, such as food and supplies, is not taxable as compensation.

(f) This section applies even if:

(1) The use or service is offered on a discriminatory basis.

(2) The employer incurs substantial additional cost, including forgone revenue, in providing the use or service.

**§ 101.7. Receipt of income.**

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(e) *Present economic benefit.* An amount paid as a contribution shall be considered as received if an employe receives rights, such as coverage under a plan that are the following:

(1) Of a value which can in no event fall materially below the amount of the contribution.

(2) Presently belonging to the employe.

(3) Unequivocally provided for the ultimate benefit of the employe under whatever contingency and whatever circumstance the occasion for the benefit should arise.

(f) *Wage and salary deductions; taxability.*

(1) Except as provided in paragraph (2), any amount lawfully deducted and withheld by an employer from the remuneration of an employe and accounted for as a part of the employe's total remuneration shall be considered to have been paid to the employe as compensation at the time the deduction is made.

(2) An amount will not be considered to have been paid to the employe because the amount is specified in a written cafeteria plan document as being available to the participant for the purpose of selecting or purchasing benefits under a plan or as additional cash remuneration received in lieu of coverage under a plan. Whether an amount is specified in a cafeteria plan document as being available to a participant shall be determined using Federal rules.

*Example.*

Employer M is a manufacturing company situated in this Commonwealth and under its collective bargaining agreement with a union, all nonmanagement personnel must contribute $15 per week from their gross salary toward the purchase of Blue Cross/Blue Shield coverage and $3 per week toward the purchase of group life insurance.

The plan is not a Federally qualifying cafeteria plan.

Conclusion: M shall withhold Pennsylvania Personal Income Tax from the $18 contributed by each nonmanagement employe toward benefits.

## CHAPTER 125. PERSONAL INCOME TAX PRONOUNCEMENTS—STATEMENTS OF POLICY

**§ 125.21. (Reserved).**

**§ 125.22. (Reserved).**

**§ 125.23. (Reserved).**

**§ 125.24. (Reserved).**

**§ 125.25. (Reserved).**

**§ 125.26. (Reserved).**

**§ 125.27. (Reserved).**

**§ 125.28. (Reserved).**

**§ 125.29. (Reserved).**

**§ 125.30. (Reserved).**

**§ 125.31. (Reserved).**

**§ 125.32. (Reserved).**

**§ 125.33. (Reserved).**

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