RULES AND REGULATIONS

Title 7—AGRICULTURE

MILK MARKETING BOARD

[7 PA. CODE CH. 150]

Milk Marketing Fees

The Milk Marketing Board (Board) amends Chapter 150 (relating to milk marketing fees) to read as set forth in Annex A. The authority for this final-form rulemaking is section 3 of the Milk Marketing Fee Act (act) (31 P. S. § 700k-3).

Notice of proposed rulemaking was published at 32 Pa.B. 3953 (August 10, 2002) with an invitation to submit written comments within 30 days. During the public comment period, the Board received comments from the Pennsylvania Association of Milk Dealers (PAMD) and from a milk hauler. The Senate Committee on Agriculture and Rural Affairs and the House Agriculture and Rural Affairs Committee offered no comments, suggestions or objections to the proposed rulemaking. The Independent Regulatory Review Commission (IRRC) did offer comments, which are discussed fully in this preamble.

In final-form rulemaking, the Board considered the comments and suggestions of the PAMD, the milk hauler and IRRC.

Purpose

The principal purpose of the final-form rulemaking is to adjust fees as necessary to reflect the administrative costs of issuing licenses, and to meet the Board's budget requirements. Article XI of the Milk Marketing Law (31 P. S. §§ 700j-1101—700j-1104) provides that all money collected by the Board from license fees and other sources shall be placed in a separate fund known as the Milk Marketing Fund (Fund), which is annually appropriated to the Board to pay its expenses. The Board is therefore self-supporting, receiving no revenues from the General Fund. Its chief source of revenue is license and certification fees. Monetary penalties paid by licensees in settlement of prosecution actions and miscellaneous income such as interest provide minor supplemental income. Of these sources, only license and certification fees are capable of meaningful adjustment to offset projected shortfalls. Under current funding, the Board projects steadily declining balances in the Fund. The Board is increasing fees at this time to cover projected deficits in the coming years.

A secondary purpose of the final-form rulemaking is to achieve greater clarity and consistency in the regulations.

Comments

Both the PAMD and IRRC objected to the size of the fee increases, and the hundredweight fees in particular. IRRC also questioned the need for the fee increase for the 2003-2004 fiscal year, when a deficit was not projected until the 2005-2006 fiscal year. The PAMD suggested that the increase should be phased in over time, and IRRC recommended that the hundredweight fee increase be reduced by at least 1/2 of the proposed increase.

The fee increase is necessary at this time to cure projected deficits in the Fund in the "out" years. The size of the proposed increase was simply the result of the Board following its historical practices. Traditionally, fee increases have been sufficient to sustain the Board for 10 years or more. The last previous fee increase was effective for the 1992-1993 license year, 11 years ago. The proposed increase was projected to sustain the Board through the license year 2013-2014.

However, in response to the comments from the PAMD and IRRC, the Board has decided to reduce the hundredweight fee increase by 1/2 of what was originally proposed, and to delay the increases for 1 year. The final-form rulemaking sets the hundredweight fee for milk for which the Board sets wholesale or retail prices at $.045, and for milk for which the board does not set these prices at $.0057. The hundredweight fee increases will take effect with the 2004-2005 license year (July 1, 2004—June 30, 2005); the increase in certification fees for milk weighers and samplers will take effect commencing with the 2004 certification year (January 1, 2004—December 31, 2004). These fees are projected to sustain the Board through the 2008-2009 license year.

IRRC suggested that the final-form rulemaking should designate the name or number of the form required by each provision, where the forms can be obtained and whether the forms are available from the Board's website. This suggestion has been implemented in the final-form rulemaking.

IRRC also suggested that the word "substantially" be removed from § 150.13(b) (relating to time for payment of fees). This change has been made in the final-form rulemaking.

The only other comment received was from a milk hauler who suggested that the milk hauler license and the weigher/sampler certificate be renewed every 2 years rather than the current 1-year period. The annual renewal of the milk hauler license and the weigher/sampler certificate is a requirement of the Milk Marketing Law (31 P. S. §§ 700j-101—700j-1302) and cannot be changed by rulemaking. A letter to this effect was sent to the milk hauler who submitted this comment.

Additional Changes in the Final-Form Rulemaking from the Proposed Rulemaking

Some additional changes have been made to the final-form rulemaking from the proposed rulemaking. These changes were made to improve consistency within and between sections, to clarify an ambiguity regarding the payment of monthly hundredweight fees by new applicants for milk dealer's licenses and to correct typographical errors which were found in the proposed rulemaking.

Since the term "fixed fee" is the term now being used throughout Chapter 150 to describe the annual fee that all applicants pay upon application or renewal, that term has been used to replace "annual fee" or "annual license renewal fee" in the text whenever these fees are referred to, and wherever necessary to distinguish between the fixed fee and other types of fees. This applies to §§ 150.11—150.13, 150.21—150.23 and 150.51—150.53. Similarly, the term "hundredweight fee" has been added to the text of § 150.13, and "quart-equivalent fee" has been added to the text of §§ 150.22 and 150.23 (relating to quart-equivalent fees; and time for payment of fees) to distinguish between these fees and the fixed fee.

In the proposed rulemaking, it was not clear that a new applicant for a milk dealer's license was subject to the monthly payment of the hundredweight fee. This was the result of the addition of § 150.11(b) (relating to fixed fees), which establishes a lower fee for an applicant for

annual renewal of a milk dealer's license. Section 150.12(b) (relating to hundredweight fees), which imposes the monthly hundredweight fee payments on dealers who were not licensed for the entire preceding calendar year, was amended in the proposed rulemaking by the addition of the clause "In addition to the annual license renewal fee imposed under § 150.11(b). . . ." Taken together, the additions to these two sections would imply that the monthly hundredweight fee was applicable only to applicants for annual renewal under § 150.11(b), but not to new applicants under § 150.11(a). Adding further confusion, the language added to § 150.13(c), regarding time for payment of fees, provided that "[a]n applicant for renewal of a milk dealer's license subject to the requirements of § 150.12(b) . . ." would be required to pay the monthly hundredweight fee. As stated previously, the implication is that only applicants for renewal are subject to the requirements of § 150.12(b).

To clarify this issue, the final-form rulemaking amends the first sentence of § 150.12(b) to read "In addition to the fixed fee imposed under § 150.11 (relating to fixed fees), a milk dealer that was not licensed for the entire calendar year preceding license application or renewal shall pay a monthly hundredweight fee as set forth in paragraphs (1) and (2)." Additionally, § 150.13(a) was amended to state that "A new applicant for a milk dealer's license shall pay the fixed fee imposed under § 150.11(a) . . . and shall submit the monthly hundredweight fee imposed under § 150.12(b) . . . ." Finally, § 150.13 was amended by the removal of the phrase "subject to the requirements of § 150.12(b)" from subsection (c), accompanied by the addition of language to subsections (b) and (c) that will still differentiate between applicants who were licensed for the entire preceding calendar year (who pay the annual hundredweight fee at time of application) and those who were not licensed for the entire preceding calendar (who pay the monthly hundredweight fee each month).

The final-form rulemaking makes minor changes to § 150.12 to correct errors which appeared in the proposed rulemaking. In subsections (a)(2) and (b)(2) of the proposed rulemaking, the word "produced" was erroneously deleted from the text. This error has been corrected in the final-form rulemaking. In the same two paragraphs of the proposed rulemaking, the phrase "that is not included under paragraph (1) and that the milk dealer" appeared as an addition to the text. Upon further consideration, this phrase has been removed since it is redundant. Also, subsection (b)(1) and (2) of the proposed rulemaking both contained the phrase "for which the license is issued." This phrase does not appear in these paragraphs in the existing regulations and was not intended to be included in the proposed rulemaking. Since it was mistakenly included in the proposed rulemaking, the final-form rulemaking has simply omitted this phrase.

Paperwork Estimates

There will be no additional paperwork requirements for milk dealers, subdealers, milk haulers, milk testers or milk weighers and samplers.

Effective Date

This rulemaking will become effective 30 days after final-form publication in the *Pennsylvania Bulletin*.

Sunset date

There is no sunset date.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S.§ 745.5(a)), the Board submitted a copy of the notice of proposed rulemaking, published at 32 Pa.B. 3953, to IRRC and to the Senate Committee on Agriculture and Rural Affairs and the House Agriculture and Rural Affairs Committee for review and comment.

In compliance with section 5(c) of the Regulatory Review Act, the Board also provided IRRC and the Committees with copies of comments received by the Board relating to the proposed regulation and the Board's response to those comments.

In preparing this final form rulemaking, the Board has considered the comments received from all commentators.

Contact Person

The contact person is Lynda J. Bowman, Executive Secretary, Milk Marketing Board, 2301 North Cameron Street, Harrisburg, PA 17110-9408, (717) 787-4194.

Findings

The Board finds that:

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

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

(3) The final-form rulemaking is necessary and appropriate for the administration of the act.

Order

The Board, acting under authorizing statute, orders that:

(a) The regulations of the Board, 7 Pa. Code Chapter 150, are amended by amending §§ 150.1, 150.11—150.13, 150.21—150.23, 150.51—150.53, 150.61, 150.62, 150.71, 150.72 and 150.81; by adding § 150.2a; and by deleting §§ 150.41 and 150.42 to read as set forth in Annex A.

(b) The Board will submit this order and Annex A to the Office of Attorney General for review and approval as to legality and form as required by law.

(c) The Board 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 January 26, 2004.

BEVERLY R. MINOR,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 33 Pa.B. 2831 (June 14, 2003).)

Fiscal Note: Fiscal Note 47-10 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 7. AGRICULTURE

PART VI. MILK MARKETING BOARD

CHAPTER 150. MILK MARKETING FEES

GENERAL PROVISIONS

§ 150.1. Definitions.

When used in this chapter, terms defined in section 103 of the act (31 P. S. § 700j-103) have the meanings given to them in that section, unless the context clearly indicates otherwise.

§ 150.2a. License year; certification year.

(a) The license year for milk dealers, subdealers and milk haulers is the period beginning on July 1 of a given year and ending on June 30 of the succeeding year.

(b) The certification year for milk testers and milk weighers and samplers is a calendar year.

LICENSE FEES OF MILK DEALERS

§ 150.11. Fixed fees.

(a) A new applicant for a milk dealer's license shall pay a fixed fee of $100 for a license issued on or after July 1 but before October 1 of the same year or a proportionate fixed fee as follows:

(1) $75 for a license issued on or after October 1 but before January 1 of the succeeding year.

(2) $50 for a license issued on or after January 1 but before April 1 of the same year.

(3) $25 for a license issued on or after April 1 but before July 1 of the same year.

(b) An applicant for annual renewal of a milk dealer's license shall pay a fixed fee of $50.

§ 150.12. Hundredweight fees.

(a) In addition to the fixed fee imposed under § 150.11 (relating to fixed fees), a milk dealer that was licensed for the entire calendar year preceding license renewal shall pay an annual hundredweight fee as set forth in paragraphs (1) and (2).

(1) For milk for which the Board has fixed a minimum wholesale or retail price, received, produced or brought into this Commonwealth during the calendar year preceding the period for which the license is issued, the fee is $.045 per hundredweight.

(2) For milk for which the Board has not fixed a minimum wholesale or retail price, received, produced or brought into this Commonwealth during the calendar year preceding the period for which the license is issued, the fee is $.0057 per hundredweight.

(b) In addition to the fixed fee imposed under § 150.11, a milk dealer that was not licensed for the entire calendar year preceding license application or renewal shall pay a monthly hundredweight fee as set forth in paragraphs (1) and (2). Monthly payments shall continue until the milk dealer has been licensed for an entire calendar year and for each month thereafter until the next license year begins. Annual payments shall then commence under subsection (a).

(1) For milk for which the Board has fixed a minimum wholesale or retail price, received, produced or brought into this Commonwealth during the preceding month, the fee is $.045 per hundredweight.

(2) For milk for which the Board has not fixed a minimum wholesale or retail price, received, produced or brought into this Commonwealth during the preceding month, the fee is $.0057 per hundredweight.

(c) In computing hundredweight fees under subsections (a) and (b), the Board will ascertain and fix the fluid milk equivalent of milk other than fluid milk by dividing the pounds of butterfat in cream by 3.5 and the pounds of nonfat solids in condensed and concentrated milk by 8.8. For farm-separated sour cream used exclusively in making butter to be marketed or ultimately sold as such, the Board will compute the total quantity of milk based on pounds of butterfat or sour cream rather than on the fluid milk equivalent.

(d) Milk that was purchased by a milk dealer located in or outside this Commonwealth from an out-of-State producer, and was diverted to an out-of-State milk dealer, is not subject to a hundredweight fee. As used in this subsection, "diverted" means that the purchasing milk dealer took possession of producer milk at the farm, from which location it was delivered to another milk dealer without entering the purchasing milk dealer's plant.

§ 150.13. Time for payment of fees.

(a) A new applicant for a milk dealer's license shall pay the fixed fee imposed under § 150.11(a) (relating to fixed fees) when the applicant submits the milk dealer/subdealer license application (available from the Board Office or website), and shall submit the monthly hundredweight fee imposed under § 150.12(b) (relating to hundredweight fees) with the monthly report milk dealers must file under § 147.10 (relating to monthly reports).

(b) An applicant for renewal of a milk dealer's license that was licensed for the entire calendar year preceding license renewal shall pay the fixed fees imposed under § 150.11(b) and the annual hundredweight fee imposed under § 150.12(a) when the applicant submits the milk dealer/subdealer license renewal application (available from the Board Office or website). Fees exceeding $2,000 may be paid in four equal installments, the first to be submitted with the milk dealer/subdealer license renewal application and the remaining three to be received in the Board office on or before September 15, December 15 and March 15, respectively, or the next business day if the 15th falls on a day when Commonwealth offices are closed.

(c) An applicant for renewal of a milk dealer's license that was not licensed for the entire calendar year preceding license renewal shall pay the fixed fee imposed under § 150.11(b) when the applicant submits the milk dealer/subdealer license renewal application, and shall submit the monthly hundredweight fee imposed under § 150.12(b) with the monthly report milk dealers shall file under § 147.10.

LICENSE FEES OF SUBDEALERS

§ 150.21. Fixed fees.

(a) A new applicant for a subdealer's license shall pay a fixed fee of $50 for a license issued on or after July 1 but before October 1 of the same year or a proportionate fixed fee as follows:

(1) $37.50 for a license issued on or after October 1 but before January 1 of the succeeding year.

(2) $25 for a license issued on or after January 1 but before April 1 of the same year.

(3) $12.50 for a license issued on or after April 1 but before July 1 of the same year.

(b) An applicant for annual renewal of a subdealer's license shall pay a fixed fee of $25.

§ 150.22. Quart-equivalent fee.

(a) In addition to the fixed fee imposed under § 150.21(b) (relating to fixed fees), an applicant for annual renewal of a subdealer's license shall pay an annual quart-equivalent fee calculated by dividing the total quarts of milk purchased during the previous calendar year by the number of months in which the subdealer engaged in business. The Board will assess the fee in accordance with the following schedule:

Avg. Qts. Purchased per Month	*Annual Fee*
1—29,999	$ 50
30,000—59,999	100
60,000—119,999	150
120,000—149,999	200
150,000—199,999	250
200,000—299,999	300
300,000—399,999	400
400,000—599,999	500
600,000—799,999	800
800,000—999,999	1,200
1,000,000 and over	1,400

(b) As used in subsection (a), "quarts" means the total volume of milk for which the Board sets a wholesale price expressed in quart equivalents.

§ 150.23. Time for payment of fees.

(a) A new applicant for a subdealer's license shall pay the fixed fee imposed under § 150.21(a) (relating to fixed fees) when the applicant submits the milk dealer/subdealer license application.

(b) An applicant for renewal of a subdealer's license shall pay the fixed fees imposed under § 150.21(b) and the quart-equivalent fee imposed under § 150.22 (relating to quart-equivalent fee) when the applicant submits the milk dealer/subdealer license renewal application.

§ 150.41. (Reserved).

§ 150.42. (Reserved).

LICENSE FEES OF MILK HAULERS

§ 150.51. Fixed fees.

A new applicant for a milk hauler's license and an applicant for annual renewal of a milk hauler's license shall pay a fixed fee of $30.

§ 150.52. Hundredweight fee.

In addition to the fixed fee imposed under § 150.51 (relating to fixed fees), a milk hauler shall pay a fee of $.005 per hundredweight for milk hauled during the license year. The fee shall apply to:

(1) Milk picked up at a producer's farm located in this Commonwealth and delivered to a milk dealer located in this Commonwealth.

(2) Milk picked up at a producer's farm located outside this Commonwealth and delivered to a milk dealer located in this Commonwealth.

(3) Milk picked up at a producer's farm located in this Commonwealth and delivered to a milk dealer located outside this Commonwealth.

§ 150.53. Time for and manner of payment of fees.

(a) A new applicant for a milk hauler's license and an applicant for renewal of a milk hauler's license shall pay the fixed fee imposed under § 150.51 (relating to fixed fees) when the applicant files the license application, Form PMMB-77B or Form PMMB-77 (available from the Board Office or website).

(b) Payment of the hundredweight fee shall be remitted by a licensed milk hauler in full to be received in the office of the Board by the 30th day of the month immediately succeeding the month in which the milk was hauled or the nearest business day thereafter (March 1 for January reports). The payment shall accompany the Milk Hauler's Monthly Report, Form PMMB-79 (available from the Board Office or website), which is also due on that date.

CERTIFICATION FEES OF MILK TESTERS

§ 150.61. Examination fee.

The fee to take the Board-approved examination for a certificate of proficiency in milk testing is $25, payable when the examination is taken. The examination fee is not refundable and may not be applied toward payment of the fixed fees in § 150.62 (relating to fixed fees for new and renewed certificates).

§ 150.62. Fixed fees for new and renewed certificates.

A new applicant for a milk tester's certificate and an applicant for renewal of a milk tester's certificate shall pay a fee of $20, which shall accompany the milk tester certificate application (available from the Board Office or website).

CERTIFICATION FEES OF MILK WEIGHERS AND SAMPLERS

§ 150.71. Examination fee.

The fee to take the Board-approved examination for a certificate of proficiency in milk weighing and sampling is $25, payable when the examination is taken. The examination fee is not refundable and may not be applied toward payment of the fixed fees in § 150.72 (relating to fixed fees for new and renewed certificates).

§ 150.72. Fixed fees for new and renewed certificates.

A new applicant for a milk weigher and sampler's certificate and an applicant for renewal of a milk weigher and sampler's certificate shall pay a fee of $20, which shall accompany the milk weigher/sampler certificate application (available from the Board Office or website).

OTHER FEES

§ 150.81. Transfer fee.

The fee to transfer a license under section 407 of the act (31 P. S. § 700j-407) is $50.

§ 150.82. Fees for copying and certifying Board documents.

Fees for providing copies of, or for certification of, Board documents will be in an amount that will fully offset the costs incurred by the Board in providing the documents or certification.

[Pa.B. Doc. No. 03-2450. Filed for public inspection December 26, 2003, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

INSURANCE DEPARTMENT UNDERGROUND STORAGE TANK INDEMNIFICATION BOARD

[25 PA. CODE CH. 977]

Owner and Operator Fees

The Insurance Department (Department) and the Underground Storage Tank Indemnification Board (Board) amend § 977.12 (relating to owner and operator fees) to read as set forth in Annex A. Sections 206, 506, 1501 and

1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412) provide the Insurance Commissioner with the authority to promulgate regulations governing the enforcement of the laws relating to insurance. Section 705 of the Storage Tank and Spill Prevention Act (35 P. S. § 6021.705) provides the Board with the authority to promulgate regulations concerning the establishment of fees to be paid by participants in the Underground Storage Tank Indemnification Fund (Fund). Public notice of this amendment is impractical and unnecessary because the proposed changes are needed to ensure the solvency of the Fund and any input from the public would not decrease the necessity to increase the fees collected.

Notice of proposed rulemaking is omitted in accordance with section 204(3) of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204(3)) (CDL). In accordance with section 204(3) of the CDL, notice of proposed rulemaking may be omitted when the agency for good cause finds that public notice of its intention to amend an administrative regulation is, under the circumstances, impracticable and unnecessary.

Purpose

This final-omitted rulemaking will bring the fees to the appropriate levels as recommended by an actuarial report that was completed on September 25, 2003. After reviewing this report, the Board determined that this increase is necessary to maintain the solvency of the Fund for the public health and safety of this Commonwealth's citizens and their environment. The actuarial study, performed by Milliman USA, determined that an increase in the gallon and capacity fees was necessary to maintain the actuarial soundness of the Fund in the future.

Explanation of Regulatory Requirements

Section 977.12 is being amended to reflect the fees that the Board approved after extensive review and discussion of the report.

Fiscal Impact

An owner or operator transacting business in this Commonwealth will be affected by this final-omitted rulemaking. The fee increases approved by the Board are not significant, however, because despite these increases, the fees are only slightly higher than half as much of what they were when the program began in 1994.

The local municipalities will see an increase of approximately $15.54 per quarter or $62.17 per year ($137,700 divided by 2,215 municipalities, including school districts). State-owned tanks are exempt from all Fund fees.

General Public

Because the public is a consumer of goods and services provided by owners and operators of an underground storage tank (UST) or a heating oil tank (HOT), any increase to the fees could result in higher prices to consumers. However, it is expected that this increase in fees will result in an additional $.08 per month to motorists, in accordance with a survey on vehicle fuel consumption and expenditures by United States' households, conducted by the Energy Information Administration, Office of Energy Markets and End Use.

This increase is proposed to keep the Fund solvent after an actuarial study completed in September 2003 indicated the need for additional revenue, to maintain the Fund's actuarial soundness.

Effectiveness/Sunset Date

This final-omitted rulemaking will become effective January 1, 2004.

Paperwork

Adoption of this final-omitted rulemaking should not require any significant paperwork for the owners or operators of USTs or HOTs. The paperwork necessary after the increase is expected to be the same as before the increase was implemented.

Persons Regulated

This final-omitted rulemaking applies to all owners or operators of USTs and HOTs in this Commonwealth.

Contact Person

Questions regarding the final-omitted rulemaking may be addressed to Peter J. Salvatore, Regulatory Coordinator, Insurance Department, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429. Questions may also be e-mailed to psalvatore@state.pa.us or faxed to (717) 772-1969.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on November 14, 2003, the agency submitted a copy of the amendment with the proposed rulemaking omitted to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Insurance and the Senate Committee on Banking and Insurance. On the same date, the amendment was submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506).

In accordance with section 5(c) of the Regulatory Review Act, the amendment was deemed approved by the Senate Banking and Insurance Committee on December 17, 2003, and deemed approved by the House Insurance Committee on December 17, 2003. The Attorney General approved the regulation on December 10, 2003. IRRC met on December 18, 2003 and approved the amendment.

Findings

The Insurance Commissioner finds that:

(1) There is good cause to amend § 977.12 effective upon publication with the proposed rulemaking omitted. Deferral of the effective date of this final-omitted rulemaking would be impractical and not serve the public interest. Under section 204(3) of the CDL, there is no purpose to be served by deferring the effective date. An effective date of January 1, 2004, will best serve the public interest by ensuring that fees have the full potential that the actuarial study predicted.

(2) There is good cause to forego public notice of the intention to amend Chapter 977, Subchapter B (relating to fees and collection procedures), because notice of the amendment under the circumstances is unnecessary and impractical because the changes proposed are necessary to ensure the solvency of the Fund and any input from the public would not decrease the necessity to increase the fees collected.

Order

The Insurance Commissioner, acting under the authority in sections 206, 506, 1501 and 1502 of The Administrative Code of 1929, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 977, are amended by amending § 977.12 to read as set forth in Annex A.

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

(c) 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 January 1, 2004.

M. DIANE KOKEN,
Insurance Commissioner

E. BRUCE SHELLER,
Chairperson
Underground Storage Tank Indemnification Board

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 33 Pa.B. (December 27, 2003).)

Fiscal Note: 11-219. (2) Implementing Year 2003-04 is $68,850; (3) 1st Succeeding Year 2004-05 is $137,700; 2nd Succeeding Year 2005-06 is $140,454; 3rd Succeeding Year 2006-07 is $143,263; 4th Succeeding Year 2007-08 is $146,128; 5th Succeeding Year 2008-09 is $149,051; (4) 2002-03 Program—$69,466,774; 2001-02 Program—$65,921,722; 2000-01 Program—$49,971,701; (8) recommends adoption. The costs outlined are aggregate costs for municipalities, including school districts, with storage tanks. The gallon and capacity fee increases were recommended by an actuarial report. The increases should be considered a minimum step and assumes a continued unfunded liability.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART VIII. UNDERGROUND STORAGE TANK INDEMNIFICATION BOARD

CHAPTER 977. UNDERGROUND STORAGE TANK INDEMNIFICATION FUND

Subchapter B. FEES AND COLLECTION PROCEDURES

§ 977.12. Owner and operator fees.

(a) *Annual fees.* The Board may charge fees established in this section, based on an annual actuarial review.

(b) *Tank and gallon fees.* A UST owner or operator storing gasoline, new motor oil, hazardous substances, gasohol, aviation fuel, mixture, farm diesel and other types of substances based on the tank registration information maintained by the DEP may be assessed the following fees:

(1) *Tank fee.* A tank fee of $0 per UST per year.

(2) *Gallon fee.* A gallon fee on all regulated substances entering a UST of $.011 per gallon. (For example, 10,000 gallons at $.011 per gallon equals $110).

(c) *Nonretail bulk storage.* Total fees paid by an owner or operator of a nonretail bulk storage or wholesale distribution UST storing gasoline are established using the method described in subsection (b) and are capped at $5,000 per UST per year in accordance with section 705(d)(3) of the act (35 P. S. § 6021.705(d)(3)).

(d) *Capacity fee.* An owner or operator which stores regulated substances including diesel, heating oil, used motor oil, kerosene and unknown substances based on the tank registration information maintained by the DEP may be assessed a capacity fee of $.0825 per gallon of capacity, which amount is established in accordance with section 705(d)(2) of the act (35 P. S. § 6021.705(d)(2)). (For example, 10,000 gallons at $.0825 per gallon equals $825).

[Pa.B. Doc. No. 03-2451. Filed for public inspection December 26, 2003, 9:00 a.m.]

Title 31—INSURANCE

INSURANCE DEPARTMENT

[31 PA. CODE CH. 84d]

Recognition of the 2001 CSO Mortality Table for Use in Determining Minimum Reserve Liabilities and Nonforfeitue Benefits

The Insurance Department (Department) adopts Chapter 84d (relating to recognition of the 2001 CSO mortality table for use in determining minimum reserve liabilities and nonforfeiture benefits) to read as set forth in Annex A.

Statutory Authority

The final-form rulemaking is adopted under the authority of sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412), section 301(c)(1) of The Insurance Department Act of 1921 (40 P. S. § 71(c)(1)), section 410F(e)(8)(F) of The Insurance Company Law (40 P. S. § 510.1(e)(8)(F)) and 31 Pa. Code § 84c.5(a) and (b) (relating to general requirements for basic reserves and premium deficiency reserves). Likewise, this final-form rulemaking is made under the Department's rulemaking authority under the Unfair Insurance Practices Act (UIPA) (40 P. S. §§ 1171.1—1171.15) (as that authority is further explained in *PALU v. Insurance Department*, 371 A.2d 564 (Pa. Cmwlth. 1977)), because the Insurance Commissioner (Commissioner) has determined that, in and of itself, it is not a violation of the UIPA for a company to determine nonforfeiture benefits for the same type of policy of life insurance on both a sex-distinct and sex-neutral basis. See section 5(a)(7) of the UIPA (40 P. S. § 1171.5(a)(7)).

Comments and Response

Notice of proposed rulemaking was published at 33 Pa.B. 4297 (August 30, 2003) with a 30-day comment period. During the 30-day comment period, comments were received from the American Council of Life Insurers (ACLI) and the Insurance Federation of Pennsylvania, Inc. (IFP). Although the IFP commented on the preamble, neither the ACLI nor the IFP provided any substantive comments on the Annex and both parties supported the adoption of the rulemaking. The Independent Regulatory Review Commission (IRRC) did not submit any comments to the Department during its review. Therefore, no substantive changes were made to the Annex A in the final-form rulemaking.

However, the Department, in reviewing the proposed rulemaking as submitted and as printed, noticed two minor errors. The table of contents indicated that the definitions section is § 84d.1 and the purpose section is § 84d.2, while the body of the rulemaking had this reversed. The proper order is in the final-form rulemaking.

Also, when submitted, the term "regulation" was used in § 84d.3(a) (relating to 2001 CSO Mortality Table) but when published in proposed form, this term was changed

to "section." "Section" would not be appropriate here as the conditions in § 84d.3 apply to the entire chapter and not just this section. It was noted that the same term "regulation" was changed to "chapter" in several other subsections; therefore, the Department is requesting that the term "section" as used in § 84d.3(a) be changed to "chapter."

As these changes are relatively minor, the Department does not believe that the final-form rulemaking has changed substantially enough to request further comments.

Affected Parties

This final-form rulemaking will apply to insurers issuing life insurance coverage in this Commonwealth.

Fiscal impact

State Government

This final-form rulemaking will not increase costs to the Department due to the use of the new mortality table since the extent of the analysis performed by the Department is not affected by the mortality table used in the calculation of nonforfeiture benefits and reserves.

General Public

It is unlikely that there will be any adverse fiscal impact on consumers who purchase life insurance coverage. The use of the 2001 CSO Mortality Table may result in a reduction in nonforfeiture benefit amounts; however, with the highly competitive life insurance market in this Commonwealth, there will most likely be a reduction in the cost of insurance due to improved mortality recognized by the 2001 CSO Mortality Table.

Political Subdivisions

There will be no fiscal impact on political subdivisions, as insurers will continue to maintain adequate reserves and provide adequate nonforfeiture benefits. Adequate reserves have the potential to minimize insurer insolvencies that could result in less erosion of the tax base since insurers pay premium taxes on premium income and pay salaries that are taxed.

Private Sector

The final-form rulemaking will likely have no fiscal impact on insurance companies issuing life insurance coverage. Insurers will be required to expend some time to prepare and submit to the Department forms using the 2001 CSO Mortality Table.

Paperwork

This final-form rulemaking will not impose additional paperwork on the Department or the insurance industry. The final-form rulemaking provides for the use of an additional mortality table, and does not impose additional requirements resulting in additional paperwork.

Effectiveness/Sunset Date

This final-form rulemaking becomes effective on January 1, 2004. The Department continues to monitor the effectiveness of its regulations on a triennial basis; therefore no sunset date has been assigned.

Contact Person

Questions regarding this final-form rulemaking should be directed to Peter J. Salvatore, Regulatory Coordinator, Office of Special Projects, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429, fax (717) 705-3873, psalvatore@state.pa.us.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 19, 2003, the Department submitted a copy of this final-form rulemaking to IRRC and to the Chairpersons of the House Insurance Committee and the Senate Banking and Insurance Committee.

In preparing this final-form rulemaking, the Department considered all comments received from IRRC, the Committees and the public. This final-form rulemaking was deemed approved by the House and Senate Committees on December 17, 2003. In accordance with section 5a(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), IRRC met on December 18, 2003, and deemed approved the final-form rulemaking in accordance with section 5a(e) of the Regulatory Review Act.

Findings

The Commissioner finds that:

(1) Public notice of intention to adopt this rulemaking as amended 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 adoption of this rulemaking in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

Order

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

(a) The regulations of the Department, 31 Pa. Code, are amended by adding §§ 84d.1—84d.6 to read as set forth in Annex A.

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

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

(d) The regulation adopted by this order shall take effect January 1, 2004.

M. DIANE KOKEN,
Insurance Commissioner

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 33 Pa.B. 6472 (December 27, 2003).)

Fiscal Note: Fiscal Note 11-21B remains valid for the final adoption of the subject regulations.

Annex A

TITLE 31. INSURANCE

PART IV. LIFE INSURANCE

CHAPTER 84d. RECOGNITION OF THE 2001 CSO MORTALITY TABLE FOR USE IN DETERMINING MINIMUM RESERVE LIABILITIES AND NONFORFEITURE BENEFITS

Sec.
84d.1. Purpose.
84d.2. Definitions.
84d.3. 2001 CSO Mortality Table.
84d.4. Applicability of the 2001 CSO Mortality Table to Chapter 84c (relating to valuation of life insurance policies).
84d.5. Gender-blended tables.
84d.6. Permitted usage.

§ 84d.1. Purpose.

This chapter implements section 301(c)(1) of the act (40 P. S. § 71(c)(1)), section 410A(e)(8)(F) of the law (40 P. S. § 510.1(e)(8)(F)) and § 84c.5(a) and (b) (relating to general requirements for basic reserves and premium deficiency reserves) which authorize the Commissioner to promulgate regulations specifying tables adopted after 1980 by the NAIC for use in determining minimum nonforfeiture standards and minimum valuation standards.

§ 84d.2. Definitions.

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

Act—The Insurance Department Act of 1921 (40 P. S. §§ 1—324).

Actuarial Standards Board—The board established by the American Academy of Actuaries, or a successor thereto, to develop and promulgate standards of actuarial practice.

Commissioner—The Insurance Commissioner of the Commonwealth.

Composite Mortality Tables—The mortality tables with rates of mortality that do not distinguish between smokers and nonsmokers.

Law—The Insurance Company Law of 1921 (40 P. S. §§ 341—991).

NAIC—The National Association of Insurance Commissioners.

Smoker and Nonsmoker Mortality Tables—The mortality tables with separate rates of mortality for smokers and nonsmokers.

2001 CSO Mortality Table—The mortality table, consisting of separate rates of mortality for male and female lives, developed by the American Academy of Actuaries CSO Task Force from the Valuation Basic Mortality Table developed by the Society of Actuaries Individual Life Insurance Valuation Mortality Task Force, and adopted by the NAIC in December 2002. The 2001 CSO Mortality Table is included in the *Proceedings of the NAIC (2nd Quarter 2002)*. Unless the context indicates otherwise, the 2001 CSO Mortality Table includes both the ultimate form of that table and the select and ultimate form of that table and includes both the smoker and nonsmoker mortality tables and the composite mortality tables. It also includes both the age-nearest-birthday and age-last-birthday bases of the mortality tables.

2001 CSO Mortality Table (F)—The mortality table consisting of the rates of mortality for female lives from the 2001 CSO Mortality Table.

2001 CSO Mortality Table (M)—The mortality table consisting of the rates of mortality for male lives from the 2001 CSO Mortality Table.

§ 84d.3. 2001 CSO Mortality Table.

(a) At the election of the company for any one or more specified plans of insurance and subject to the conditions stated in this chapter, the 2001 CSO Mortality Table may be used as the minimum nonforfeiture standard and the minimum valuation standard for policies issued on or after January 1, 2004, and before the date specified in subsection (b). If the company elects to use the 2001 CSO Mortality Table, it shall do so for both nonforfeiture and valuation purposes.

(b) Subject to the conditions stated in this chapter, the 2001 CSO Mortality Table shall be used as the minimum nonforfeiture standard and the minimum valuation standard for policies issued on and after January 1, 2009.

(c) For each policy form with separate rates for smokers and nonsmokers a company may use the 2001 CSO Mortality Tables in one of the following ways:

(1) The Composite Mortality Tables as the minimum nonforfeiture standard and the minimum valuation standard.

(2) The Composite Mortality Tables as the minimum nonforfeiture standard and to determine the minimum reserves required by section 301 of the act (40 P. S. § 71) and the Smoker and Nonsmoker Mortality Tables as the minimum valuation standard to determine the additional minimum reserves, if any, required by section 303 of the act (40 P. S. § 73).

(3) The Smoker and Nonsmoker Mortality Tables as the minimum nonforfeiture standard and the minimum valuation standard.

(d) For each policy form without separate rates for smokers and nonsmokers the Composite Mortality Tables shall be used as the minimum nonforfeiture standard and the minimum valuation standard.

(e) Subject to the restrictions of § 84d.4 (relating to applicability of the 2001 CSO Mortality Table to Chapter 84c (relating to valuation of life insurance policies)) and Chapter 84c, the 2001 CSO Mortality Table may, at the option of the company for each policy form, be used in its ultimate or select and ultimate form as the minimum nonforfeiture standard and the minimum valuation standard.

(f) When the 2001 CSO Mortality Table is the minimum reserve standard for any policy form for a company, the actuarial opinion in the annual statement filed with the Commissioner shall be based on an asset adequacy analysis as specified in Chapter 84b (relating to actuarial opinion and memorandum). The Commissioner may exempt a company from this requirement if it only does business in this Commonwealth.

§ 84d.4. Applicability of the 2001 CSO Mortality Table to Chapter 84c (relating to valuation of life insurance policies).

(a) The 2001 CSO Mortality Table shall be used in applying Chapter 84c (relating to valuation of life insurance policies) in the following manner, subject to the transition dates for use of the 2001 CSO Mortality Table in § 84d.3(a) (relating to 2001 CSO Mortality Table) and § 84d.3(b).

(1) The net level reserve premium referenced in § 84c.2(b)(2)(ii) (relating to applicability) shall be based on the ultimate mortality rates in the 2001 CSO Mortality Table.

(2) All calculations in § 84c.4(b)(1) (relating to segmented and unitary reserve methods) shall be made using the 2001 CSO Mortality Table. The value of "qx+k+t-1" is the valuation mortality rate for deficiency reserves in policy year k+t, but using the unmodified select mortality rates if modified select mortality rates are used in the computation of deficiency reserves.

(3) The basic reserves minimum standard in § 84c.5(a) (relating to general requirements for basic reserves and premium deficiency reserves) shall be the 2001 CSO Mortality Table.

(4) The deficiency reserves minimum standard in § 84c.5(b) shall be the 2001 CSO Mortality Table. If select mortality rates are used, they may be multiplied by X% for durations in the first segment, subject to the conditions specified in § 84c.5(b)(3)(i)—(ix). In demonstrating compliance with those conditions, the demonstrations may not combine the results of tests that utilize the 1980 CSO Mortality Table with those tests that utilize the 2001 CSO Mortality Table, unless the combination is explicitly required by regulation or necessary to be in compliance with relevant standards of practice as promulgated by the Actuarial Standards Board.

(5) The valuation mortality table used in determining the tabular cost of insurance in § 84c.6(c) (relating to minimum valuation standard for policies with guaranteed nonlevel gross premiums or guaranteed nonlevel benefits (other than universal life policies)) shall be the ultimate mortality rates in the 2001 CSO Mortality Table.

(6) The calculations specified in § 84c.6(e)(4) shall use the ultimate mortality rates in the 2001 CSO Mortality Table.

(7) The calculations specified in § 84c.6(f)(4) shall use the ultimate mortality rates in the 2001 CSO Mortality Table.

(8) The net premiums referenced in § 84c.6(g)(2) shall be calculated using the ultimate mortality rates in the 2001 CSO Mortality Table.

(9) The 1-year valuation premium in § 84c.7(a)(1)(ii) (relating to minimum valuation standard for universal life insurance policies that contain provisions resulting in the ability of a policy owner to keep a policy in force over a secondary guarantee period) shall be calculated using the ultimate mortality rates in the 2001 CSO Mortality Table.

(b) Nothing in this section expands the applicability of Chapter 84c to include life insurance policies exempted under § 84c.2(b).

§ 84d.5. Gender-blended tables.

(a) For any ordinary life insurance policy delivered or issued for delivery in this Commonwealth on and after January 1, 2004, that utilizes the same premium rates and charges for male and female lives or is issued in circumstances when applicable law does not permit distinctions on the basis of gender, a mortality table that is a blend of the 2001 CSO Mortality Table (M) and the 2001 CSO Mortality Table (F) may, at the option of the company for each policy form, be substituted for the 2001 CSO Mortality Table as the minimum nonforfeiture standard. The blended tables may not be used as the minimum valuation standard.

(b) If blended tables are used as the minimum nonforfeiture standard, the company shall choose from among the blended tables developed by the American Academy of Actuaries CSO Task Force and adopted by the NAIC in December 2002.

§ 84d.6. Permitted usage.

In and of itself, it is not a violation of the Unfair Insurance Practices Act (40 P. S. §§ 1171.1—1171.15) for a company to determine nonforfeiture benefits for the same type of policy of life insurance on both a sex-distinct and sex-neutral basis.

[Pa.B. Doc. No. 03-2452. Filed for public inspection December 26, 2003, 9:00 a.m.]

Title 61—REVENUE

DEPARTMENT OF REVENUE

[61 PA. CODE CHS. 113 AND 121]

Employer Withholding Provisions

The Department of Revenue (Department), under the authority contained in section 354 of the Tax Reform Code of 1971 (TRC) (72 P. S. § 7354), by this order amends §§ 113.2, 113.3, 113.3a, 113.3b, 113.4, 113.16 and 121.16 to read as set forth in Annex A.

Purpose of this Final-Form Rulemaking

This final-form rulemaking is intended to serve the following purposes:

1. Section 113.3(c) and (d) (relating to computing withholding of Pennsylvania Personal Income Tax) is being amended to add the provisions of the act of May 7, 1997 (P. L. 85, No. 7) (Act 7) relating to cafeteria plans and other employee compensation arrangements. See section 301(d) of the TRC (72 P. S. § 7301(d)).

2. The amendments establish new employer identification number requirements to facilitate the Department's Keystone Integrated Tax System.

3. The amendments establish new employer registration requirements to facilitate the common employer registration form of the Department and the Department of Labor and Industry.

4. The amendments change W-2 filing requirements in order to facilitate the Department's new Infoimage System and make more use of electronic and magnetic media.

5. The Federal employee reporting and withholding requirements for tip income are being adopted so that businesses will not have to deal with conflicting requirements at the Federal and State level.

6. The addition of § 113.16 (relating to enforceable trust fund) will enhance the Department's enforcement powers.

Explanation of the Final-Form Rulemaking

Section 113.2 (relating to compensation subject to withholding) is amended by adding a new paragraph (3) relating to tips. Employers are required to deduct and withhold tax on tips of which the employer has the control, receipt, custody or payment or that are reported by the employee and only to the extent that the employer can collect the tax by deducting it from the employee's compensation exclusive of tips.

Section 113.3 (relating to computing withholding of Pennsylvania Personal Income Tax) is amended by adding a new subsection (c) that addresses special situations pertaining to the deduction or payment of amounts by an employer for or on behalf of an employee. A new subsection (d) provides that amounts specified in a cafeteria plan as being available to the employee for purposes of selecting or purchasing benefits under a plan or as additional cash remuneration received in lieu of coverage are excludible from tax and withholding if certain enumerated conditions are met.

Section 113.3a (relating to employer identification number) is added to explain the various rules relating to Federal and State employer identification numbers.

Section 113.3b (relating to registration) details when an employer shall register with the Department.

Section 113.4 (relating to time and place for filing reconciliation and withholding statements) has been amended by deleting unnecessary language relating to the completion of W-2's for tax year 1971. Subsection (b) is updated to provide for the filing of quarterly withholding returns. Subsection (c) is amended by providing that reconciliation statements with accompanying withholding statements for each employee can be forwarded to the Department by means of first class mail or electronic or magnetic media. The subsection is further amended to provide that if an employer is required to file 250 or more withholding statements, the reconciliation statement with accompanying withholding statements shall be forwarded via electronic or magnetic media as specified in the instructions of the Department available on its website or at its Harrisburg or district offices.

Section 113.16 is added to provide guidance regarding deducted and withheld tax.

Finally, § 121.16 (relating to Form W-2) is deleted in its entirety, consistent with the changes regarding W-2 filing requirements previously referenced.

Affected Parties

Affected parties are employers, employees and tax professionals.

Comment and Response Summary

Notice of proposed rulemaking was published at 31 Pa.B. 4956 (September 1, 2001). This proposal is being adopted with changes to read as set forth in Annex A.

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

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

1. In the proposal, the Department added § 113.3(d) and (e) to explain statutory trust fund provisions. In its comments, IRRC suggested that the trust fund provisions should be moved to a separate and distinct section. The Department agrees with IRRC's suggestion and creates a new § 113.16. The new language clarifies who may be held liable for withheld tax and how the amount of the liability is determined.

2. With regard to § 113.3(f)(3), since the nontaxable payments referenced are delineated in existing § 101.6 (relating to compensation), IRRC recommended that the Department insert a reference to § 101.6. The Department agrees and amends paragraph (3) accordingly.

3. In § 113.3b, IRRC suggested that the Department modify the section to state how employers can access a registration form. The Department agrees with IRRC's suggestion and amends the section accordingly.

4. Section 113.4(c) states that when employers file withholding statements by means of electronic or magnetic media, the date shall be forwarded as specified in the instructions of the Department. IRRC suggested that the Department explain what the instructions are and where they can be found. The Department agrees with IRRC's suggestion and amends subsection (c) accordingly.

Comment that did not result in an amendment to the regulation is as follows:

IRRC raised a concern with regard to proposed § 113.3(f) which provides that certain amounts specified in a cafeteria plan document are excluded from tax and withholding if the enumerated conditions are met. IRRC indicated that paragraph (3) should appear as a separate subsection because it addresses payments that are outside of a qualifying cafeteria plan but are still nontaxable for Pennsylvania Personal Income Tax purposes. It is the Department's position that paragraph (3) should be read in conjunction with subsection (f)(1) and (2) and not as a separate, stand alone statement; therefore, no revision was made to the paragraph.

Fiscal Impact

This final-form rulemaking establishes specific requirements for the reporting and withholding of tips income. Instead of being remitted with the taxpayers' estimated or annual payments, tips income will be withheld by employers. As a result, tax collection on tips income will be accelerated to the extent that employers comply with the withholding requirements. This accelerated tax collection should result in tax savings and improved tax compliance of tips income earners.

Using an effective date of January 2004 (for calculation purposes only), and using an average interest rate at which the Commonwealth invests funds, the Department has estimated a tax revenue gain of about $8.2 million for Fiscal Year 2003-04 and about $0.5 million additional revenue in interest thereafter. This estimate may be overstated because actual interest earnings will depend on cash balances in the Treasury's funds and some taxpayers may qualify for 100% tax forgiveness. The estimate could be understated because the estimate assumes that these persons are reporting all of the tip income currently. To the extent that they are not, there could be an additional revenue increase.

Paperwork

This final-form rulemaking will not require additional paperwork for the public or the Commonwealth. This final-form rulemaking will reduce paperwork requirements in that form W-2 will no longer be required to be filed with each individual return.

Effectiveness/Sunset Date

This final-form rulemaking will become effective upon final publication in the *Pennsylvania Bulletin*. This final-form rulemaking is scheduled for review within 5 years of 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 August 17, 2001, the Department submitted a copy of the notice of proposed rulemaking, published at 31 Pa.B. 4956, 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 all 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 November 5, 2003, and was approved

by IRRC on November 6, 2003, 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 Chapters 113 and 121, are amended by amending §§ 113.2, 113.3, 113.4; by adding §§ 113.3a, 113.3b and 113.16; and by deleting § 121.16 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*.

GREGORY C. FAJT,
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 33 Pa.B. 5791 (November 22, 2003).)

Fiscal Note: Fiscal Note 15-418 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 113. WITHHOLDING OF TAX

§ 113.2. Compensation subject to withholding.

All compensation shall be subject to withholding of tax by an employer. Regulations for residents and nonresidents shall be as follows:

(1) *Residents.* The following procedure shall be utilized by employers withholding Commonwealth Income Tax from a resident:

(i) If a Commonwealth resident renders service in this Commonwealth, his employer shall withhold Commonwealth tax from his compensation.

(ii) If the employer is subject to the jurisdiction of this Commonwealth and a Commonwealth resident is rendering services as his employee in another state, the following procedure shall be followed:

(A) If the other state does not have an income tax, he shall withhold on the compensation he pays to the employee.

(B) If the other state does have an income tax and the employer is withholding the tax, the employer is not be required to withhold Commonwealth tax.

(C) If the employer is not withholding income tax for the state in which the services are rendered, he shall withhold Commonwealth tax.

(iii) If a Commonwealth resident is rendering services partly within and partly outside this Commonwealth, the following procedure shall be followed:

(A) If the other state does not have an income tax, he shall withhold on the entire compensation he pays to the employee.

(B) If the other state does have an income tax and the employer is withholding the tax, the following employer shall also withhold the following Commonwealth income tax on compensation for services rendered within this Commonwealth:

(I) The amount of compensation attributable to services within this Commonwealth shall be that proportion of the total compensation which the total number of working days employed within this Commonwealth bears to the total number of working days employed both within and outside this Commonwealth, exclusive of nonworking days. Nonworking days are normally considered to be Saturdays, Sundays, holidays, and days of absence because of illness or personal injury, vacation, or leave with or without pay.

(II) With respect to earnings of a traveling salesman or other employee whose compensation depends directly on the volume of business transacted by him, the amount attributable to services within this Commonwealth shall be that proportion of the compensation received which the volume of business transacted by him within this Commonwealth bears to the total volume of business transacted by him both within and outside this Commonwealth.

(C) If the employer is not withholding income tax for the state in which the services are rendered, he shall withhold Commonwealth tax on the entire compensation.

(2) *Nonresident.* The following procedure shall be utilized by employers withholding Commonwealth income tax from a nonresident:

(i) The tax shall be deducted and withheld on compensation paid to nonresident employees for services performed in this Commonwealth. Accordingly, if a nonresident employee performs all of his services in this Commonwealth, the tax shall be deducted and withheld from all compensation paid him.

(ii) If a nonresident employee performs services partly within and partly outside this Commonwealth, only compensation for services within this Commonwealth shall be subject to withholding.

(A) The amount of compensation attributable to services within this Commonwealth shall be that proportion of the total compensation which the total number of working days employed within this Commonwealth bears to the total number of working days employed both within and outside this Commonwealth, exclusive of nonworking days. Nonworking days are normally considered to be Saturdays, Sundays, holidays, and days of absence because of illness or personal injury, vacation, or leave with or without pay.

(B) With respect to earnings of a traveling salesman or other employee whose compensation depends directly on the volume of business transacted by him, the amount

attributable to services within this Commonwealth shall be that proportion of the compensation received which the volume of business transacted by him within this Commonwealth bears to the total volume of business transacted by him both within and outside this Commonwealth.

(iii) The portion of compensation allocable to the Commonwealth may be determined by the employer on the basis of the preceding year's experience, or on the basis of an estimate for the current year made by the employee or his employer. In either case, the employer shall make any necessary adjustment during the year to assure that the proper amount is withheld for the current year.

(iv) An employer shall withhold on all compensation paid to a nonresident who works partly within and partly outside this Commonwealth unless the employer maintains adequate current records to determine accurately the amount of compensation from Commonwealth sources.

(3) *Tips.*

(i) Every employee who, in the course of his employment, receives in any calendar month cash tips which are wages as defined in section 3401(a) of the IRC (26 U.S.C.A. § 3401(a)) shall report those tips in one or more written statements furnished to his employer on or before the 10th day following that month.

(ii) Employers are required to deduct and withhold tax only on tips of which the employer has the control, receipt, custody or payment or tips that are reported by the employee and only to the extent that the employer can collect the tax by deducting it from the employee's compensation exclusive of tips.

§ 113.3. Computing withholding of Pennsylvania Personal Income Tax.

(a) The Pennsylvania Personal Income Tax to be withheld shall be at the rate prescribed in Article III of the TRC (72 P. S. §§ 7301—7361). For example, the rate applicable to the first pay period beginning on or after:

January 1, 1983 is 2.45

July 1, 1984 is 2.35

January 1, 1986 is 2.20

September 1, 1986 is 2.10

(1) *Regular compensation.* Computation of withholding tax on regular compensation shall be made in accordance with the following:

(i) For a payroll period an employer shall compute the tax to be withheld from the compensation of an employee by multiplying the compensation by the rate prescribed in Article III of the TRC.

(ii) The term "payroll period" means a period for which a payment of compensation is ordinarily made to an employee by his employer and may be a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual or annual period.

(2) *Supplemental or other compensation.* If supplemental, such as commissions, overtime pay, vacation pay, bonuses, and so forth, or other compensation is received by an employee, an employer shall determine the tax to be withheld by adding the supplemental or other compensation for the current payroll period and multiplying the amount by the rate prescribed in Article III of the TRC.

(b) In addition to the tax required to be withheld, an employer and employee may agree that an additional amount be withheld from the employee's compensation. The agreement shall be in writing, and the amount deducted and withheld under the agreement between the employer and employee shall be considered as tax required to be deducted and withheld, and statutes and regulations applicable to the tax are applicable with respect to an amount deducted and withheld under the agreement.

(c) Except as provided in subsection (d):

(1) Any amount lawfully deducted by an employer from the remuneration of an employee shall be deemed to be a part of the employee's remuneration and to have been paid to the employee as compensation at the time the deduction is made.

(2) Any amount paid by an employer on behalf of an employee without deduction from the remuneration of, or other reimbursement from, the employee on account of any liability or obligation of, or payment required from, an employee shall be deemed to be paid to the employee as compensation at the time the payment is made.

(3) Any payment made to an employee, third party or fund under a cash or deferred arrangement under which an employee may unilaterally elect to have the employer make payments to the third party or fund for the benefit of the employee or to the employee directly in cash shall be deemed to be paid to the employee as compensation at the time the payment is made.

(4) Any payment made to an employee, third party or fund under an arrangement under which an employee may unilaterally choose between two or more benefits consisting either of cash and coverage under a plan or coverage under two or more plans shall be deemed to be paid to the employee as compensation at the time the payment is made.

(d) Amounts specified in a cafeteria plan document as being available to the employee for the purpose of selecting or purchasing benefits under a plan or as additional cash remuneration received in lieu of coverage under a plan are excludible from tax and withholding if the following apply:

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

(2) The benefits selected or purchased are nontaxable under the IRC when offered under a cafeteria plan described in section 125 of the IRC.

(3) The payments made for the plan would be nontaxable under § 101.6 (relating to compensation) if made by the employer outside a cafeteria plan described in section 125 of the IRC.

§ 113.3a. Employer identification number.

An employer shall use both the Federal and Pennsylvania employer identification numbers to report all Pennsylvania withholding. Employers who have not yet received a Federal employer identification number will be assigned a temporary Pennsylvania number until the Federal employer identification number is obtained, at which time the Department shall be notified. If an employer has multiple divisions using the same Pennsylvania employer identification number but remitting and reconciling withholding tax separately, the employer shall request a separate Pennsylvania number for each division.

§ 113.3b. Registration.

Every employer having an office or transacting business within this Commonwealth and making payment of

wages for the first time to one or more nonresident individuals performing services on behalf of the employer within this Commonwealth or to one or more resident individuals shall, within 10 business days of the payment, register with the Department by completing and filing Form PA-100 Pennsylvania Combined Registration Form available on its website or at its Harrisburg or district offices.

§ 113.4. Time and place for filing reconciliation and withholding statements.

(a) An employer shall submit a wage and tax withholding statement to each of his employees on or before January 31 following the year of payment of compensation, or within 30 days from the date of the last payment of compensation if employment or the business is terminated.

(1) An employer shall use the combined Federal-State Wage and Tip Withholding Statement (Form W-2) issued by the Internal Revenue Service or one that conforms thereto with the word "Commonwealth" printed, stamped or typed thereon. The statement shall show the name of employer, address and identification number of the employer; the name, address and Social Security number of the employee; the total compensation paid during the taxable year; and the total amount of Pennsylvania tax withheld during the taxable year.

(2) The wage and tax withholding statements required in this chapter shall be in addition to a requirement of the Federal or a local government.

(b) A completed Reconciliation Statement (Return Form PA-W3), reconciling Personal Income Tax withheld with related quarterly withholding returns and deposit and employee withholding statements shall be submitted by the following:

(1) A going business for tax withheld in the prior year, annually, by January 31.

(2) A terminated business within 30 days after the end of the month in which business or payment of compensation ceased.

(c) Reconciliation Statements (Form PA-W3), with accompanying withholding statements (Form W-2) for each employee shall be forwarded by means of first class mail with sufficient postage or electronic or magnetic media as specified in instructions of the Department to the Department. If an employer is required to file 250 or more withholding statements, the reconciliation statement, with accompanying withholding statements shall be forwarded by means of electronic or magnetic media as specified in the instructions of the Department available on its website or at its Harrisburg or district offices.

§ 113.16. Enforceable trust fund.

(a) For purposes of assessment and collection of deducted tax and withheld tax that is not paid over to the Department, all taxes deducted and withheld from employees under this article or under color of this article shall constitute a trust fund for the Commonwealth and shall be enforceable against the employer, his representative, any person knowingly receiving a disbursement of any part of the fund, any person receiving a disbursement of any part of the fund without giving fair and valuable consideration therefore or any other person who is required to collect, account for and pay over the tax. The taxes will not be enforceable against a person receiving a disbursement from an employer if, before the negligent failure to truthfully account for and pay it over to the Commonwealth is discovered, the money is expended in payment of a genuine, uncontested and enforceable obligation, judgment, claim, lien or other liability of the person existing at the time the money was obtained or otherwise superior to the rights of the Commonwealth.

(b) Tax deducted from the State wages of an employee shall be considered to have been withheld at the time of payment of the State wages against which the deduction was charged.

(c) If an employer fails or refuses to pay over any withheld tax or to deposit it in a separate account in trust for and payable to the Department or otherwise identify and segregate it from other funds, it shall be deemed that:

(1) Withheld tax would be on deposit in the general operating account of the employer at the time of payment of the State wages from which deduction was made.

(2) The employer would disburse withheld tax last.

(3) Once withheld tax is disbursed, subsequent deposits would not replenish it.

(4) The lowest intermediate balance of cash on deposit in the general operating account is withheld tax that constitutes a trust fund for the Commonwealth that is enforceable against the employer or any person receiving any part of the fund.

(5) Any excess of the tax deducted over the lowest intermediate balance is withheld tax that has been received by the employer and disbursed.

CHAPTER 121. FINAL RETURNS

§ 121.16. (Reserved).

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