

# RULES AND REGULATIONS

## Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

### STATE REAL ESTATE COMMISSION [49 PA. CODE CH. 35]

#### Corrective Amendment to 49 Pa. Code § 35.271(b)(6)

The State Real Estate Commission has discovered a discrepancy between the agency text of 49 Pa. Code § 35.271(b)(6) (relating to examination for broker's license), as deposited with the Legislative Reference Bureau, and the official text published at 35 Pa.B. 4711 (August 20, 2005) and scheduled to be codified in the October 2005 *Pennsylvania Code Reporter* (Master Transmittal Sheet No. 371). The text of subsection (b)(6) was inadvertently omitted.

Therefore, under 45 Pa.C.S. § 901: The State Real Estate Commission has deposited with the Legislative Reference Bureau a corrective amendment to 49 Pa. Code § 35.271(b)(6). The corrective amendment to 49 Pa. Code § 35.271(b)(6) is effective as of August 20, 2005, the date the defective text was printed in the *Pennsylvania Bulletin*.

The correct version of 49 Pa. Code § 35.271 appears in Annex A.

#### Annex A

### TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

#### PART I. DEPARTMENT OF STATE

#### CHAPTER 35. STATE REAL ESTATE COMMISSION

#### Subchapter D. LICENSING EXAMINATIONS

#### § 35.271. Examination for broker's license.

(a) An individual who wants to take the broker's examination for a standard broker's license shall:

- (1) Be 21 years of age or older.
- (2) Be a high school graduate or have passed a high school general education equivalency examination.
- (3) Have worked at least 3 years as a licensed salesperson, with experience qualifications that the Commission considers adequate for practice as a broker, or possess at least 3 years of other experience, education, or both, that the Commission considers the equivalent of 3 years' experience as a licensed salesperson.
- (4) Have acquired 16 credits, or 240 hours of instruction, in professional real estate education as determined by the Commission under subsection (b).
- (5) Submit a completed examination application to the Commission or its designee with:
  - (i) Official transcripts evidencing the acquisition of course credits.
  - (ii) A detailed resume of real estate activities performed by the candidate while working as a salesperson and a sworn statement from the candidate's employing broker confirming that these activities were performed if the candidate is a licensed salesperson.

(iii) A complete description of work experience and education that the candidate considers relevant to the requirements of paragraph (3) if the candidate is not a licensed salesperson.

(iv) A certification from the real estate licensing authority of the jurisdiction in which the candidate is licensed stating that the candidate had an active license for each year that credits are claimed if the candidate is applying brokerage experience to satisfy the professional education requirement.

(v) The fee for review of the candidate's qualifications to take the examination prescribed in § 35.203 (relating to fees) and the fees for administration of the examination.

(b) The Commission will apply the following standards in determining whether an examination candidate has met the education requirement of subsection (a)(4):

(1) A candidate who has obtained one of the following degrees will be deemed to have met the education requirement and will not be required to show completion of coursework in specific areas of study:

(i) A bachelor's degree with a major in real estate from an accredited college, university or institute of higher learning.

(ii) A bachelor's degree from an accredited college, university or institute of higher learning, having completed coursework equivalent to a major in real estate.

(iii) A juris doctor degree from an accredited law school.

(2) Two of the required 16 credits shall be in a Commission-developed or approved real estate office management course and 2 of the required 16 credits shall be in Commission-developed or approved law course. At least 6 of the remaining 12 credits shall be in 3 or more of the Commission-developed courses listed in this paragraph. The remaining 6 credits shall be in real estate courses but not necessarily those listed in this paragraph. A candidate may not apply credits used to qualify for the salesperson's examination toward fulfillment of the broker education requirement.

(3) To be counted toward the education requirement, a real estate course shall have been offered by:

(i) An accredited college, university or institute of higher learning, whether in this Commonwealth or outside this Commonwealth.

(ii) A real estate education provider in this Commonwealth approved by the Commission.

(iii) A real estate education provider outside this Commonwealth, that has been approved by the real estate licensing authority of the jurisdiction where the real estate education provider is located. The course transcript or certificate of completion shall state that the course is approved by the licensing authority of the jurisdiction where the real estate education provider is located.

(iv) A real estate industry organization outside this Commonwealth, if the course is approved by the licensing jurisdiction of another state. The course transcript or certificate of completion shall state that the course is approved by the licensing jurisdiction which has approved it.

(4) A maximum of four credits will be allowed for each real estate course. A maximum of four credits will be allowed for each area of real estate study listed in paragraph (2).

(5) Courses shall have been completed within 10 years prior to the date of successful completion of the licensing examination.

(6) Two credits will be allowed for each year of active practice the candidate has had a licensed broker in another state during the 10-year period immediately preceding the submission of the examination application.

(c) A reciprocal licensee who is converting that license to a standard broker's license is exempt from subsection (a) and is only required to pass the state portion of the examination.

[Pa.B. Doc. No. 05-1710. Filed for public inspection September 16, 2005, 9:00 a.m.]

## Title 55—PUBLIC WELFARE

### DEPARTMENT OF PUBLIC WELFARE

#### [55 PA. CODE CH. 1187]

#### MA Day of Care Definition

The Department of Public Welfare (Department), under the authority of sections 201(2), 206(2), 403(b), 443.1(5) and 454 of the Public Welfare Code (code) (62 P. S. §§ 201(2), 206(2), 403(b), 443.1(5) and 454), as amended by the act of July 7, 2005 (P. L. 177, No. 42) (Act 42), amends Chapter 1187 (relating to nursing facility services) to read as set forth in Annex A.

Act 42 amended, among other things, provisions of the code regarding payment for nursing facility services under the Medical Assistance (MA) Program. More specifically, Act 42 added a subsection (5) to section 443.1 of the code. This new subsection provides that on or after July 1, 2004, and until regulations are otherwise adopted by July 1, 2006, payments to MA nursing facility providers shall be calculated and made as specified in the Department's regulations in effect on July 1, 2003, except as may be otherwise required by the Commonwealth's approved Title XIX plan for nursing facility services and regulations promulgated by the Department under section 454 of the code.

Section 454, which was also added to the code by Act 42, authorizes the Department to promulgate regulations to establish provider payment rates. Section 454 of the code specifies that, until December 31, 2005, notwithstanding any other provision of law including section 814-A of the code (62 P. S. § 814-A), provider payment rate regulations must be promulgated under section 204(1)(iv) of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204(1)(iv)), known as the Commonwealth Documents Law (CDL), which permits an agency to omit or modify notice of proposed rulemaking when the regulation pertains to Commonwealth grants or benefits. In addition, section 454 of the code expressly exempts these provider payment rate regulations from review under the Regulatory Review Act (71 P. S. §§ 745.1—745.15), and from review by the Attorney General under section 205 of the CDL (45 P. S. § 1205) and section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732-204(b)).

#### *Justification for Adoption of Final-Omitted Rulemaking*

In accordance with sections 443.1(5) and 454 of the code, the Department is adopting this final-omitted rulemaking because:

- As recognized by section 454(b) of the code, the final-omitted rulemaking pertains to MA provider payments, which are Commonwealth grants or benefits.
- The final-omitted rulemaking pertains to payments for MA nursing facility services made on or after July 1, 2004.
- The final-form rulemaking is necessary to conform the Department's regulations to the Commonwealth's approved State Plan for nursing facility services.

#### *Purpose*

The Department is amending the definition of "MA day of care" in § 1187.2 (relating to definitions) to include additional categories of days of care provided to MA nursing facility residents. This amendment conforms the regulatory definition to the Commonwealth's approved State Plan for nursing facility services.

#### *Background*

Current § 1187.2 defines "MA day of care" as "a day of care for which the Department pays 100% of the MA rate for an MA resident or a day of care for which the Department and the resident pay 100% of the MA rate for the MA resident's care." Under the case-mix payment system in Chapter 1187, the Department uses the definition of "MA day of care" for two purposes. First, the Department uses the definition to determine which residents are included in the calculation of every nursing facility's quarterly MA Case-Mix Index (CMI) under § 1187.93 (relating to CMI calculations). A nursing facility's MA CMI is "the arithmetic mean of the individual CMIs for residents for whom the Department paid an MA day of care on the [quarterly] picture date." See § 1187.93(2). Each quarter during the rate year, the Department adjusts a nursing facility's case-mix per diem rate by multiplying the resident care component of the rate by the facility's MA CMI. See § 1187.95(b)(1) (relating to general principles for rate and price setting).

Second, the Department uses the definition of "MA day of care" to determine which nursing facilities are eligible to receive a disproportionate share incentive (DSH) payment under § 1187.111 (relating to disproportionate share incentive payments). To qualify for a DSH payment, a nursing facility must maintain an annual overall occupancy rate of at least 90% along with an annual MA occupancy rate of at least 80%. A nursing facility's MA occupancy rate is determined by dividing the MA days of care paid by the Department by the total actual days of care provided by the nursing facility. If the nursing facility meets the minimum occupancy requirements, the Department uses the same MA days of care to calculate the facility's DSH payment amount.

The current definition of "MA day of care" only recognizes those days for which payment is made under the Department's Fee-For-Service Program. While most MA nursing facility residents receive nursing facility services through the Department's Fee-For-Service Program, some MA recipients may receive nursing facility services through the HealthChoices Program, the Department's managed care program, and the Long Term Care Capitated Assistance Program (LTCCAP), the Department's community-based managed care program for the frail and elderly. When a HealthChoices managed care organization (MCO) under contract with the Department

(MA MCO) or an LTCCAP provider authorizes nursing facility services for an enrolled MA recipient, the MA MCO or LTCCAP provider, and not the Department, pays the nursing facility for the days of care which the nursing facility provides to the MA recipient. Since these days of care do not meet the current definition of "MA day of care" in § 1187.2, they are not counted in calculating the nursing facility's MA CMI or in determining whether the nursing facility qualifies for a DSH payment.

During the past several years the number of MA recipients receiving services under the HealthChoices Program and the LTCCAP has grown. As these managed care programs continue to enroll new members, more MA recipients who are admitted to nursing facilities will likely be enrolled in either an MA MCO or the LTCCAP and more days of care provided in nursing facilities will be paid for by MA MCOs and LTCCAP providers. In anticipation of this change in circumstance, MA nursing facility providers asked the Department to modify its policies to recognize these days as MA days of care. Upon consideration of this request, the Department agreed that the definition of "MA day of care" should be expanded and undertook the necessary steps to amend both the Commonwealth's approved State Plan and the language of § 1187.2 in a manner that would more fully recognize the services nursing facilities are providing to MA recipients.

The Department published an advance public notice at 33 Pa.B. 6468 (December 27, 2003) announcing its intent to amend its State Plan to expand the definition of "MA day of care" to include two new categories of days: (1) days of care for which an MA MCO or an LTCCAP provider pays 100% of its negotiated rate or fee for the MA resident's care in a nursing facility and days of care for which the resident and an MA MCO or an LTCCAP provider pays 100% of its negotiated rate or fee for the MA resident's care in a nursing facility; and (2) days of care provided to an MA resident receiving hospice services in a nursing facility which are paid for by the Department. The Department invited the public to comment on this proposed change.

Following the public comment period, the Department submitted a proposed State Plan Amendment to the Federal Centers for Medicare and Medicaid Services (CMS) on March 24, 2004, to incorporate the revised "MA day of care" definition into the Commonwealth's State Plan. Subsequently, while the proposed State Plan Amendment was pending with the CMS, the Department published a notice of proposed rulemaking at 34 Pa.B. 4462 (August 14, 2004) to make a corresponding change to the definition of "MA day of care" in § 1187.2 and again invited interested parties to comment.

On January 27, 2005, the CMS notified the Department that the State Plan Amendment incorporating the revised "MA day of care" definition into the Commonwealth's State Plan was approved effective January 1, 2004. This final-omitted rulemaking now conforms the text of § 1187.2 to the approved State Plan.

Although this regulation changes the definition of "MA day of care" retroactive to January 1, 2004, it only affects payments made to nursing facilities on or after July 1, 2004. More specifically, the expanded definition is applicable to DSH payments for fiscal periods ending on and after December 31, 2003, and to the MA CMI for picture dates beginning February 1, 2004. Under the Department's case-mix regulations, the first DSH payments using the expanded definition could not be (and were not) made prior to July 28, 2004, or 210 days from the close of the December 31, 2003, fiscal year. See § 1187.11(d).

Similarly, under the Department's case-mix regulations, the first MA CMI using the expanded definition (the February 1, 2004, MA CMI) could only be used to adjust the nursing facilities' July 1, 2004, rates. See § 1187.96(a)(4) (relating to price and rate setting computations).

#### *Affected Individuals and Organizations*

This final-omitted rulemaking will affect nursing facilities enrolled in the MA Program.

#### *Accomplishments and Benefits*

This final-omitted rulemaking revises the current definition of "MA day of care" consistent with the recommendation of nursing facility providers. This final-omitted rulemaking may result in increased reimbursement to nursing facility providers through increased DSH payments and case-mix per diem rates, and may encourage nursing facilities to admit more MA residents who are enrolled in MA MCOs and enrolled in the LTCCAP.

#### *Fiscal Impact*

By expanding the definition of "MA day of care," more nursing facilities may qualify for DSH payments and nursing facilities that currently receive DSH payments may experience an increase in those payments. Nursing facilities may also experience a change in their case-mix per diem rates as a result of an increase or decrease in the MA CMI used to establish the nursing facilities' case-mix per diem rate. The Department estimates that MA nursing facilities could receive an additional \$500,000 in payments in Fiscal Year 2004-2005 as a result of this final-omitted rulemaking.

Although the Commonwealth may have increased costs due to the expanded definition, any increased costs will be defrayed in part by Federal matching funds which will cover approximately half of the payment increases attributable to this amendment. Further, because the effect of the final-omitted rulemaking is to more fully recognize the services nursing facilities are providing to MA recipients, it should help ensure that MA recipients have continued access to medically necessary nursing facility services. Therefore, the Department finds that the benefit of the regulation outweighs the increased costs which may be associated with the final-omitted rulemaking.

#### *Paperwork Requirements*

The MA-11 Cost Report currently used by nursing facilities to report financial and statistical data will be modified to accommodate the changes to the definition of "MA day of care." This final-omitted rulemaking will not change the manner in which MA days of care are reported. However, the final-omitted rulemaking will increase the number of MA days of care being reported.

#### *Public Comment*

On November 26, 2003, and December 23, 2003, the Department met with members of the four nursing home associations—Pennsylvania Association of Non-Profit Homes for the Aging, Pennsylvania Health Care Association, Hospital and Healthsystem Association of Pennsylvania and Pennsylvania Association of County Affiliated Homes—to discuss the implications of the Department's intent to change the definition of "MA day of care." The Department also discussed and solicited comments on the proposed changes at the Long-Term Care Subcommittee of the Medical Assistance Advisory Committee (MAAC) on February 11, 2004, April 14, 2004, October 13, 2004, and December 1, 2004.

The Department published an advance public notice at 33 Pa.B. 6468 in which it announced its intent to change the definition of "MA day of care" in the State Plan, and invited interested persons to comment on the proposed amendment. The Department received one comment letter in response to the notice. The Department subsequently published a notice of proposed rulemaking and received a total of three public comment letters regarding the proposed rulemaking. In addition, comments were received from the Independent Regulatory Review Commission (IRRC).

Subsequent to the publication of the proposed rulemaking, the General Assembly enacted Act 42 directing the Department to promulgate provider payment rate regulations in accordance with Act 42. Although not required by Act 42, the Department considered all public comments received in response to its advance public notice and notice of proposed rulemaking.

#### *Discussion of Comments and Major Changes*

Following is a summary of the comments received by the Department following publication of the advance public notice and the proposed rulemaking, and the Department's response to those comments.

#### *Comment*

Two nursing facility associations sent comments endorsing the proposed rulemaking. One association observed that the failure to recognize LTCCAP and MA MCO paid days as MA days of care may have created a disincentive for nursing facilities to admit HealthChoices enrollees. Both associations commented that expanding the definition of "MA day of care" to include these days would allow nursing facilities to receive more accurate reimbursement for providing services. Both associations also supported the proposed amendment to the definition clarifying that days of care provided to MA nursing facility residents receiving hospice services paid by the Department are also to be considered as MA days of care.

#### *Response*

The Department agrees with the association that the expanded definition of "MA day of care" more fully recognizes the services nursing facilities are providing to MA recipients.

#### *Comment*

IRRC and a nursing facility representative questioned whether the Department has authority to retroactively change the definition of "MA day of care."

#### *Response*

Although not determinative of the Department's authority to make the retroactive change, the Department notes that this final-omitted rulemaking is being adopted in response to the request of the nursing facility industry and its effect is most likely an increase in payments to nursing facility providers. Even if the final-omitted rulemaking reduced payments to providers, however, both Federal and State law would allow the Department to adopt the amendment retroactive to January 1, 2004.

Consistent with Federal law, the Department announced its intent to make the amendment in advance of the proposed effective date, solicited public comment and input from the MAAC and submitted the State Plan Amendment to the CMS on March 24, 2004. Applicable Federal regulations specifically permit a State Plan amendment to be "retroactively" effective to the first day of the calendar quarter in which an approvable amendment is submitted. See 42 CFR 447.256(c) (relating to

procedures for CMS action on assurances and State plan amendments). On January 27, 2005, the CMS approved this State Plan Amendment, retroactive to January 1, 2004.

State statute and common law also recognized that administrative agencies, including the Department, may promulgate retroactive regulations. See, for example, section 203 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1203); *Ashbourne School v. Department of Education*, 403 A.2d 161, 165 (Pa. Cmwlth 1979) (en banc); *Wesbury United Methodist Community v. Department of Public Welfare*, 597 A.2d 271 (Pa. Cmwlth 1992); *Carbon County Home v. Department of Public Welfare*, 535 A.2d 1243 (Pa. Cmwlth 1988).

The General Assembly has not enacted legislation to remove that authority from the Department. To the contrary, Act 42 not only requires the Department to calculate and make payments to MA nursing facility providers in accordance with the Commonwealth's approved State Plan, it specifically authorizes the Department to publish regulations relating to provider payments on or after July 1, 2004. See section 443.1(5) of the code. Consistent with section 443.1(5) of the code, this final-omitted rulemaking conforms the text of the Department's regulations to the approved State Plan and ensures that payments to nursing facilities effective July 1, 2004, are calculated and made as required by the State Plan.

#### *Comment*

A commentator recommended that the Department allow nursing facility providers to correct Picture Date CMI Report transmittals to make them consistent with the new definitions for a period of at least 30 days from the date that the final rulemaking is published in the *Pennsylvania Bulletin*. The commentator suggested that the extension would be appropriate because there was confusion as to the effective date of the change in the notices that the Department sent to providers. Although the commentator was aware that the Department announced that providers would be granted an extension by way of the March 12, 2004, website posting, the commentator contended that an Internet posting is not an accepted replacement for publication in the *Pennsylvania Bulletin*.

#### *Response*

The Department disagrees with the commentator's suggestions that providers are confused about the effective date of the final-omitted rulemaking and that providers should be afforded additional time to correct CMI submissions. Providers have been given repeated and individual notice of the amendment to the definition of "MA day of care," and provided ample opportunity to adjust their CMI submissions and cost reports in accordance with the definition.

As previously noted, the Department published an advance notice at 33 Pa.B. 6468 announcing its intent to make the amendment and identifying a proposed effective date of January 1, 2004. Three weeks later, the Department sent a "Dear Administrator" letter to all nursing facilities whose cost report fiscal year ended December 31, 2003. This letter provided individual notice to the facilities of the amendment to the definition of "MA day of care" well in advance of the April 30, 2004, deadline for the submission of their cost reports. The letter enclosed a new cost reporting schedule for facilities to complete to report the additional categories of MA days recognized

under the expanded definition. On June 16, 2004, more than 3 months prior to their cost report filing deadline, the Department sent a substantially identical "Dear Administrator" letter to nursing facilities whose cost report fiscal year ended June 30, 2004, to likewise notify them of the amendment to the definition of "MA day of care" and allow them the opportunity to report the additional MA days of care.

In addition, as the commentator acknowledged, on March 12, 2004, the Department posted notification of the amendment to the definition on the Nursing Facility Minimum Data Set (MDS) submission site. This notification included instructions for correcting a nursing facility's CMI Report in instances when a facility may have had residents affected by the amendment to the definition of "MA day of care." On the same day it posted the notification online, the Department sent copies of the notification to the four nursing home associations for circulation to their respective members. Further, to allow time for any questions nursing facility providers might have concerning the new definition and submission of reports, the March 12, 2004, notification extended the February 2004 Picture Date submission period from March 15, 2004, to March 30, 2004.

Any provider that submitted its CMI data on or after March 12, 2004, would have accessed the MDS submission site to do so, and therefore, should have been aware of the notification announcing the amendment to the definition and extending the deadline for submission. Approximately 270 nursing facility providers had submitted a signed CMI Report for the February 1 Picture Date with a print date prior to the online posting of the March 12, 2004, notification extending the submission deadline. Each provider was contacted by phone by the Myers and Stauffer Helpdesk staff and alerted to the notification and amendment to the definition. Approximately 30% of the providers that were contacted by the Helpdesk and a total of 148 providers (23.2% of all providers) subsequently mailed a corrected CMI Report to replace their original report for the February 1, 2004, picture date.

The Department notes that as a general matter, approximately 5% of providers send multiple reports or corrections for a picture date submission. The significant increase in submissions for the February 1, 2004, picture date illustrates that providers received more than adequate advance notice of the amendment to the definition of "MA day of care" and were given ample opportunity to and did adjust their February 2004 CMI Reports as they determined necessary.

Under these circumstances, the Department finds that additional time for corrections is unwarranted.

*Sunset Date*

There is no sunset date. However, the Department will review the effectiveness of this regulation on an ongoing basis and evaluate the need for further amendments.

*Regulatory Review Act*

Under sections 443.1(5)(ii) and 454 of the code, this final-omitted rulemaking is not subject to review under the Regulatory Review Act.

*Findings*

The Department finds that:

(1) Notice of proposed rulemaking is omitted in accordance with section 204(1)(iv) of the CDL and 1 Pa. Code § 7.4(1)(iv) because this final-omitted rulemaking pertains to Commonwealth grants and benefits.

(2) The adoption of this final-omitted rulemaking in the manner provided by this order is necessary and appropriate for the administration and enforcement of the code.

(3) Any delay in the effective date of this rulemaking beyond January 1, 2004, would be impracticable and contrary to the public interest since: (i) it would be inconsistent with the Commonwealth's approved State Plan and, thereby, jeopardize the receipt of Federal matching funds; and (ii) it would violate the requirement of section 443.1(5) of the code that the Department calculate and make payments to nursing facility providers consistent with the Commonwealth's approved State Plan.

*Order*

The Department, acting under sections 201(2), 206(2), 403(b), 443.1(5) and 454 of the code, orders that:

(a) The regulations of the Department, 55 Pa. Code Chapter 1187, are amended by amending § 1187.2 to read as set forth in Annex A, with ellipses referring to the existing text of the regulation.

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

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

(d) This order amends the definition of "MA day of care" effective January 1, 2004, and applies to DSH payments for fiscal periods ending on and after December 31, 2003, and to the MA CMI for picture dates beginning February 1, 2004.

ESTELLE B. RICHMAN,  
*Secretary*

**Fiscal Note:** 14-498. (1) General Fund; (2) Implementing Year 2003-04 is \$212,000; (3) 1st Succeeding Year 2004-05 is \$237,000; 2nd Succeeding Year 2005-06 is \$245,000; 3rd Succeeding Year 2006-07 is \$252,000; 4th Succeeding Year 2007-08 is \$260,000; 5th Succeeding Year 2008-09 is \$268,000; (4) 2002-03 Program—\$777.084 million; 2001-02 Program—\$761.878 million; 2000-01 Program—\$722.565 million; (7) MA Long-Term Care; (8) recommends adoption. Funds have been included in the Department's budget to cover this increase.

**Annex A**

**TITLE 55. PUBLIC WELFARE**

**PART III. MEDICAL ASSISTANCE MANUAL**

**CHAPTER 1187. NURSING FACILITY SERVICES**

**Subchapter A. GENERAL PROVISIONS**

**§ 1187.2. Definitions.**

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

\* \* \* \* \*

*LTCCAP—Long-Term Care Capitated Assistance Program*—The Department's community-based managed care program for the frail elderly based on the Federal Program of All-inclusive Care for the Elderly (PACE) (see section 1894 of the Social Security Act (42 U.S.C.A. § 1395eee)).

\* \* \* \* \*

*MA MCO—Medical Assistance Managed Care Organization*—An entity under contract with the Department that

manages the purchase and provision of health services, including nursing facility services, for MA recipients who are enrolled as members in the entity's health service plan.

\* \* \* \* \*

*MA day of care*—A day of care for which one of the following applies:

(i) The Department pays 100% of the MA rate for an MA resident.

(ii) The Department and the resident pay 100% of the MA rate for an MA resident.

(iii) An MA MCO or an LTCCAP provider that provides managed care to MA residents, pays 100% of the negotiated rate or fee for an MA resident's care.

(iv) The resident and either an MA MCO or LTCCAP provider that provides managed care to an MA resident, pays 100% of the negotiated rate or fee for an MA resident's care.

(v) The Department pays for care provided to an MA resident receiving hospice services in a nursing facility.

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[Pa.B. Doc. No. 05-1711. Filed for public inspection September 16, 2005, 9:00 a.m.]

## Title 58—RECREATION

### FISH AND BOAT COMMISSION

#### [58 PA. CODE CH. 65]

#### Fishing; Miscellaneous Special Regulations

The Fish and Boat Commission (Commission) amends Chapter 65 (relating to special fishing regulations). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The final-form rulemaking relates to permits for the use of cast nets or throw nets for the taking of gizzard shad and alewife on Lake Arthur in Butler County.

#### A. *Effective Date*

The final-form rulemaking will go into effect immediately upon publication in the *Pennsylvania Bulletin*.

#### B. *Contact Person*

For further information on the final-form rulemaking, contact Laurie E. Shepler, Chief Counsel, P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's website at [www.fish.state.pa.us](http://www.fish.state.pa.us).

#### C. *Statutory Authority*

The amendment to § 65.24 (relating to miscellaneous special regulations) is published under the statutory authority of section 2307 of the code (relating to waters limited to specific purposes).

#### D. *Purpose and Background*

The final-form rulemaking is designed to update, modify and improve the Commission's fishing regulations. The specific purpose of the final-form rulemaking is described in more detail under the summary of change.

#### E. *Summary of Change*

Several years ago, the Commission promulgated a regulation pertaining to the issuance of permits for the use of cast nets for taking live gizzard shad and alewife at Raystown Lake, Huntingdon County. Live gizzard shad and alewife are a popular bait for striped bass but are difficult to capture by means of conventional seines and nets less than or equal to 4 feet in diameter. Subsequently, the Commission amended its regulation for Raystown Lake to increase the maximum size from 12 to 20 feet in diameter.

A recent application was submitted for use of larger cast nets at Lake Arthur to capture alewife for striped bass angling. This application was denied as the cast net permit applies only to Raystown Lake. The use of a net such as this at Lake Arthur warranted consideration given the presence of surface schooling alewife for much of the year and the wish to enhance striped bass angling there. The Commission has determined that using larger cast nets on Lake Arthur is feasible and can be done without adverse impacts. This regulation will enhance striped bass fishing in the region. The Commission therefore amended § 65.24 to read as set forth in the notice of proposed rulemaking.

#### F. *Paperwork*

The final-form rulemaking will increase paperwork in that individuals who wish to use cast nets or throw nets to take gizzard shad and alewife on Lake Arthur will be required to complete an application, and if approved, the Commission will issue a permit. The Commission estimates that it will issue less than 100 permits each year for the use of cast nets or throw nets on Lake Arthur. No new paperwork requirements will be created because the Commission already issues net permits under section 2902 of the code (relating to net permits).

#### G. *Fiscal Impact*

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form rulemaking will impose no new costs on the private sector or the general public. Under section 2902 of the code, the Commission has the authority to issue net permits for a fee of \$10.

#### H. *Public Involvement*

Notice of proposed rulemaking was published at 35 Pa.B. 2633 (April 30, 2005). The Commission received seven written public comments concerning the proposed rulemaking, all of which supported it. Copies of all public comments were provided to the Commissioners.

#### *Findings*

The Commission finds that:

(1) Public notice of intention to adopt the amendment adopted 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 promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided, and the comments that were received were considered.

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

#### *Order*

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

(a) The regulations of the Commission, 58 Pa. Code Chapter 65, are amended by amending § 65.24 to read as set forth at 35 Pa.B. 2633.

(b) The Executive Director will submit this order and 35 Pa.B. 2633 to the Office of Attorney General for approval as to legality as required by law.

(c) The Executive Director shall certify this order and 35 Pa.B. 2633 and deposit them with the Legislative Reference Bureau as required by law.

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

DOUGLAS J. AUSTEN, Ph.D.,  
*Executive Director*

**Fiscal Note:** Fiscal Note 48A-169 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 05-1712. Filed for public inspection September 16, 2005, 9:00 a.m.]

**FISH AND BOAT COMMISSION**

**[58 PA. CODE CH. 111]**

**Boating; Special Regulations Counties**

The Fish and Boat Commission (Commission) amends Chapter 111 (relating to special regulations counties). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The final-form rulemaking corrects a minor discrepancy in the description of the slow, no wake zone on the Beaver River in Beaver County and removes a 10 horsepower restriction at the former Connequenessing Creek Dam in Beaver County. The final-form rulemaking also establishes a 45-mile per hour speed limit from sunrise to sunset on weekends and holidays from the Saturday before Memorial Day through Labor Day on Harveys Lake in Luzerne County.

*A. Effective Date*

The final-form rulemaking will go into effect on January 1, 2006.

*B. Contact Person*

For further information on the final-form rulemaking, contact Laurie E. Shepler, Chief Counsel, P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7815. This final-form rulemaking is available on the Commission's website at [www.fish.state.pa.us](http://www.fish.state.pa.us).

*C. Statutory Authority*

The amendments to §§ 111.4 and 111.40 (relating to Beaver County; and Luzerne County) are published under the statutory authority of section 5124 of the code (relating to particular areas of water).

*D. Purpose and Background*

The final-form rulemaking is designed to update, modify and improve the Commission's boating regulations. The specific purpose of the final-form rulemaking is described in more detail under the summary of changes.

*E. Summary of Changes*

(1) *Section 111.4.* A review of the Commission's regulations uncovered a minor discrepancy in the description of the special regulation for the Beaver River. The regulation establishes a slow no wake zone for a length of 2 miles, but the regulation also references River Mile 0.0

and River Mile 2.3, a distance of 2.3 miles. The Commission has corrected this discrepancy as set forth in the notice of proposed rulemaking.

The Connequenessing Creek Dam was a wicket dam near Ellwood City. In its early life, the pool behind the dam was used by locals for waterskiing under very strict regulations. These regulations were removed in the mid-1980s, and a 10 horsepower restriction was applied to allow limited use. The dam no longer exists as an operational structure. Without the dam creating an impoundment, there is no reason to retain the current 10 horsepower restriction. Therefore, the Commission has deleted this regulation as set forth in the notice of proposed rulemaking. With the deletion of this regulation, the creek will revert to general unlimited horsepower. However, since the unimpounded depth of the creek is insufficient to support power boats, the change will have no impact on current or potential motor boating activities.

(2) *Section 111.40.* The Commission received a petition from the Harveys Lake Protective Association to amend the regulations to establish a 45-mile per hour speed limit from sunrise to sunset on weekends and holidays from the Saturday before Memorial Day through Labor Day. As part of staff's review of the petition, they polled other states and found that relatively few states use radar extensively. The states that do, Maryland, Florida and Missouri, primarily use radar on waters with narrow channels or rivers where the boat traffic is relatively constrained. All have indicated that there are limitations on the use of radar on open waters with heavy boat traffic. Nonetheless, speed limits act as a social and psychological deterrent and have some value. Accordingly, the Commission has adopted the 45-mile per hour speed limit on Harveys Lake as set forth in the notice of proposed rulemaking.

*F. Paperwork*

The final-form rulemaking will not increase paperwork and will create no new paperwork requirements.

*G. Fiscal Impact*

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form rulemaking will impose no new costs on the private sector or the general public.

*H. Public Involvement*

Notice of proposed rulemaking was published at 35 Pa.B. 2394 (April 23, 2005). The Commission did not receive any public comments regarding the proposed amendments to § 111.4. The Commission received two public comments regarding the proposed speed limit on Harveys Lake, both supporting the proposed rulemaking. After the formal comment period, the Commission received two additional public comments, one supporting and one opposing the speed limit. Copies of all public comments were provided to the Commissioners.

*Findings*

The Commission finds that:

(1) Public notice of intention to adopt the amendments adopted 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 promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided, and the comments that were received were considered.

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

*Order*

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

(a) The regulations of the Commission, 58 Pa. Code Chapter 111, are amended by amending §§ 111.4 and 111.40 to read as set forth at 35 Pa.B. 2394.

(b) The Executive Director will submit this order and 35 Pa.B. 2394 to the Office of Attorney General for approval as to legality as required by law.

(c) The Executive Director shall certify this order and 35 Pa.B. 2394 and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on January 1, 2006.

DOUGLAS J. AUSTEN, Ph.D.,  
*Executive Director*

**Fiscal Note:** Fiscal Note 48A-165 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 05-1713. Filed for public inspection September 16, 2005, 9:00 a.m.]

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