

RULES AND REGULATIONS

Title 4—ADMINISTRATION

STATE EMPLOYEES' RETIREMENT SYSTEM

[4 PA. CODE CH. 250]

Special Rules of Administrative Practice and Procedure

The State Employees' Retirement Board (Board) proposes to amend Chapter 250 (relating to special rules of administrative practice and procedures) by amending § 250.1 (relating to applicability of general rules) and adding § 250.2 (relating to appeal period from decisions of administrative staff).

A. Effective Date

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

B. Contact Person

For further information contact Robert Gentzel, Director of Communications and Policy, State Employees' Retirement System, 30 North Third Street, P. O. Box 1147, Harrisburg, PA 17108-1147, (717) 787-9657 or Paul M. Stahlnecker, Counsel, State Employees' Retirement System, 30 North Third Street, Harrisburg, PA 17101, (717) 783-7317.

C. Statutory Authority

This final-form rulemaking is being made under the authority of 71 Pa.C.S. § 5902(h) (relating to administrative duties of the board).

D. Summary of the Final-Form Rulemaking

This final-form rulemaking formalizes current Board practice of allowing for a 30-day appeal period for parties aggrieved by an administrative decision of the State Employees' Retirement System (SERS).

E. Summary of Comments and Responses

No comments were received from the Independent Regulatory Review Commission (IRRC), the House State Government Committee and the Senate Finance Committee (Committees) or the public.

F. Benefits, Costs and Compliance

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

Benefits

The final-form rulemaking is intended to alleviate any confusion and prevent possible disputes with regard to the granting of the additional 20-day period in which an aggrieved party may file an appeal.

Costs

There are no costs to the Commonwealth, its citizens or State employees associated with this final-form rulemaking.

Compliance Costs

The final-form rulemaking is not expected to impose any additional compliance costs on State employees.

G. Sunset Review

Sunset review is not applicable.

H. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on July 24, 2007, the Board submitted a copy of the proposed rulemaking, published at 37 Pa.B.

4209 (August 4, 2007), IRRC and the Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, the Board is required to provide IRRC and the Committees with copies of the comments received during the public comment period, as well as other documents requested. The Board received no comments with regard to this final-form rulemaking.

Under section 5.1(j.2) of the Regulatory Review Act, on July 22, 2009, this final-form rulemaking was deemed approved by the Committees. Under section 5.1(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC, effective July 22, 2009.

I. Findings

The Board finds that:

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

(2) The final-form rulemaking is necessary and appropriate for the administration of the Retirement Code.

J. Order

The Board, acting under 71 Pa.C.S. § 5902(h), orders that:

(a) The regulations of the Board, 4 Pa. Code Chapter 250, are amended by amending § 250.1 and adding § 250.2 to read as set forth at 37 Pa.B. 4209.

(b) The amendments shall be submitted to the Office of Attorney General for approval as to legality as required by law.

(c) The Secretary of the Board shall certify this order and 37 Pa.B. 4209 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*.

LEONARD KNEPP,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 37 Pa.B. 4208 (August 4, 2007).)

Fiscal Note: Fiscal Note 31-6 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 09-1677. Filed for public inspection September 11, 2009, 9:00 a.m.]

Title 28—HEALTH AND SAFETY

DEPARTMENT OF HEALTH

[28 PA. CODE CHS. 1101, 1103, 1105,
1107 AND 1113]

Supplemental Nutrition Program for Women, Infants and Children

The Department of Health (Department), Bureau of Family Health, Division of WIC (WIC Program), amends

28 Pa. Code Chapters 1101, 1103, 1105, 1107 and 1113. The chapters govern the authorization and management of stores participating in the Special Supplemental Nutrition for Women, Infants and Children (WIC) Program.

Without some of these revisions, the United States Department of Agriculture, Food Nutrition Services (USDA-FNS) may withhold funding to the WIC Program. If Federal funding is interrupted, the Department would likely need to suspend or eliminate the WIC Program, having a significant negative impact on the health and welfare of WIC eligible women, infants and children. Loss or even suspension of Federal funding for the WIC Program would render it inoperable, as 100% of the WIC Program's funds are Federal funds; or would place a difficult, if not impossible, financial burden on the Commonwealth, should the Commonwealth continue to operate the WIC Program with state funds. The WIC Program serves approximately 260,000 families and individuals each month, and is a high profile benefits program not only in this Commonwealth, but also around the country. An interruption in the funding of the WIC Program would affect the receipt of necessary food benefits for the participants of the WIC Program, the retail grocery business and the employment of personnel at 24 local WIC agencies.

Other revisions to the WIC Program State regulations include the addition of language which allows the WIC Program to more smoothly incorporate technological advancements. These advancements ensure that the Pennsylvania WIC Program remains at the forefront of quality and efficiency and continues to provide the best experience for WIC participants and WIC authorized stores.

The Department published notice of the proposed rule-making at 38 Pa.B. 4767 (August 30, 2008), and provided a 30-day public comment period. There were no comments submitted from the public.

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of the proposed regulations on August 15, 2008, to the Independent Regulatory Review Commission (IRRC) and to the House Health and Human Services Committee and the Senate Public Health and Welfare Committee (Committees). In addition to submitting the proposed regulations, the Department provided IRRC and the Committees with a copy of a Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." There were no comments submitted by the Committees. IRRC submitted comments to the Department on October 29, 2008. The comments and the Department's responses to them appear in the summary of the final-form rulemaking.

A. Comments and Revisions

Section 1101.2. Definitions.

IRRC suggested the Department explain the phrase "Federally-mandated cost containment measures." The phrase "Federally-mandated cost containment measures" refers to the requirement that states establish peer group pricing and competitive pricing as found in 7 CFR 246.12(g)(4)(ii) (relating to food delivery systems).

IRRC also noted the proposed definition for "peer group" referred to "criteria selected by the Department," and the proposed definition for "store peer group system"

referred to "common characteristics" or "criteria that affect food prices." IRRC suggested the Department provide examples of such criteria for both phrases. In response to IRRC's request, the Department supplemented the phrase "criteria selected by the Department" in the definition of "peer group" with, "including the size of a store sales floor, number of cash registers in the store, number of stores owned and county where the store is located." The Department also supplemented the phrase "common characteristics" and "criteria that affect food prices" in the definition of "store peer group system" with "the size of a store sales floor, number of cash registers in the store, number of stores owned, and a measure of geography, such as metropolitan or other statistical areas that form distinct labor and product markets."

Section 1103.1. Authorization and reauthorization process and requirements.

IRRC noted that proposed subsections (b)(5) and (c)(2) refer to "any information necessary" for the Department to determine whether the store qualifies as an above-50-percent-store. IRRC suggested the Department provide examples of the relevant "information" needed. In response to IRRC's request, the Department added the following language "this information may include official State and Federal Income Tax Filings, official State Sales Tax records, inventory purchase records, sales records and/or a self-declaration from the applicant."

IRRC also noted that proposed subsection (d)(7) states that if the Department does not receive from the store the information requested to determine if the store qualifies as an above-50-percent-store within 20-calendar days, the Department will terminate a store's authorization or reauthorization. IRRC inquired about the appropriateness of this time frame. The 20-day time period was selected to remain consistent with current WIC Program policy to give 20 days for payment or receipt of items (see the explanation of § 1107.1a(d)(13)) (relating to disqualifications). If those items are not received within 20 days, a "Late Due Notice" is sent to the store giving them an additional 10 days. If the items are not received after those additional 10 days, a disqualification letter is sent to the store which gives the store an additional 30 days to submit the items. If the items are still not received, the store is disqualified. This disqualification can be appealed by a store.

Section 1103.4. Selection criteria for authorization and reauthorization.

IRRC noted that under proposed paragraph (15), the Department will provide notice by September 15 of minimum technology requirements for the following year. IRRC asked whether notice by September 15 would allow a store sufficient time to purchase, test and implement the new technology in all circumstances, given the potential magnitude of the technological change. Stores will have ample time to purchase, test and implement the new technology requirement because this paragraph will apply only to new stores applying for initial authorization. Stores authorized prior to the effective date of this paragraph, maintaining an uninterrupted authorized status, will be exempt from the requirements of this paragraph. If a store applies for authorization, it will be required to "meet the minimum technology requirement" which is set by the Department prior to the start of that Federal Fiscal Year.

Section 1103.8. Store peer group system.

IRRC noted proposed subsection (b) stated the Department will create peer groups "based upon at least two criteria selected by the Department. . . ." IRRC further noted this subsection lists a measure of geography as one criterion, but it does not explain the second. IRRC suggested the Department should explain both criteria. In response, the Department has revised the subsection to explain the criteria as "the size of a store sales floor, number of cash registers in the store, number of stores owned, and a measure of geography, such as metropolitan or other statistical areas that form distinct labor and product markets."

Section 1107.1a. Disqualifications.

IRRC inquired about how long a store must be in violation of this section before it will be subject to a 1 year disqualification. IRRC also asked if the store will receive notice of the violation and be given an opportunity to cure it before it being disqualified, what happens after the 1 year period ends, and the procedure by which a store becomes reauthorized.

There are many reasons for disqualification in this section, all of which can be appealed by a store. All State WIC programs are required by Federal regulation at 7 CFR 246.12(j) to monitor WIC authorized stores for compliance with WIC regulations, and stores must follow WIC regulations, even when not under investigation.

Violation of § 1107.1a(d)(4) would be observed during a retail store monitoring review. All WIC programs are required to annually monitor at least 5% of their authorized retail stores through "routine monitoring" per 7 CFR 246.12(j)(2). This is done with a computerized random selection process and WIC representatives who visit the randomly selected stores. Each store is reviewed to determine whether it is maintaining the minimum inventory of WIC items priced at, or below, competitive price levels and if the WIC allowable items are fresh or stale dated. The store personnel are asked a series of questions to ensure they are following the program rules and regulations. If a store passes one monitoring review during a monitoring investigation, the investigation is closed and the store is considered to be in compliance. Following each review, a store is sent written notification of the results of each review, and provided training after failing two monitoring reviews. A store must fail three monitoring reviews during a monitoring investigation before a store will be disqualified. The information about routine reviews and store notification can be found at § 1105.6(d).

Violations as a result of § 1107.1a(d)(6) and (7) could be reported by a WIC customer leading to a store inspected by WIC program staff. One incidence would warrant a store's disqualification.

Violation of § 1107.1a(d)(8) would warrant a 1-year immediate disqualification of the store.

According to 7 CFR 246.12(j)(4), each State WIC program is required to monitor at least 5% of the WIC authorized stores through compliance investigations. Violation of § 1107.1a(d)(9)—(12) would be discovered during a compliance investigation, which is not closed until a store passes two consecutive compliance buys. Following each compliance buy, a store is given written notification of the results of each compliance buy, and required to receive mandatory cashier training if they fail two compliance buys. Under § 1105.6(b)(8) (relating to monitoring of WIC authorized stores), the Department may withhold notification of compliance buy results, and may withhold

providing training or conducting further compliance investigations, when fraudulent activity by the WIC authorized store is indicated during a compliance investigation or by local agency or participant complaint. A store may be disqualified if it fail at least three compliance buys through the course of a compliance investigation. The information about compliance investigations and store notification can be found at § 1105.6(b).

Violation of § 1107.1a(d)(13) occurs when a store fails to reimburse the Department for overpayments, overcharges or other improper charges. Stores are given 20 days to reimburse the Department following written notification. If payment is not received, the store is given an additional 10 days through written notification. If payment is still not received, a store is sent a disqualification letter that gives it an additional 30 days to send payment. If the store still does not provide payment, the store is disqualified.

If there was a violation of § 1107.1a(d)(14) that can be proven, the store would be immediately disqualified for 1 year.

Under 7 CFR 246.12(h)(7)(i), State WIC programs are required to provide annual training to each WIC authorized retail store. This training is meant to keep stores notified of any changes in Federal or State regulations, and ensure stores maintain the knowledge to transact WIC checks properly. A store must attend an annual training session by the end of each Federal Fiscal Year (FY) or the store will be disqualified for noncompliance with WIC regulations. If a store misses its annual training session, it is given an opportunity to attend alternative training sessions before being disqualified.

A store may apply for authorization following a 1-year period of disqualification. If a store is in the program for a period of 3 consecutive years, it would be required to be reauthorized. The information regarding what stores may do after a 1-year disqualification can be found in § 1107.1a(l). The information about reauthorizations can be found in § 1103.1, referring to authorizations and reauthorizations.

Section 1105.1. Training.

The Department did not receive comments on this section.

Section 1105.2. Price adjustment.

The Department did not receive comments on this section.

Section 1105.3. Terms and conditions of participation.

The Department did not receive comments on this section.

Section 1105.5. Changes in availability or location of WIC authorized stores.

The Department did not receive comments on this section.

Section 1105.6. Monitoring of WIC authorized stores.

The Department did not receive comments on this section.

Section 1107.1a. Disqualifications.

The Department did not receive comments on this section.

Section 1107.2. Civil money penalties.

The Department did not receive comments on this section.

Section 1113.1. Right to administrative appeal.

The Department did not receive comments on this section.

B. Fiscal Impact

Fiscal Impact on the Department

The WIC Program is 100% Federally funded. No State dollars are involved in the operation of the WIC Program. The regulatory change to § 1105.3, allowing a WIC check to be used at any authorized store, causes the WIC Program to incur a one-time equipment purchase fee.

Pennsylvania is one of the few states whose regulations provide for store specific WIC checks. The customary practice in states that are nonstore specific is to require their banking contractor to capture the authorized store number from the face of each check as it is processed through the bank. This service would have added approximately \$.02 to the cost of each check processed. Pennsylvania processes approximately 8 million WIC checks annually, which would result in an estimated direct cost increase of approximately \$160,000 annually if this method were implemented. Additional costs to the Department under this method would include the issuance and maintenance of WIC authorization stamps to approximately 1,500 authorized stores. The anticipated initial cost would be \$2,800 and ongoing replacement and new applicant stamp cost of approximately \$300 annually.

Pennsylvania chose an alternate method to this check identification system, which is less costly and less labor intensive. The alternate method uses direct data transfer from each WIC authorized store to the WIC Program. This is accomplished with the use of electronic cash registers, Magnetic Ink Character Recognition (mini-MICR) readers, a secure web site, and touchtone telephones. Each WIC authorized store is required to transfer check redemption data to the WIC Program, prior to depositing its redeemed WIC checks. The data is then combined electronically with each WIC check number, before the bank will redeem the check. This process will incur an initial cost of \$93,823 for the cost of the mini-MICR readers that will be supplied to stores that have the appropriate communications equipment. There will be no additional banking fees incurred. Since the Department was required by Federal law to implement these changes no later than July 1, 2006, before regulatory revisions could be completed, some of these costs have already been absorbed by the WIC Program.

Although costs to the Department initially increased, the long-term costs are greatly reduced. Additionally, savings in efficiencies at the local agency level will mitigate these initial cost increases. WIC checks previously identified the authorized store at which they were to be redeemed. However, when the store did not have the products the participant wanted or ceased operating, participants had to go back to the clinics to have the WIC checks reissued to another store. This created additional workload at the clinics, which is eased with these changes. Unfortunately, the actual cost of this additional workload cannot be quantified for accurate comparison to expected increases in costs.

Other aspects of changes in these regulations may cause some additional costs to the Department. The initial and annual determination of whether a store is, or is expected to, derive more than 50% of its annual revenue from the sale of food items from WIC sales and the establishment and maintenance of the store peer

group system will require additional staff time. However, it is anticipated this task can be absorbed by the existing staff.

In addition, the list of authorized infant formula manufacturers, wholesalers, distributors or retailers required to be provided to WIC authorized stores will include approximately 11,000—12,000 entities. The Department has worked with USDA and determined that such a list can be provided or made available to WIC authorized stores in an electronic format, thereby mitigating the cost of production of an 11,000—12,000 entry list to approximately 1,400 WIC authorized stores annually.

Any cost increases as a result of these changes mandated by Federal law will be covered by the Federal funding provided to the WIC Program. Additional costs saving may also be realized from the cost containment measures in these regulations as required by Federal law.

Fiscal Impact on the Regulated Community

The Department does not anticipate any increased costs for the regulated community as a result of these regulations.

C. Paperwork Requirements

Paperwork Requirements for the Department

The Department's paperwork will increase in obtaining, preparing and updating the list of authorized infant formula manufacturers, wholesalers, distributors and retailers. The Department's paperwork requirements will also increase in the evaluation and documentation of the review of each store's actual or anticipated WIC sales to determine if any store is deriving more than 50% of its annual revenue from the sale of food items from WIC sales and in establishing and maintaining the store peer group system and the applicable competitive and maximum allowable prices.

Paperwork Requirements for the Regulated Community

The amendments do not increase paperwork for WIC Program participants. The WIC authorized stores are required to submit electronic data regarding the redemption of WIC checks prior to deposit. Although this task will increase the time necessary for WIC authorized stores to prepare WIC checks for deposit, it will be somewhat offset by the fact that cashiers will no longer need to verify that the WIC check being presented for payment is payable to the store.

D. Statutory Authority

The WIC Program was authorized through an amendment to the Federal Child Nutrition Act of 1966 (42 U.S.C.A. § 1786). Congress authorized the USDA-FNS to contract with and make funds available to states to administer the WIC Program. In this Commonwealth, the WIC Program receives 100% of its funding from the USDA-FNS. Recent amendments to the Federal WIC statutes and appropriations necessitate these regulatory revisions. See Child Nutrition and WIC Reauthorization Act, Pub. L. No. 108-265, § 203(e)(10), 118 Stat. 729 at 776—779 (2004) (codified at 42 U.S.C. § 1786(h)(11)); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2833 and 2850 § 780; and, Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, 119 Stat. 2120, 2144 and 2163 § 787.

There are no state statutes governing the operation or administration of the WIC Program. The Women's, Infants' and Children's Nutrition Improvement Act (62 P. S. §§ 2951—2955) authorizes additional state funding for

the expansion of the WIC Program. The Commonwealth, however, has not provided funding for the expansion of the program since State FY 1996.

The State regulations governing the WIC Program were published at 29 Pa.B. 3841 (July 24, 1999), following the decision of the Commonwealth Court in *Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health*, 713 A.2d 177 (Pa. Cmwlth. 1998). The Commonwealth Court held that the Department was required to promulgate regulations governing the selection and management of grocery stores to participate in the WIC Program. The State regulations added 28 Pa. Code Part VIII (relating to supplemental nutrition program for women, infants and children (WIC program)). The regulations also deleted 28 Pa. Code §§ 8.41—8.74, the Department's then existing regulations pertaining to WIC Program administrative appeals.

The final-form regulations are published under section 2102(g) of The Administrative Code of 1929 (code) (71 P. S. § 532(g)), which provides the Department general power to promulgate regulations to carry out its duties. Section 2102(a) of the code gives the Department the authority and duty to protect the health of the people of this Commonwealth. See 71 P. S. § 532(a).

E. Effective Date/Sunshine Date

The regulations will become effective upon publication in the *Pennsylvania Bulletin* as final-form rulemaking. The regulations will be monitored continuously and will be updated as required by changes in Federal laws governing the WIC Program. Therefore, no sunset date has been set.

F. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. §§ 745.1—745.15), the Department submitted a copy of a notice of proposed rulemaking, published at 38 Pa.B. 4767, to IRRC and to the Chairpersons of the House Health and Human Services Committee and the Senate Public Health and Welfare Committee (Committee) on August 15, 2008. The Department received no comments during the formal comment period. In compliance with the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of all other required documentation.

In compliance with section 5.1(a) of the Regulatory Review Act, the Department submitted a copy of the final-form rulemaking to IRRC and the Committees on June 4, 2009. In addition, the Department provided IRRC and the Committees with information pertaining to commentators and a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

In preparing this final-form rulemaking the Department has considered all comments received from IRRC, the Committees and the public.

This final-form rulemaking was deemed approved by the Committees on July 22, 2009. IRRC met on July 23, 2009, and approved the regulation in accordance with section 5.1(e) of the Regulatory Review Act. The final-form rulemaking was delivered to the Office of Attorney General on August 6, 2009. The Office of Attorney General approved the final-form rulemaking on September 1, 2009.

G. Contact Person

Questions regarding these regulations may be submitted to Greg Landis, Director, WIC Program, 2150 Herr Street, 1st Floor, Harrisburg, PA 17103, (717) 783-1289. Persons with a disability may submit questions in alternative format such as audio tape, Braille or by using V/TT (717) 783-6514 or the Pennsylvania AT&T Relay Service at (800) 654-5984 (TT). Persons who require an alternative format of this document may contact Greg Landis at the previous address or telephone numbers so that necessary arrangements may be made.

H. Findings

The Department finds that:

(1) Public notice of intention to adopt the regulations 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 thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law and no public comments were received.

(3) The adoption of regulations in the manner provided by this order is necessary and appropriate for the administration of the authorizing statute.

I. Order

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

(1) The regulations of the Department, at 28 Pa. Code Chapters 1101, 1103, 1105, 1107 and 1113 are amended by amending §§ 1101.2, 1103.1, 1103.4, 1103.8, 1105.1—1105.3, 1105.5, 1105.6, 1107a.1, 1107.2 and 1113.1 as set forth in Annex A.

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

(3) The Secretary of Health shall submit this Order, Annex A and a Regulatory Analysis Form to IRRC and the Committees for their review and action as required by law.

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

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

Editor's Notice: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 4832 (August 8, 2009).

Fiscal Note: Fiscal Note 10-180 remains valid for the final adoption of the subject regulation.

EVERETTE JAMES,
Secretary

Annex A

TITLE 28. HEALTH AND SAFETY

PART VIII. SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM)

CHAPTER 1101. GENERAL PROVISIONS

§ 1101.2. Definitions.

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

Above-50-percent-store—A store that derives more than 50% of its annual food sales revenue from WIC checks, and a new store applicant expected to meet this criterion under guidelines approved by USDA-FNS.

* * * * *

Competitive price—The price established by the Department, at or below which a store shall maintain the required minimum inventory.

* * * * *

Food items—Items sold for human consumption that are eligible for purchase under the Food Stamp Program.

* * * * *

Food sales—

(i) Sales of all Food Stamp Program eligible foods intended for home preparation and consumption, including meat, fish, and poultry; bread and cereal products; dairy products; fruits and vegetables.

(ii) Food items such as condiments and spices, coffee, tea, cocoa and carbonated and noncarbonated drinks may be included in food sales when offered for sale along with foods in the categories identified in this definition.

(iii) The term does not include the sale of any item that cannot be purchased with food stamp benefits, such as hot foods or food that will be eaten in the store.

Food Stamp Program—The government benefits program operated under the authority of the Food Stamp Act of 1964 (7 U.S.C. Chapter 51) and 55 Pa. Code Part II, Subpart L (relating to Food Stamp Program), and administered by the USDA-FNS and the Department of Public Welfare.

Full line grocery store—A store that:

(1) Offers for sale, in addition to WIC authorized foods, food items from each of the following four food categories on a continuous basis:

- (i) Meat, poultry or fish.
- (ii) Bread or cereal.
- (iii) Vegetables or fruits.
- (iv) Dairy.

(2) Has available for sale at all times of operation and displays in a public area of the store, a minimum of three different varieties of food items in each of the four above listed food categories.

* * * * *

Overpayment—Payment to a WIC authorized store of a WIC check redeemed by the store in an amount in excess of the amount to which the store was entitled based upon the maximum allowable price applicable to the store's peer group for each allowable food authorized for purchase on the WIC check.

* * * * *

Peer group—The classification of an authorized store under the store peer group system, as determined by the criteria selected by the Department, including size of a store sales floor, number of cash registers in the store, number of stores owned, and county where the store is located.

* * * * *

Store peer group system—A classification of authorized stores into groups based on common characteristics or criteria including size of a store sales floor, number of

cash registers in the store, number of stores owned, and a measure of geography, such as metropolitan or other statistical areas that form distinct labor and product markets that affect food prices, for the purposes of applying appropriate competitive pricing criteria to stores at authorization and reauthorization and limiting payment for foods to competitive levels.

* * * * *

CHAPTER 1103. AUTHORIZATION OF STORES

§ 1103.1. Authorization and reauthorization process and requirements.

(a) *Duration of authorization or reauthorization.* To serve as a WIC authorized store, a store shall be authorized in accordance with subsection (b) or reauthorized in accordance with subsection (c). A store's authorization or reauthorization shall remain in effect until the Department acts on the store's application for reauthorization when the next periodic review is conducted in the trade area in which the store is located, unless terminated earlier in accordance with subsection (d). At least once every 3 years, the Department will conduct a periodic review in each trade area. Failure to submit an application for reauthorization as prescribed under subsection (c) shall result in expiration of the store's authorization or reauthorization. The Department will provide 30 days written notice to the store prior to expiration of authorization or reauthorization for any store failing to submit an application. A store that has received a letter of authorization dated less than 60 days prior to the date of the notice of the periodic review in the store's trade area shall be exempt from the periodic review.

(b) *Authorization process.*

(1) The store's representative shall contact the local agency responsible for the trade area where the store is located to request an application for authorization. The local agency shall send WIC Program information and an application for authorization to the store. The store shall complete the application for authorization and return it to the local agency.

(2) The Department will refuse to accept an application from a store if the store has been provided notice of disqualification or is disqualified from the WIC Program, if the Department determines that the store relocated or effected a change of ownership to avoid a disqualification, or if the store has been denied authorization or reauthorization and is not eligible to apply for authorization.

(3) The Department will not accept an application for authorization less than 90 days prior to the scheduled start date of the periodic review in that trade area unless the Department finds that there would be inadequate participant access, as set forth in § 1103.7 (relating to inadequate participant access), if it does not consider the application.

(4) If the store's application for authorization is accepted, the local agency shall schedule, as expeditiously as possible, an announced onsite review of the store to determine if the store meets the selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization). The local agency shall notify the store in advance of the approximate date of the review.

(5) The Department may request from the store any information necessary for the Department to determine whether the store qualifies as an above-50-percent-store. This information may include official State and Federal Income Tax filings, official State Sales Tax records,

inventory purchase records, sales records or a self-declaration from the applicant.

(6) The local agency shall conduct the onsite review and forward the results to the Department for a decision on the store's application.

(7) The Department will deny the application if the selection criteria in § 1103.4 are not satisfied, unless the Department grants probationary authorization under § 1103.2 (relating to probationary authorization). The Department will notify the store in writing whether the store's application for authorization is granted or denied. If the Department denies the application for authorization, the store shall be eligible to reapply for authorization 6 months after the effective date of the denial.

(c) *Reauthorization process.*

(1) The Department will include an application for reauthorization with the notice of periodic review it sends to the store. The local agency will collect the application for reauthorization at the time of the announced onsite review of the store to determine if the store meets the selection criteria in § 1103.4. The local agency shall notify the store in advance of the approximate date of the review.

(2) The Department may request from the store any information necessary for the Department to determine whether the store qualifies as an above-50-percent-store. This information may include official State and Federal Income Tax filings, Official State Sales Tax records, inventory purchase records, sales records or a self-declaration from the applicant.

(3) The local agency shall conduct the onsite review and forward the results to the Department for a decision on the store's application.

(4) The Department will deny the application without advance warning if the selection criteria in § 1103.4 are not satisfied, unless the store requests and the Department grants temporary authorization in accordance with § 1103.3 (relating to temporary authorization) or the Department grants probationary authorization in accordance with § 1103.2. The Department will notify the store in writing whether the store's application for reauthorization is granted or denied. If the Department denies the application for reauthorization, the store shall be eligible to apply for authorization 6 months after the effective date of the denial. If the Department grants and later rescinds temporary authorization, the store shall be eligible to apply for authorization 1 year from the date of the first onsite review for reauthorization.

(d) *Termination of authorization or reauthorization.* The Department will terminate a store's authorization or reauthorization if:

- (1) The store has been disqualified.
- (2) The store supplied false information in the application for authorization or reauthorization.
- (3) The store is not serving at least 25 participants 8 months following authorization.
- (4) Ownership of the store changes
- (5) The store relocates in excess of 1 mile of its current location and to a geographical area assigned to another local agency.
- (6) The store closes for more than 3 business days and does not notify the Department.
- (7) The Department does not receive from the store, within 20 calendar days of the store's receipt of a written

notice from the Department, the information the Department has requested necessary for it to determine whether the store qualifies as an above-50-percent-store.

(8) After authorization of the store, the Department determines if the store qualifies as an above-50-percent-Store. This paragraph does not apply to stores solely owned or operated by nonprofit entities.

§ 1103.4. Selection criteria for authorization and reauthorization.

The Department will use the following selection criteria to identify stores that meet the operational criteria to serve as a WIC authorized store:

- (1) The store shall be located within this Commonwealth.
- (2) A store seeking reauthorization shall serve at least 25 participants per month. The Department will deny reauthorization if the store is not serving 25 participants per month in the most recent month for which the Department has participant data at the time the onsite review for reauthorization is conducted.
- (3) The store shall have allowable foods properly stored and refrigerated.
- (4) The store may not have stale-dated allowable foods on its sales floor.
- (5) The store shall at all times have available on the premises the minimum inventory of allowable foods as established by the Department under § 1103.5 (relating to minimum inventory) at shelf prices that are equal to or less than the competitive prices applicable to the store's peer group for those foods. On a quarterly basis, the Department will publish in the *Pennsylvania Bulletin* and mail to all WIC authorized stores, the competitive prices and maximum allowable prices applicable to all peer groups for allowable foods for the next quarter.
- (6) The store shall be open for business and able to serve participants at least 8 hours per day, 6 days per week.
- (7) The store shall be sanitary. There may not be unremoved rubbish, vermin, or general lack of cleanliness.
- (8) The store shall operate as a full line grocery store in a permanent fixed location where participants may purchase allowable foods with their WIC checks.
- (9) If the store has been denied authorization or reauthorization within the past 12 months, the store must be eligible to apply for authorization under § 1103.1(b) or (c) or § 1103.3(b)(2) (relating to authorization and reauthorization process and requirements; and temporary authorization).
- (10) The store may not be currently disqualified from participation in the Food Stamp Program or have been assessed a civil money penalty in lieu of a disqualification from the Food Stamp Program that, had it been imposed, would not yet have expired.
- (11) The store may not be currently disqualified from the WIC Program.
- (12) The store shall have implemented all required corrective actions resulting from monitoring by the Department, including reimbursement of any overcharges or overpayments, and shall be in compliance with the applicable Federal and State regulations.
- (13) None of the store's current owners, officers, or managers shall have been convicted of or had a civil

judgment entered against them for conduct demonstrating a lack of business integrity.

(14) The store will not qualify or will not be expected to qualify as an above-50-percent-store. This paragraph does not apply to stores solely owned or operated by nonprofit entities.

(15) The store shall meet the minimum information technology requirements set by the Department. The Department will publish in the *Pennsylvania Bulletin* and mail to all WIC authorized stores, by September 15 of each year, the minimum technology requirements applicable for the following calendar year. This paragraph does not apply to stores authorized prior to September 12, 2009, and maintaining an uninterrupted authorized status.

§ 1103.8. Store peer group system.

(a) The Department will establish a store peer group system, including distinct competitive pricing criteria and allowable reimbursement levels for each peer group.

(b) The Department will create peer groups based upon at least two criteria selected by the Department. These criteria may include the size of a store sales floor, number of cash registers in the store, number of stores owned, and a measure of geography, such as metropolitan or other statistical areas that form distinct labor and product markets. The Department will annually publish the peer group selection criteria in the *Pennsylvania Bulletin*.

(c) The Department will place a store seeking authorization into an appropriate peer group based upon information gathered from the store's application as completed by the store and returned to the local agency in accordance with § 1103.1(b)(1) (relating to authorization and reauthorization process and requirements). The Department will notify a store of its peer group classification prior to conducting an onsite review under § 1103.1(b)(5). A WIC authorized store seeking reauthorization shall remain in the peer group previously selected for the store unless otherwise notified by the Department.

(d) A WIC authorized store shall adhere to the competitive prices and maximum allowable prices applicable to the store's peer group.

(e) A WIC authorized store shall inform the Department of any store changes applicable to the peer group selection criteria in effect.

CHAPTER 1105. REQUIREMENTS OF WIC AUTHORIZED STORES

§ 1105.1. Training.

(a) *Initial training.* Following authorization, the local agency shall provide initial training for the personnel the WIC authorized store designates. The training shall be mandatory and shall occur within 30 days after the date of authorization. A store receiving authorization may not accept WIC checks prior to having its designated personnel attend the initial mandatory training.

(b) *Annual training.* The Department will provide for WIC authorized stores annual training which is designed to prevent WIC Program errors and abuses and to improve WIC Program services. The following apply to annual training:

(1) A WIC authorized store shall ensure that at least one representative from the store who is responsible for training store personnel on the WIC Program shall attend.

(2) Attendance is mandatory.

(3) The Department will offer each WIC authorized store two opportunities to attend.

(4) The Department will ensure that annual training is offered to a WIC authorized store either within the county in which it is located or in an adjoining county within the appropriate local agency's jurisdiction.

(5) Failure to have at least one representative attend training shall result in the Department imposing sanctions against the WIC authorized store under § 1107.1a(d)(15) (relating to disqualifications).

(c) *Corrective training.* The Department will provide corrective training as set forth in §§ 1103.2 and 1105.6 (relating to probationary, authorization; and monitoring of WIC authorized stores). Attendance is mandatory.

§ 1105.2. Price adjustment.

(a) *Determination of overpayment.* In each calendar quarter, the Department will compare the maximum amount for which a WIC authorized store could have redeemed a WIC check, based upon the maximum allowable prices applicable to the store's peer group for foods authorized for purchase on the check, against the actual amount for which the WIC check was redeemed, to determine whether there was an overpayment.

(b) *Pursuit of reimbursement.* The Department will seek reimbursements from a WIC authorized store when the price comparison reveals overpayments to the store in excess of \$10 in a calendar quarter.

(c) *Reimbursement of overpayments.* A WIC authorized store shall reimburse the Department for overpayments within 20-calendar days of the date on the Department's notice of the overpayment, unless the WIC authorized store disputes the determination of overpayment.

(d) *Dispute of overpayments.* A WIC authorized store that disputes a determination of overpayment shall submit the basis for its dispute in writing to the Department, postmarked within 15-calendar days of the date on the Department's notice. Reimbursement the Department determines is owed shall be due within 15-calendar days of the mailing date of the Department's notification of its resolution of the dispute. The Department's resolution of a dispute regarding overpayments is not an adverse action that may be appealed.

(e) *Sanctions.* The Department will impose a sanction against a WIC authorized store under § 1107.1a(d)(11) (relating to disqualifications) if the store fails to reimburse the Department for an overpayment within the time required under subsections (c) and (d).

§ 1105.3. Terms and conditions of participation.

(a) *General terms and conditions.* A WIC authorized store shall adhere to this subsection. Failure to do so shall result in the imposition of sanctions under § 1107.1 (relating to imposition of sanctions). A WIC authorized store shall:

(1) Adhere to all applicable statutes and State and Federal regulations, regulating the WIC Program, including the nondiscrimination provisions of 7 CFR Parts 15, 15a, 15b and 246, and this part.

(2) Inform the public of its participation in the WIC Program by displaying at least one WIC decal supplied by the Department in a place conspicuously visible to the general public.

(3) Be accountable for the actions of owners, officers, managers, agents and employees in the handling of WIC

checks, the selling of allowable foods, and the performance of other conduct related to the WIC Program.

(4) Comply with the selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization) throughout the authorization period.

(5) Provide orientation and training to employees regarding applicable regulations governing the WIC Program.

(6) Maintain a copy of the current WIC food list at each check-out aisle.

(7) Send at least one representative who is responsible for training store personnel on the WIC Program to WIC Program training annually, or more often if required by the Department under § 1105.1(c) (relating to training).

(8) Immediately notify the Department when store ownership changes, when store operations cease on a permanent or temporary basis, or when any other circumstance impacting service to participants occurs.

(9) Allow Federal, State, Department and local agency representatives who are involved in monitoring the store's compliance with statutes and regulations governing the WIC Program, to visit the store to observe its procedures for accepting and handling WIC checks and to conduct announced or unannounced onsite reviews to determine compliance with applicable Federal and State regulations.

(10) Provide Federal, State, Department and local agency representatives who are involved in monitoring the store's compliance with statutes and regulations governing the WIC Program, access to all WIC checks accepted by the store and on its premises at the time of an onsite review.

(11) Provide Federal, State, Department and local agency representatives who are involved in monitoring the store's compliance with statutes and regulations governing the WIC Program, access, which includes providing copies if requested by the Department, to purchase records used for Federal tax reporting purposes and other records as requested to determine compliance with WIC Program requirements.

(12) Agree that authorization does not constitute a license or a property interest, that the store must reapply for authorization in accordance with § 1103.1(c) (relating to authorization and reauthorization process and requirements), and that neither the Department nor the WIC authorized store has an obligation to renew the store's authorization to participate in the WIC Program.

(13) Agree that the store's authorization to participate in the WIC Program shall become void when ownership of the store changes.

(14) Display the current shelf price of each allowable food either on the allowable food, on the shelf immediately above or below the allowable food, or prominently on an allowable food price list easily located by participants and clearly visible to them.

(15) Not transfer or assign its WIC authorization or reauthorization to another person or entity.

(16) Maintain purchase records and records used for Federal tax reporting purposes for allowable foods for a minimum of 2 years.

(17) Purchase infant formula for resale to WIC participants only from Department authorized infant formula manufacturers, wholesalers, distributors or retailers. Information on where to obtain the list will be published by

the Department in the *Pennsylvania Bulletin* simultaneously with the initial publishing of this subsection.

(18) Provide the Department, within 20 calendar days of the store's receipt of a written notice from the Department requesting the additional information, any information the Department has requested necessary to determine whether the store qualifies as an above-50-percent-store. This paragraph does not apply to stores solely owned or operated by nonprofit entities.

(b) *Terms and conditions of participation with regard to participants.* A WIC authorized store shall serve participants and authorized representatives as set forth in this subsection. The Department will impose sanctions against a WIC authorized store that fails to do so, as set forth in § 1107.1. A WIC authorized store shall:

(1) Provide allowable foods to a participant or authorized representative only as authorized on the WIC food list as specified on the WIC check.

(2) Not encourage or discourage a participant or authorized representative from purchasing an allowable food specified on the WIC check.

(3) Provide an allowable food to a participant or authorized representative at or below the current price the store charges other customers, and at or below the maximum allowable price applicable to the store's peer group.

(4) Not seek restitution or payment from a participant or authorized representative for a WIC check not reimbursed by the Department, or contact a participant or authorized representative concerning a WIC transaction that occurs in the store.

(5) Not seek restitution or payment from a participant or authorized representative for an allowable food authorized for purchase on the WIC check tendered by the participant or authorized representative.

(6) Not request the personal address, telephone number or other personal identification of a participant or authorized representative.

(7) Offer each participant or authorized representative the same courtesies offered other customers, and not distinguish or identify a participant or authorized representative from other customers, if no other terms and conditions of participation are violated in doing so.

(8) Provide services to each participant or authorized representative without regard to race, color, age, sex, religion, nationality origin or disability.

(9) Provide the same promotional incentive for a purchase made with a WIC check as given for a cash purchase.

(10) Accept cents-off coupons, a store discount card or other discounts from a participant or authorized representative for an allowable food, and deduct the savings in calculating the total purchase price entered into the "Pay Exactly" amount on WIC checks.

(11) Accept "buy one get one free" coupons and manufacturers' promotional free product offers from a participant or authorized representative.

(12) Provide a promotional incentive for use of a WIC check only if the same incentive is offered for a cash purchase.

(c) *Terms and conditions of participation with regard to WIC check processing and redemption.* A WIC authorized store shall adhere to the requirements of this subsection with regard to WIC check processing and redemption.

The Department will impose sanctions against a WIC authorized store that fails to do so, as set forth in § 1107.1. A WIC authorized store shall:

- (1) Treat the acceptance of a WIC check as a financial transaction between the WIC authorized store and the Department, not the participant.
- (2) Accept a WIC check only if the participant or authorized representative presents the WIC check on or between the "First Day to Use" and the "Last Day to Use" designations on the WIC check.
- (3) Accept a WIC check only if a valid WIC identification card is presented at the time of the WIC transaction.
- (4) Accept a WIC check only if the signature of the participant or authorized representative is obtained on the WIC check at the time of the WIC transaction and the family identification number on the WIC check matches the family identification number on the identification card.
- (5) Accept a WIC check only if there is no visible alteration on the WIC check.
- (6) Charge the WIC Program only for the types and quantities of allowable foods specified on the WIC check and selected for purchase by the participant or authorized representative.
- (7) Record in ink, on each WIC check immediately after completion of the WIC transaction and prior to the participant or authorized representative signing the WIC check, the actual purchase amount of the transaction net of any cents-off coupons or other discounts.
- (8) Properly correct an error made in recording the "Pay Exactly" amount of a WIC check by drawing a single line through the incorrect amount and writing the correct amount above or below the error and having the participant or authorized representative initial next to the corrected amount. No other corrections are permissible.
- (9) Not alter any information on the WIC check as presented by the participant or authorized representative.
- (10) Not provide a substitute item, raincheck or cash reimbursement for an allowable food that is unavailable.
- (11) Not provide cash or credit for a WIC check.
- (12) Not provide change for a coupon tendered during the WIC transaction.
- (13) Not provide an exchange to replace an allowable food returned by a participant or authorized representative unless the exchange is to replace an identical product that was found to be damaged or otherwise unusable.
- (14) Not refund money for an allowable food purchased in a WIC transaction that is returned by a participant or authorized representative.
- (15) Not accept a WIC check as payment for an item other than an allowable food specified on the WIC check.
- (16) Not charge the WIC Program for an allowable food not received by the participant or authorized representative or for an allowable food in excess of the quantity prescribed on the WIC check.
- (17) Not charge the WIC Program for the sale of an amount of an allowable food which exceeds the store's documented inventory of that food item covering the period of time under review and in which the sale was made.
- (18) Prior to depositing WIC checks, transmit records of WIC check numbers from WIC checks accepted by the

store to the Department through transmission mechanisms made available by the Department.

- (19) Deposit a WIC check accepted by it directly to its bank account no later than 45 days after the "First Day to Use" date on the WIC check.
- (20) Not receive, transact, redeem or otherwise dispose of a WIC check in violation of check redemption procedures set forth in this section.
- (21) Not use a WIC check for the purchase of any item other than an allowable food or for the payment of any debt.
- (22) Not collect Sales Tax in connection with a WIC transaction.

(d) *Denial of.* When the Department determines, prior to payment of a check submitted for redemption, that the store has committed a violation of this section that affects the payment to the store, the Department may deny payment. If payment already has been made, the Department may establish a claim for reimbursement by sending the store a written notice of the overcharge or other improper charge. The store may dispute the Department's claim and shall submit the basis for its dispute in writing within 15-calendar days of the date of the Department's written notice. The Department will notify the store of the resolution of the claim dispute. The Department's resolution of a claim dispute is not an adverse action that may be appealed.

§ 1105.5. Changes in availability or location of WIC authorized stores.

- (a) *Notification of store closing.* A WIC authorized store shall notify the Department at least 15 days prior to a temporary or permanent closing of the store, and provide the reason for closing and the expected duration of a temporary closing, if it has at least 15 days prior knowledge. Otherwise, it shall provide this information to the Department immediately after it acquires the information.
- (b) *Temporary store closing.* The Department may permit a WIC authorized store to temporarily close for reasons such as a natural disaster, death in immediate family or personal illness, without imposing a sanction against the store. In making a determination to permit a temporary closure, as well as the length of time of the closure, the Department will consider circumstances such as the nature of the disaster, number of WIC authorized stores affected by the disaster, nature and expected duration of illness, length of closing anticipated by the WIC authorized store, number of and distance to other WIC authorized stores, number of participants served by the store, or any other information that the Department may determine to be relevant.
- (c) *Store closing for remodeling.*
 - (1) A WIC authorized store that closes for less than 15 days for remodeling shall continue as a WIC authorized store if it notifies the Department at least 15-calendar days prior to the day the store closes for remodeling.
 - (2) A WIC authorized store that closes in excess of 15 store operation days for remodeling, shall automatically lose its status as a WIC authorized store and shall apply for and secure authorization before it may again serve as a WIC authorized store.
 - (d) *Store relocations.*
 - (1) A WIC authorized store that relocates 1 mile or less from its current location or within the same geographical area assigned to the local agency, and reopens within 15-calendar days at its new location, shall provide the Department with written notification of its new address.

The store will continue as a WIC authorized store if it notifies the Department at least 15-calendar days prior to the day the store closes for relocating.

(2) A WIC authorized store that relocates in excess of 1 mile of its current location and to a geographical area assigned to another local agency shall automatically lose its status as a WIC authorized store and shall apply for authorization at its new location to again serve as a WIC authorized store.

(3) A WIC authorized store that closes in excess of 3 store operation days for relocating shall notify the Department before doing so, or shall automatically lose its status as a WIC authorized store and shall apply for authorization to again serve as a WIC authorized store.

§ 1105.6. Monitoring of WIC authorized stores.

(a) *Purpose and types of monitoring of WIC authorized stores.*

(1) Federal, State or local representatives will conduct announced and unannounced onsite reviews of WIC authorized stores to determine compliance with applicable Federal and State regulations, and to investigate complaints regarding a store. The types of onsite reviews that may be conducted for monitoring purposes are compliance investigations, inventory audits, routine reviews and WIC transaction reviews. The monitoring process, to determine compliance with applicable Federal and State regulations, operates independently of the authorization process and may overlap more than one authorization period.

(2) The Department will conduct an annual analysis of a WIC authorized store's sales data to determine whether the store qualifies as an above-50-percent-store, except that stores solely owned or operated by nonprofit entities shall not be subject to this annual analysis.

* * * * *

(h) *Annual determination of WIC sales percentage.* The Department may request from a store information necessary for the Department to determine whether the store qualifies as an above-50-percent store. This information may include a request for State or Federal Income Tax returns, State Sales Tax records, Department of Revenue Form PA-3 filings, and sales records. This paragraph does not apply to stores owned by nonprofit entities.

CHAPTER 1107. SANCTIONS

§ 1107.1a. Disqualifications.

* * * * *

(d) *One-year disqualification.* The Department will disqualify a WIC authorized store for 1 year for any of the following violations:

(1) Two or more incidences of providing a food item other than an allowable food in exchange for WIC checks.

(2) Two or more incidences of providing an allowable food in excess of the amount authorized for purchase on the WIC check.

(3) Having a stale-dated allowable food on the sales floor.

(4) Failing to maintain on the premises, at all times minimum inventory requirements of an allowable food at or below the current competitive price applicable to the store's peer group for that food.

(5) Two or more incidences of failing to request a WIC identification card prior to accepting a WIC check.

(6) Failing to maintain a clean and sanitary store.

(7) Failing to properly store or refrigerate an allowable food.

(8) Closure of the store by a city, local or county health department.

(9) Charging or demanding that a participant or authorized representative pay for an allowable food with money or with another WIC check for purchases made with a WIC check.

(10) Two or more incidences of securing the signature of the participant or authorized representative prior to completing the "Pay Exactly" box on the WIC check.

(11) Two or more incidences of charging the WIC Program sales tax.

(12) Giving monetary change to the person who tenders a WIC check.

(13) Failing to reimburse the Department for overpayments, overcharges or other improper charges within the specified time frame.

(14) Physically altering or changing on the face of a WIC check the store name, food type or quantity, participant information, date, or printed dollar amount.

(15) Failing to have at least one representative of the store attend required training.

(16) Providing false information on the application for authorization or reauthorization.

(e) *Second mandatory sanction.* If a WIC authorized store, which previously has been assessed a sanction for any of the violations in subsections (b)—(d), receives another sanction for any of these violations, the Department will double the second sanction. The Department will double civil money penalties up to the limits allowed under § 1107.2(c) (relating to civil money penalties).

* * * * *

§ 1107.2. Civil money penalties.

(a) *Option available in lieu of a disqualification or denial of reauthorization.* The Department may offer to a WIC authorized store the option of paying a civil money penalty in lieu of a denial of reauthorization or a disqualification required under § 1107.1 (relating to imposition of sanctions), only if the Department finds inadequate participant access as set forth in § 1103.7 (relating to inadequate participant access). The Department will not provide this option for third or subsequent violations under § 1107.1a(b)—(d) (relating to disqualifications) or for any permanent disqualifications under § 1107.1a(a).

(b) *Calculation of civil money penalty.*

(1) For a civil money penalty in lieu of a disqualification under § 1107.1a(b), (c) or (d)(1) and (2), the Department will calculate the civil money penalty for each violation identified by multiplying 10% of the average monthly total value of WIC checks redeemed for the most recent 6-month period by the number of months the store would be disqualified under § 1107.1. If 6 months of information relating to the monthly value of WIC checks redeemed is not available, the Department will calculate the monthly average based upon the number of months for which information is available.

(2) For a civil money penalty in lieu of disqualification under § 1107.1a(d)(3)—(15), the Department will calculate the civil money penalty for each violation identified by multiplying 5% of the average monthly total value of WIC checks redeemed for the most recent 6-month period

by the number of months the store would be disqualified under § 1107.1. For a store to which the Department may deny reauthorization and for which this option is available, the Department will multiply 5% of the average monthly total value of WIC checks for the most recent 6-month period by 6 months to determine the civil money penalty to be paid. If 6 months of information relating to the monthly value of WIC checks redeemed is not available, the Department will calculate the monthly average based upon the number of months for which information is available.

(c) *Limitation of penalties.* The amount of the civil money penalty will not exceed \$10,000 for each violation. If, during the course of a single investigation, the Department determines a store has committed multiple violations, the Department will impose a civil money penalty for each violation. The total civil money penalty for all violations investigated as part of a single investigation will not exceed \$40,000.

(d) *Written agreement.* If the Department offers and the store agrees to pay a civil money penalty in lieu of disqualification, the Department and store shall set forth the terms of the agreement in writing. The terms may include a probationary period during which the Department may conduct monitoring to ensure action has been taken by the store to correct problems. The agreement will be effective when it is signed by the Director of the Division of WIC or the Director's designee.

(e) *Payment of the civil money penalty.* If a WIC authorized store does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the Department will disqualify the WIC authorized store for the length of the disqualification authorized for the violation for which the civil money penalty was assessed. If a civil money penalty is assessed for more than one violation, the Department will impose the disqualification for the period authorized for the most serious violation. The Department may permit payment of a civil money penalty by installments.

(f) *Outstanding financial liabilities.* Payment of the civil money penalty, unless specifically provided for in a written agreement between the Department and the store, does not relieve the store of any other past or future financial liability incurred by the store by reason of its participation in the WIC Program. This includes, by way of example, reimbursement to the Department of overpayments.

CHAPTER 1113. STORE APPEALS

§ 1113.1. Right to administrative appeal.

(a) A store has the right to appeal an adverse action of the Division of WIC that affects the store's participation in the WIC Program as a WIC authorized store. Adverse actions include:

(1) Termination of authorization or reauthorization in accordance with § 1103.1(d) (relating to authorization and reauthorization process and requirements).

(2) Denial of an application for authorization or reauthorization.

(3) Refusal to accept an application for authorization or reauthorization.

(b) A store may not appeal the following:

(1) The expiration of authorization or reauthorization.

(2) The validity or appropriateness of selection criteria.

(3) The validity or appropriateness of the Department's participant access criteria and the Division of WIC's participant access determination.

(4) The validity or appropriateness of the Department's store peer group system criteria and the criteria used by the Department to identify stores that qualify as an above-50-percent-store or that are comparable to above-50-percent-stores.

(5) Disqualification from the WIC Program as a result of disqualification from the Food Stamp Program.

(6) The resolution of an overpayment dispute under § 1105.2(d) (relating to price adjustment) or the resolution of an overcharge dispute under § 1105.3(d) (relating to terms and conditions of participation).

(c) A denial of authorization under § 1103.1(b)(7) and a disqualification imposed under § 1107.1a(a) (relating to disqualifications) shall be effective on the date of the store's receipt of notice of the adverse action. All other adverse actions shall be effective on the date set forth in the written notice.

[Pa.B. Doc. No. 09-1678. Filed for public inspection September 11, 2009, 9:00 a.m.]

Title 37—LAW

MUNICIPAL POLICE OFFICERS' EDUCATION AND TRAINING COMMISSION

[37 PA. CODE CH. 221]

Retired Law Enforcement Officers Identification and Qualification Cards

Description and Purpose

Under section 7 of the Retired Law Enforcement Identification Act (act) (53 P. S. § 753.7), the Municipal Police Officers' Education and Training Commission (Commission) is required to promulgate regulations necessary to carry out the provisions of the act. This final-form rulemaking provides for the eligibility, requirements, contents, issuance, and replacement of identification and qualification cards for retired Pennsylvania law enforcement officers.

Statutory Authority

This final-form rulemaking is authorized under section 7 of the act.

Effect

This final-form rulemaking will affect former law enforcement officers who retired from law enforcement agencies in this Commonwealth.

Effective Date/Sunset Date

These regulations will be continually monitored and updated as needed. Therefore, no sunset date has been set.

Comments and Responses

The Commission received several comments from members of the public who were concerned that the final-form rulemaking did not apply to individuals who retired from a Federal or out-of-State law enforcement agency. To address these concerns, the Commission amended § 221.31 (relating to eligibility). The Commission made no change to § 221.21 (relating to eligibility). For pur-

poses of issuing a retired law enforcement officer identification card, the State law only governs individuals who retired from law enforcement agencies in this Commonwealth. Individuals who retired from a Federal or out-of-State agency are authorized to carry under 18 U.S.C. § 926C(d)(2) (relating to carrying of concealed firearms by qualified retired law enforcement officers) by obtaining an identification card from the agency they retired from, coupled with a qualification card issued in this Commonwealth.

One commentator was concerned that §§ 221.21 and 221.31 could be interpreted to mean an individual was not eligible for an identification or qualification card unless the individual spent an aggregate of 15 or more years with a single, law enforcement agency in this Commonwealth. These sections have been clarified to eliminate that concern. One retiree asked whether the Commission or the former agency would determine whether the individual had retired in good standing with the requisite years of service. Section 221.21 has been revised to clarify that the decision will be made by the current head of the public agency from which the officer retired.

The Commission also received these additional comments from the Independent Regulatory Review Commission (IRRC):

IRRC noted that the terms “agency,” “public agency,” “law enforcement agency,” “issuing agency,” “law enforcement agency from which the applicant retired” and “retiring agency” seemed to be used interchangeably throughout the regulations. The final-form rulemaking has been revised to use the term “public agency” with more consistency.

Sections 221.23(b), 221.24(a) and 221.34(a) either require or permit a retired law enforcement officer to make requests related to identification and qualification cards. IRRC said the final-form rulemaking should specify whether these requests must be in writing. Public agencies in this Commonwealth that employ law enforcement officers vary greatly in terms of size and internal operating procedures. Accordingly, the Commission decided to leave the required form of request to the discretion of the individual public agencies and firearms instructors.

The definition of “certified law enforcement firearm instructor” in § 221.2 contains the phrase “or other certification approved by the . . . Commission.” IRRC believes the regulation should set forth the specific methods for obtaining “other certification” from the Commission. The Commission declined this suggestion as unnecessary because substantially similar language exists in the Commission’s current regulations regarding approval of CPR certifications and police training courses.

IRRC said the Commission should explain how a retired officer’s eligibility for a retired law enforcement identification card is affected by the Pension Forfeiture Act. IRRC’s suggestion was prompted by an objection from the Fraternal Order of Police (FOP), Pennsylvania State Lodge to § 221.21(4), which requires an officer to have a nonforfeitable right to benefits under the retirement plan of a public agency to be eligible for an identification card. That eligibility requirement is mandated by the Federal law, 18 U.S.C. § 926C(c)(3)(B)(5). Based on this eligibility requirement, the FOP mistakenly contends that no retired officer has a truly nonforfeitable right to benefits because a public official or employee’s pension is subject to forfeiture if the person is convicted of certain criminal offenses. However, the Pension Forfeiture

Act only pertains to offenses committed in relation to one’s office or employment. Therefore, if an officer retires without committing one of the enumerated offenses, the officer has a nonforfeitable right to retirement benefits.

IRRC commented on a discrepancy between language in the act and § 221.21(5) and § 221.31(2)(x) of the proposed rulemaking. Section § 221.21(5) has been removed. Section 221.31(2)(x) has been revised to be consistent with the act.

IRRC noted that § 221.22(b)(9) requires the identification card to contain “other information” as designated by the Commission. IRRC asked how one would know what other information to put on the card. IRRC also felt this provision seems to conflict with subsection (a), which requires all cards to be uniform. IRRC expressed a similar concern about § 221.32(b)(9). Subsection (b)(9) has been eliminated in both §§ 221.22 and 221.32.

IRRC asked why it is an option for a retired officer to obtain a replacement card under §§ 221.24(a) and 221.34(a) but it is a requirement to do so under §§ 221.24(b) and 221.34(b). If the identification card originally issued to a retired officer has been lost, stolen, destroyed, mutilated, or is illegible and the retired officer wants to carry a concealed weapon under the Federal Law Enforcement Officers Safety Act, the retired officer may choose to obtain a replacement card. If the officer does not want to carry a weapon, the person may choose not to have the identification card replaced. On the other hand, if there is an error on the card or information on the card is no longer correct, the card needs to be replaced with one containing accurate information. IRRC also asked why there is a fee for a replacement card under the former subsections but not the latter subsections. IRRC also asked the amount of the fees. IRRC questioned whether an individual must apply for replacement cards. IRRC noted that § 221.23 specifies the time frame within which a law enforcement agency must issue an initial identification card but does not set forth a time frame for issuing a replacement card. These subsections have been amended to clarify that there is a fee for all types of replacement cards unless the need for a replacement card is based on an error caused by the public agency. Then no fee will be charged. The Commission declined to set forth the amount of the fee in the regulation itself. The cost of replacing the card will depend on the cost of producing the cards at that point in time. The Commission does not want to have to change its regulation any time production costs change. The specific procedure and time frame for obtaining a replacement card will be determined by the agency issuing the identification card.

IRRC noted that commentators questioned what entity would be responsible for verifying that a retired officer meets the 16 criteria under § 221.31(2). This is a self-verification process in which the retiree certifies, under penalty of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities), that the person meets all of the eligibility criteria.

IRRC commented on Representative Ronald Marsico’s concern that there is an inherent conflict between § 221.31(2)(ii), which acknowledges that a retired officer can carry an “automatic weapon” and § 221.2(ix), which excludes “machine guns” from the definition of firearms. The two subsections do not conflict because there are fully automatic pistols that are not machine guns. IRRC questioned the need to permit a retired officer to carry an automatic weapon. Regardless of necessity, Federal law permits retired officers to carry automatic weapons.

IRRC pointed out that § 221.33(c) requires retired officers to meet firearms training and qualification standards without specifying what those standards are. IRRC believes the specific standards should be set forth in the regulation. The Commission declined this suggestion because current regulations for active law enforcement officers require officers to meet standards established by the Commission without setting forth the specific standards in the regulations itself. IRRC questioned how long sheriffs and firearms instructors must maintain records and in what form they should be retained. IRRC also asked the Commission to specify the acceptable format for instructors and sheriffs to submit certain records to the Commission. The regulation has been revised accordingly.

Finally, IRRC asked the Commission to make certain revisions in §§ 221.21(5), 221.21(6), 221.31(2)(xiv) and 221.31(2)(xv). The Commission made the appropriate amendments.

The Commission received comments from the Pennsylvania State Association of Township Supervisors (Association). First, the Association asked whether public agencies must reissue identification cards periodically or simply replace lost, stolen, or illegible cards. The regulations state the circumstances under which a public agency must reissue cards; otherwise, reissuance of the cards is at the discretion of the public agency, provided all cards meet the required standards. The Association also questioned whether a public agency has an obligation to notify the Commission when it issues an identification card. The regulations do not require public agencies to notify the Commission of the issuance of identification cards.

The Commission received the following comments from the Board of Probation and Parole, the County Chief Adult Probation and Parole Officers Association of Pennsylvania, and the County Probation and Parole Officers Firearm Education and Training Commission (parole officials):

First, parole officials asked if a retiree can qualify on the weapon on which an agency's active employees qualify, or any weapon. The regulations do not limit qualification to any specific weapon. If a public agency chooses to qualify its retirees based on the agency's standards, the public agency is free to specify what weapon must be used in the course of fire. However, a public agency has no obligation to qualify its retirees.

Next, parole officials questioned whether a retiree must qualify with the agency from which the person retired. A public agency elects to qualify its retired employees by the agency standards; a retiree can choose to qualify with that agency or can choose to qualify with any other certified firearms instructor. The qualification card will be issued by the agency or instructor that actually qualified the retiree.

Parole officials asked whether a public agency can charge a fee to qualify retirees. Again, public agencies have no obligation to qualify their retirees. If an agency chooses to do so, the agency would have to decide whether to charge a fee for its services.

Parole officials felt § 221.23(a) seemed to contradict § 221.23(c). Section 221.23(a) and (b) has been revised to clarify that a public agency does not have to issue a retired identification card until after the officer has paid the requisite fee.

Parole officials complained that the definition of "certified firearm instructor" does not include firearms instructors from the Board of Probation and Parole's Firearms Instructor Course. Parole officials are under no obligation

to certify any retirees. If they choose to do so, the Commission has the authority to recognize their instructors as certified law enforcement firearms instructors.

Parole officials asked whether firearms instructors must issue a separate qualification card for each weapon the retiree qualifies with. A qualification card is issued when an instructor determines a person has qualified under the applicable standards. The card is not connected to a specific weapon.

Parole officials asked about the type of ammunition required for qualification and whether a retiree must qualify with the public agency's ammunition or bring his own ammunition. Parole officials also asked whether there is a standardized course of fire available to retirees or whether that will be determined on a case-by-case basis. The statute and regulations define the Commonwealth's standards for training and qualification as either the standards established by the public agency from which the officer retired or by the Commission. Again, parole officials have no duty to qualify any retirees. If they choose to do so, the individual public agency determines its own standards and course of fire for training and qualification.

Parole officials questioned whether the regulations apply to all former retirees. They posed the hypothetical of someone who retired 10 years ago and asked whether the agency would first be required to put the retiree through its active employee qualification course of fire. They also asked what is meant by the "State's standards" in § 221.21(5). Public agencies are under no obligation to qualify their retirees. If they choose to do so, a public agency could use its own standards for training and qualification or those approved by the Commission. Section 221.25(5) has been removed from the final rulemaking.

Finally, parole officials asked who bears the responsibility for ensuring a retiree has met all of the eligibility requirements under § 221.31. As explained previously, a retiree is responsible for certifying, under penalty of 18 Pa.C.S. § 4904, that the person meets the enumerated criteria.

The Commission received the following comments from Representative Ronald S. Marsico, Republican Chairperson of the House Judiciary Committee:

Representative Marsico pointed out several typographical errors in the proposed rulemaking, all of which have been corrected. He also perceived an inherent conflict between §§ 221.21(5) and 221.31(2)(iii). Section 221.21(5) of the proposed rulemaking has been removed. Representative Marsico noted an inconsistency between terminology in §§ 221.21(6) and 221.31(2)(viii), which has been corrected.

Representative Marsico raised a question about whether an individual needed to meet all 16 requirements in § 221.31. The Commission clarified that all 16 requirements must be met by correcting a typographical error in the proposed regulations.

Representative Marsico pointed out the need to recognize that officers who retired from a Federal or out-of-State public agency would need to obtain an identification card from that agency. This clarification has been made in the final-form rulemaking.

Finally, Representative Marsico asked several questions about the need to record the type of ammunition used in the firearms qualification process. This requirement conforms to routine firearms qualification practices.

The Commission received no comments from Senate Law and Justice Committee or any other member of the House Judiciary Committee.

Regulatory Review

On, March 14, 2008, copies of the proposed rulemaking were delivered to IRRC and the Majority and Minority Chairpersons of the House Judiciary Committee and the Senate Law and Justice Committee (Committees). Notice of proposed rulemaking was published at 38 Pa.B. 1486 (March 29, 2008) and provided for a 30-day public comment period. In compliance with section 5(c) of the Regulatory Review Act, the Pennsylvania State Police provided IRRC and the Committees with copies of all comments received during the public comment period, as well as other documents if requested. In preparing the final-form rulemaking, the Pennsylvania State Police has considered all comments received from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, this final-form rulemaking was deemed approved by the Committees. Under section 5.1(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC on August 6, 2009.

Contact Person/Public Comment

For further information on the final-form rulemaking, contact Syndi L. Guido, Policy Director, Pennsylvania State Police, 1800 Elmerton Avenue, Harrisburg, PA 17110, (717) 772-0905. Persons with a disability who require an alternative format of this document (for example, large print, audio tape, Braille) should contact Syndi L. Guido so that she may make the necessary arrangements.

Findings

The Commission finds that:

(1) Public notice of intention to adopt these amendments 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 (relating of notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law and all comments were considered and forwarded to IRRC, the Senate Committee on Law and Justice and the House Judiciary Committee.

(3) The adoption of this final-form rulemaking in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statute.

Order

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

(a) The regulations of the Commission, 37 Pa. Code, are amended by adding §§ 221.1, 221.2, 221.21—221.25 and 221.31—221.35 as set forth in Annex A.

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

(c) The Commission 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 immediately upon publication in the *Pennsylvania Bulletin*.

COLONEL FRANK E. PAWLOWSKI,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 5096 (August 22, 2009).)

Fiscal Note: Fiscal Note 17-75 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 37. LAW

PART IV. MUNICIPAL POLICE OFFICERS' EDUCATION AND TRAINING COMMISSION

Subpart B. RETIRED LAW ENFORCEMENT IDENTIFICATION AND QUALIFICATION

CHAPTER 221. RETIRED LAW ENFORCEMENT OFFICERS IDENTIFICATION AND QUALIFICATION CARDS

Subch.	Sec.
A. GENERAL PROVISIONS.....	221.1
B. RETIRED LAW ENFORCEMENT IDENTIFICATION CARDS.....	221.21
C. QUALIFICATION CARD	221.31

Subchapter A. GENERAL PROVISIONS

Sec.	Purpose.
221.1.	Definitions.

§ 221.1. Purpose.

This chapter provides for the issuance of identification and qualification cards for retired law enforcement officers as provided under section 7 of the act (53 P. S. § 753.7), regarding rules and regulations.

§ 221.2. Definitions.

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

Act—The Retired Law Enforcement Identification Act (53 P. S. §§ 753.1—753.9).

Certified law enforcement firearm instructor—An individual who possesses a current police firearms instructor rating from the National Rifle Association, the Pennsylvania State Police, the Municipal Police Officers' Education and Training Commission, the Deputy Sheriffs' Education and Training Board, the Federal Bureau of Investigation, the Smith & Wesson Academy, the Philadelphia Police Academy or the United States Secret Service or other certification approved by the Municipal Police Officers' Education and Training Commission.

Commission—The Municipal Police Officers' Education and Training Commission.

Commonwealth's standards for training and qualification for active law enforcement officers to carry a firearm—The standards established by the public agency from which a law enforcement officer retired or by the Commission for training and qualification to carry a firearm of the same type as the concealed firearm, provided that the Commission does not charge a fee to certified law enforcement firearm instructors and officers for the standards, whether access to the standards is given through the Internet or some other form for publication.

Confirmation number—A unique approval number provided by the Pennsylvania State Police to the sheriff after

a check of the applicant's criminal history record, juvenile delinquency record and mental health record.

Identification card—A retired law enforcement officer identification card authorized under section 4 of the act (53 P.S. § 753.4), regarding retired law enforcement identification card.

Qualification card—A valid firearm training and qualification card authorized under section 5 of the act (53 P.S. § 753.5), regarding firearm training and qualification card. When carried with an identification card, a qualification card constitutes a Pennsylvania license to carry a firearm.

Retired law enforcement officer or office—A qualified retired law enforcement officer as defined in 18 U.S.C. § 926C(c) (relating to carrying of concealed firearms by qualified retired law enforcement officers).

Subchapter B. RETIRED LAW ENFORCEMENT IDENTIFICATION CARDS

Sec.	
221.21.	Eligibility.
211.22.	Identification card contents.
221.23.	Identification card issuance.
221.24.	Replacement; error or change in material information.
221.25.	Challenge to issuance of identification card.

§ 221.21. Eligibility.

An identification card shall only be issued to an individual who meets the following conditions:

- (1) Retired in good standing, for reasons other than mental instability, from service with a public agency as a law enforcement officer as determined by the current head of that public agency.
- (2) Before retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest.
- (3) Before retirement, was regularly employed as a law enforcement officer for an aggregate of 15 years or more or retired from service with a public agency, after completing any applicable probationary period of service, due to a service-connected disability, as determined by the public agency.
- (4) Has a nonforfeitable right to benefits under the retirement plan of the public agency.
- (5) Is not prohibited by Federal law from receiving or possessing a firearm.

§ 221.22. Identification card contents.

- (a) Identification cards must be uniform throughout this Commonwealth and on a form prescribed by the Commission.
- (b) The identification card must contain the following:
 - (1) The caption "Retired Law Enforcement Identification Card."
 - (2) The photograph of the retired law enforcement officer.
 - (3) The name, address, date of birth, race, sex, height, weight, color of hair, color of eyes, and signature of the retired law enforcement officer.
 - (4) The signature of the law enforcement officer issuing the identification card.
 - (5) The name, telephone number and address of the public agency issuing the identification card.
 - (6) The date the identification card was issued.

(7) The statement that "this card does not give the retired law enforcement officer any police powers, including any authority to arrest."

(8) The statement that "the retired law enforcement officer must carry both the identification card and qualification card in order to carry a concealed firearm."

§ 221.23. Identification card issuance.

- (a) A public agency shall provide each retired law enforcement officer with an identification card, within 60 days of the officer's retirement, provided the officer has paid the requisite fee.
- (b) If a law enforcement officer has retired prior to September 12, 2009, upon request of the retired law enforcement officer, a public agency shall provide the law enforcement officer with an identification card, within 60 days of the officer's request, provided the officer has paid the required fee.

(c) A public agency may charge a reasonable fee, not to exceed \$15, for each identification card, or replacement card. The identification card may not be issued until the retired law enforcement officer has paid the fee.

§ 221.24. Replacement; error or change in material information.

(a) *Replacement.* If an identification card is lost, stolen, destroyed, mutilated or becomes illegible, the retired law enforcement officer may obtain a replacement identification card upon request to the public agency and payment of the required fee.

(b) *Error or change in information.* If any information on an identification card has changed, or is in error, from the information originally set forth, the retired law enforcement officer shall apply to the public agency, and submit the required fee, for a new identification card within 15 days of the change or discovery of the error. A fee will not be charged if the public agency caused the error to occur.

§ 221.25. Challenge to issuance of identification card.

The Commission will have standing to contest issuance of any identification card subject to the provisions of §§ 203.101—203.103 (relating to notice and hearings).

Subchapter C. QUALIFICATION CARD

Sec.	
221.31	Eligibility.
221.32	Qualification card contents.
221.33	Qualification card issuance.
221.34	Replacement; error or change in material information.
221.35	Challenge to issuance of qualification card.

§ 221.31. Eligibility.

- A retired law enforcement officer shall be eligible for a qualification card if the retired law enforcement officer meets all of the following conditions:
- (1) Resides in this Commonwealth.
 - (2) Is a retired law enforcement officer and prior to each annual qualification, completes a Pennsylvania Retired Officer Concealed Carry Acknowledgement, on a form prescribed by the Commission, attesting to all of the following, subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) and meets the following conditions:
 - (i) Prior to retirement, the applicant was employed as a law enforcement officer for an aggregate of 15 years or more or retired from service with a public agency after

completing any applicable probationary period of service, due to a service-connected disability, as determined by the public agency.

(ii) The applicant intends to fire and carry a revolver, semiautomatic or automatic weapon.

(iii) The applicant is a retired law enforcement officer.

(iv) The applicant retired in good standing, specifying the public agency, city and state from which the applicant retired.

(v) The applicant did not retire for reasons of mental instability.

(vi) The applicant is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance.

(vii) The applicant will not carry a firearm while under the influence of alcohol or another intoxicating or hallucinatory drug or substance.

(viii) The applicant is not prohibited by Federal or State law from receiving or possessing a firearm.

(ix) The applicant understands and acknowledges that the definition of a firearm does not include any machine gun, firearms silencer, destructive device or prohibited offensive weapon.

(x) The applicant understands and acknowledges that the person shall meet the Commonwealth's standards for training and qualification for active law enforcement officers to carry a firearm of the same type as the applicant's concealed weapon.

(xi) The applicant understands and acknowledges that when carrying the concealed weapon, the applicant shall carry Pennsylvania's qualification card, along with the identification card issued under § 221.23 or identification issued by another public agency satisfying the requirements of 18 U.S.C. § 926C(d) (relating to carrying of concealed firearms by qualified retired law enforcement officers).

(xii) The applicant understands and acknowledges that the qualification card expires 12 months from the date of issue and it is the applicant's responsibility to reapply if the applicant wants to continue to carry the weapon under the act and this chapter.

(xiii) The applicant understands and acknowledges that this authorization applies only to the type of weapon with which the applicant qualified.

(xiv) The applicant understands and acknowledges that Pennsylvania's certification does not give him any right whatsoever to exercise law enforcement authority or take police action under any circumstances.

(xv) The applicant understands and acknowledges that a background investigation is required and authorizes one to be conducted to determine if the applicant has been convicted of any criminal offenses or has any mental health issues that would disqualify the applicant from possessing a concealed weapon.

(xvi) The applicant has not been charged with nor convicted of any felony or misdemeanor in this Commonwealth or any similar offenses under any other State or Federal law that would prohibit the applicant from possessing a firearm.

§ 221.32. Qualification card contents.

(a) A qualification card shall be issued to indicate compliance with the Commonwealth's standards for training and qualification for active law enforcement officers to

carry a firearm. The qualification cards must be uniform throughout this Commonwealth and on a form issued by the Commission.

(b) The qualification card must contain the following:

(1) The caption "Retired Law Enforcement Officer Qualification Card."

(2) The name, address, date of birth, race, sex, height, weight, color of hair, color of eyes and signature of the retired law enforcement officer.

(3) The date of completion of the most recent firearms training and qualification by the retired law enforcement officer.

(4) An expiration date 12 months later than the date of completion of the most recent firearms training and qualification by the retired law enforcement officer.

(5) The name and signature of the certified law enforcement firearms instructor issuing the qualification card.

(6) The name and signature of a sheriff.

(7) A confirmation number provided by the sheriff who signed the qualification card.

(8) A statement that the retired law enforcement officer has a duty to surrender the qualification card when the officer becomes legally ineligible either under Federal or State law to receive, possess, use, manufacture, control, sell or transfer a firearm.

§ 221.33. Qualification card issuance.

(a) A retired law enforcement officer shall produce the identification card issued under § 221.23 (relating to identification card issuance) or identification issued by another public agency satisfying the requirements of 18 U.S.C. § 926C(d) (relating to carrying of concealed firearms by qualified retired law enforcement officers) along with another form of official/governmental identification, which includes a photograph of the officer, to the certified law enforcement firearm instructor prior to participating in firearms training and qualification.

(b) A retired law enforcement officer may not participate in firearms training and qualification if the certified law enforcement firearm instructor determines that the officer presents a safety hazard to himself or others on the range or if the officer is not able to produce the two forms of identification required in subsection (a).

(c) A retired law enforcement officer shall meet the firearms standards established by the public agency from which the law enforcement officer retired or the guidelines established by the Commission to carry a firearm of the same type as the concealed firearm that the officer intends to carry. As part of firearms training, the certified law enforcement firearm instructor shall provide instruction on the use of force by a civilian under 18 Pa.C.S. Chapter 5 (relating to general principles of justification).

(d) The certified law enforcement firearms instructor may issue a qualification card to a retired law enforcement officer who has met the Commonwealth's standards for training and qualification for active law enforcement officers to carry a firearm.

(e) The certified law enforcement firearm instructor shall obtain the qualification cards, for a fee of \$2 for each card, from the Commission.

(f) For 1 year, the certified law enforcement firearms instructor shall keep a record of each qualification card issued, including the following:

(1) The name of the retired law enforcement officer to whom the qualification card was issued.

(2) The make and model of the weapons the retired law enforcement officer qualified on.

(3) The type of ammunition utilized by the retired law enforcement officer.

(4) The course of fire completed by the retired law enforcement officer.

(5) The date of qualification.

(g) Within 30 days of a retired law enforcement officer being issued a qualification card, the certified law enforcement firearm instructor shall provide the Commission with a copy of the record maintained under subsection (f) on a form prescribed by the Commission.

(h) The following apply to sheriffs:

(1) Prior to signing the qualification card, in addition to other requirements in section 5 of the act (53 P. S. § 753.5), the sheriff shall require the retired law enforcement officer to display the identification card and another form of official/governmental identification, which includes a photo of the retired law enforcement officer. The sheriff shall make a photocopy of both forms of identification.

(2) For 1 year, the sheriff shall keep a record of the following:

(i) Each qualification card signed.

(ii) The name and address of the retired law enforcement officer appearing on the card.

(iii) The date the sheriff signed the card.

(3) The sheriff shall confiscate the qualification card from any retired law enforcement officer who is not issued a unique approval number. Confiscated qualification cards shall be returned to the Commission.

(4) The sheriff shall collect the expired qualification card from the retired law enforcement officer and return the card to the Commission.

(5) Within 30 days of signing a qualification card, the sheriff shall provide the Commission with a copy of the record maintained under paragraph (2) on a form prescribed by the Commission.

(i) No public agency shall have any duty to provide firearms training and qualification to retired law enforcement officers or to issue qualification cards.

§ 221.34. Replacement; error or change in material information.

(a) *Replacement.* If a qualification card is lost, stolen, destroyed, mutilated or becomes illegible, the retired law enforcement officer may obtain a replacement qualification card upon request to the certified law enforcement firearm instructor and payment of the required fee.

(b) *Error or change in information.* If any information on a qualification card has changed, or is in error, from the information originally set forth, the retired law enforcement officer shall apply to the public agency, and submit the required fee, for a new qualification card within 15 days of the change or discovery of the error. A fee will not be charged if the public agency caused the error to occur.

§ 221.35. Challenge to issuance of qualification card.

The Commission will have standing to contest issuance of any identification card subject to §§ 203.101—203.103 (relating to notice and hearings).

[Pa.B. Doc. No. 09-1679. Filed for public inspection September 11, 2009, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF PHARMACY

[49 PA. CODE CH. 27]

Fees

The State Board of Pharmacy (Board) amends § 27.91 (relating to schedule of fees) to read as set forth in Annex A.

Description and Need for the Rulemaking

Section 8.2(a) of the Pharmacy Act (act) (63 P. S. § 390-8.2(a)) requires the Board to fix the fees, including renewal of licenses and permits, by regulation and if the revenue generated by fees, fines and civil penalties is not sufficient to match expenditures over a 2-year period, the Board is required to increase those fees by regulation. Section 8.2(b) of the act requires the Board to increase fees when revenue raised by fees, fines and civil penalties is not sufficient to meet expenditures.

In March, 2008, the Department of State's division of fiscal management projected that, without an increase in the biennial renewal fee, Board fiscal deficits will grow as follows:

<i>Fiscal Year</i>	<i>Beginning Balance</i>	<i>Revenue</i>	<i>Expenses</i>	<i>Ending Balance</i>
2007-08	\$1,317,335	\$500,000	\$1,842,000	(\$24,665)
2008-09	(\$24,665)	\$3,000,000	\$1,934,000	\$1,041,335
2009-10	\$1,041,335	\$500,000	\$2,031,000	(\$489,665)
2010-11	(\$489,665)	\$3,000,000	\$2,133,000	\$377,335
2011-12	\$377,335	\$500,000	\$2,240,000	(\$1,362,665)
2012-13	(\$1,362,665)	\$3,000,000	\$2,352,000	(\$714,665)
2013-14	(\$714,665)	\$500,000	\$2,470,000	(\$2,684,665)

If, however, the renewal fee for pharmacies is increased from \$100 to \$125 beginning with the 2009-2011 renewal period and the renewal fee for pharmacists is increased from \$150 to \$190 beginning with the 2010-2012 renewal period, the fiscal management division projected that the Board would recover the deficit as follows:

<i>Fiscal Year</i>	<i>Beginning Balance</i>	<i>Revenue</i>	<i>Expenses</i>	<i>Ending Balance</i>
2007-08	\$1,317,335	\$500,000	\$1,842,000	(\$24,665)
2008-09	(\$24,665)	\$3,000,000	\$1,934,000	\$1,041,335
2009-10	\$1,041,335	\$582,000	\$2,031,000	(\$407,665)
2010-11	(\$726,926)	\$3,866,000	\$2,133,000	\$1,325,335
2011-12	\$1,325,335	\$582,000	\$2,240,000	(\$332,665)
2012-13	(\$332,665)	\$3,866,000	\$2,352,000	\$1,181,335
2013-14	\$1,181,335	\$582,000	\$2,470,000	(\$706,655)

Although the Board was presented with projections for other amounts of increase in the renewal fee, the Board concluded that increasing the biennial renewal fee approximately 25% as shown previously would be the least restrictive means of eliminating the projected deficits and restoring the Board's fiscal integrity as required under section 8.2 of the act.

As part of this process, the Board also considered the application fees that it charges. In general, the fee should be enough to cover the cost of providing that service. Based upon estimates of the amount of staff time necessary to process various applications and the cost of employing staff, together with necessary overhead, and rounding to the nearest \$5, the fiscal management division recommended that the Board increase application fees as follows: pharmacy intern certificate from \$30 to \$35, pharmacist license from \$40 to \$45, new pharmacy permit from \$100 to \$125, reinspection of new pharmacy after failure of inspection from \$90 to \$115, pharmacy permit change without inspection from \$30 to \$45 and pharmacy permit change with inspection from \$95 to \$125. Because the Board should charge application fees sufficient to recover the cost of providing the services, the Board proposed to increase its application fees as recommended.

Summary of Comments and Responses to Proposed Rulemaking

The Board published a notice of proposed rulemaking at 38 Pa.B. 4784 (August 30, 2008) with a 30-day public comment period. The Board received no written comments from the public. The Board received comments from the House Professional Licensure Committee (HPLC) as part of its review of proposed rulemaking under the Regulatory Review Act (71 P. S. §§ 745.1—745.12). The Board did not receive any comments from the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) or the Independent Regulatory Review Commission (IRRC).

The HPLC first noted that the Board did not propose to increase certain other application fees and requested the Board's rationale in increasing only the identified fees. While the fiscal management division looked at these fees as well, its analysis showed that the cost of providing those services was being recovered by the current fees. Therefore, the Board did not propose to increase those fees.

The HPLC also requested information pertaining to the major cost centers of the Board and any significant increases in their expenditures. According to the division of fiscal management, as of March, 2009, the Board's actual expenses for various cost centers have been as follows:

<i>Category</i>	<i>FY 2004-05 (actual)</i>	<i>FY 2005-06 (actual)</i>	<i>FY 2006-07 (actual)</i>	<i>FY 2007-08 (projected)</i>	<i>FY 2008-09 (budgeted)</i>
Bd. Admin.	294,282.75	240,641.66	412,292.42	420,468.05	441,000
Cmmsnr. Office	25,252.94	28,724.80	30,885.29	35,979.55	37,000
Dept. Services	77,269.68	79,087.31	73,247.57	74,475.09	95,000
Legal Office	338,508.09	315,962.44	315,713.63	288,239.01	333,000
Hearing Exp.	18,478.61	19,968.82	19,192.75	24,687.31	21,000
Leg./Reg. Anal.	4,346.87	7,360.86	6,830.66	8,098.10	11,000
Enf. & Invest.	643,654.07	571,909.98	647,126.85	765,942.00	723,000
PHMP	102,919.51	137,929.05	150,936.27	155,450.98	164,000
Bd. Members	28,172.42	33,145.54	27,503.47	34,318.34	64,000
Total Costs	<u>\$1,532,884.94</u>	<u>\$1,434,730.46</u>	<u>\$1,683,728.91</u>	<u>\$1,807,640.43</u>	<u>\$1,889,000</u>

As noted in the preamble for publication as proposed rulemaking, the increases in the Board's biennial expenses occurred primarily in administrative costs and costs for inspection, investigation and enforcement (Bureau of Enforcement and Investigation). Legal office costs remained about the same, despite the continued rise in the number of complaints from previous years. Administrative costs likely increased because the Board began receiving applications for the authority to administer injectable medications, immunizations and biologicals. Additionally, vacant pharmacy inspector positions were filled, which led to the increase in inspection, investigation and enforcement costs, both due to salaries and increased number of inspections.

In November, 2008, the fiscal management division provided updated projections, based upon the anticipated increase in fees and actual expenses and revenue, that would permit the Board to recover the deficit as follows:

<i>Fiscal Year</i>	<i>Beginning Balance</i>	<i>Revenue</i>	<i>Expenses</i>	<i>Ending Balance</i>
2006-07	(\$81,593)	\$3,035,094	\$1,683,729	\$1,269,772
2007-08	\$1,269,772	\$658,963	\$1,807,640	\$121,095
2008-09	\$121,095	\$3,866,000	\$1,889,000	\$2,098,095
2009-10	\$2,098,095	\$582,000	\$1,946,000	\$734,095
2010-11	\$734,095	\$3,866,000	\$2,004,000	\$2,596,095
2011-12	\$2,596,095	\$582,000	\$2,064,000	\$1,114,095

The Board has not found a need to revise its rule-making in response to the comments.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions and will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector. The final-form rulemaking will increase certain application fees charged by the Board and will increase the biennial renewal fee for pharmacists and pharmacies in this Commonwealth.

Effective Date

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*. The increased renewal fee for pharmacies will first be charged for the biennial renewal period beginning September 1, 2009, and the increased renewal fee for pharmacists will first be charged for the biennial renewal period beginning October 1, 2010.

Statutory Authority

The final-form rulemaking is authorized under section 8.2 of the act.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 18, 2008, the Board submitted a copy of the notice of proposed rulemaking, published at 38 Pa.B. 4784, to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on July 7, 2009, the HPLC approved the final-form rulemaking. On August 5, 2009, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC effective August 5, 2009.

Additional Information

Persons who require additional information about the final-form rulemaking should submit inquiries to the Regulatory Unit Counsel, Department of State, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-7156, st-pharmacy@state.pa.us.

Findings

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968

(P. L. 769, No. 240) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

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

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapter 27, are amended, by amending § 27.91 to read as set forth in Annex A.

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

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

(d) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

MICHAEL A. PODGURSKI, R. Ph.,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 5096 (August 22, 2009).)

Fiscal Note: Fiscal Note 16A-5422 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 27. STATE BOARD OF PHARMACY FEES

§ 27.91. Schedule of fees.

An applicant for a license, certificate, permit or service shall pay the following fees at the time of application:

Application for pharmacy intern certificate	\$35
Application for pharmacist license	\$45
Certification of examination scores or internship hours	\$25
Verification of licensure	\$15
Assistant pharmacist biennial renewal	\$120
Registered pharmacist biennial renewal	\$190
Registered pharmacist late renewal penalty	\$25
New pharmacy permit application	\$125

Reinspection of new pharmacy after failure at first inspection	\$115
Pharmacy permit change without inspection	\$45
Pharmacy permit change when inspection required	\$125
Change in pharmacy ownership or Board of Directors	\$30
Verification of permit	\$15
Biennial renewal of pharmacy permit	\$125
Pharmacy permit late renewal penalty	\$25
Application for approval to administer injectables ..	\$30
Biennial renewal of approval to administer injectables	\$30

[Pa.B. Doc. No. 09-1680. Filed for public inspection September 11, 2009, 9:00 a.m.]

STATE BOARD OF PHARMACY
[49 PA. CODE CH. 27]

Sales of Hypodermic Needles and Syringes

The State Board of Pharmacy (Board) adopts amendments to § 27.18 (relating to standards of practice) to read as set forth in Annex A. The rulemaking alters the requirements regarding the sale of hypodermic needles and syringes in pharmacies.

Notice of proposed rulemaking was published at 37 Pa.B. 4652 (August 25, 2007). Publication was followed by a 30-day public comment period. The Board received comments from the National Association of Social Workers, the Pennsylvanians for the Deregulation of Syringe Sales, the Pennsylvania Medical Society (PMS), Allegheny General Hospital, Pittsburgh AIDS Task Force (PATF), Prevention Point Pittsburgh, Southwestern Pennsylvania AIDS Planning Coalition (SWPAPC), Montefiore Medical Center, the AIDS Law Project of Pennsylvania, Representative Babette Josephs, Valley Forge Medical Center & Hospital, the University of Pittsburgh Program for Health Care to Underserved Populations, the Student Global AIDS Project of the University of Pittsburgh, the American Civil Liberties Union of Pennsylvania, Reading Risk Reduction, the American Liver Foundation, the Pennsylvania Pharmacists Association and many individual commentators. The House Professional Licensure Committee (HPLC) submitted four comments to the proposed rulemaking on October 3, 2007. The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) made no comments. The Independent Regulatory Review Commission (IRRC) submitted two comments to the proposed rulemaking on October 24, 2007.

Summary of Comments and Responses to Proposed Rulemaking

Age Requirement

IRRC and several other commentators questioned the need for the provision in the proposed amendment that prohibited the sale of needles and syringes to persons under the age of 18 without a prescription. Upon review of the comments, the Board has reconsidered this provision and removed it in the final-form rulemaking. While some commentators wrote to support the age limitation, the Board ultimately decided that the limitation served no compelling public health interest.

Limitation on Number of Syringes and Needles Dispensed

PATF, Prevention Point Pittsburgh, SWPAPC and other individual commentators wrote to encourage the Board to consider removing the restriction on the number of syringes that can be purchased at one time. HPLC questioned the provision in the proposed rulemaking that placed a limit of 30 on the number of syringes that could be dispensed without a prescription. HPLC noted that other states have limits of ten syringes and needles. The Board initially chose 30, as it believed that ten was too few to dispense at one time. However upon reading the comments, the Board decided to remove the limitation altogether bringing the regulation in line with the majority of states that have no limit on the number of syringes dispensed without a prescription. HPLC also asked for information about whether the 30-syringe limitation would be for a specified time period. Having chosen to remove this limitation, the question was moot.

Recordkeeping

HPLC also questioned what type of recordkeeping would be used to track the number of syringes dispensed to individuals. The Board is not imposing a recordkeeping requirement. The Board does not believe that maintaining a record and requiring individuals to provide a name or other identifying information would advance the public health and safety. In fact, such a requirement could act to deter individuals from purchasing needles and syringes in a pharmacy.

Supervision

HPLC commented that the proposed rulemaking required direct supervision by a pharmacist while the Board's regulation in § 27.12(b)(2) (relating to practice of pharmacy and delegation of duties) requires direct, immediate and personal supervision. HPLC requested clarification of the two different standards. The Board meant to have the same standard as is used for all auxiliary personnel and has changed the language in the final-form rulemaking package to require direct, immediate and personal supervision by a pharmacist.

Insurance Coverage

PMS suggested a study to determine whether insurers should be mandated to preserve reimbursement for diabetics and people with other medical conditions requiring injected medications. IRRC urged the Board to work with necessary authorities to ensure that this rulemaking does not have a negative fiscal impact on people who obtain needles and syringes with a prescription and the assistance of medical insurance. The Board does not have the resources or funds to conduct such a study; moreover, the Board does not regulate or mandate insurance coverage for any prescription items. However, the Board notes that insulin is not a prescription item but is still generally covered by medical insurance.

Miscellaneous

PMS expressed concern regarding the proposed amendment and stated that it could not support the amendment until several qualifications were studied. The first qualification that PMS noted was that the proposed amendment not act to increase the number of IV drug users. As stated in the preamble to the proposal, several studies clearly indicate no increase in the number of IV drug users following the adoption of similar regulations in other states. No further studies have been published since the proposed amendment. Therefore the Board is confident that the change in this amendment will not act to do so in this Commonwealth. PMS next noted that syringe

exchange programs should be bolstered to encourage intravenous drug users to become drug free. The Board supports the premise of recovery and rehabilitation for anyone addicted to any kind of drug, however, the Board notes that it does not have purview over syringe exchange programs. PMS next noted that pharmacies should be required to provide materials that educate illicit drug users about the associated risks and encourage drug use withdrawal, and education resources are made available throughout the State. The Board considered this idea when drafting the proposed amendment but chose not to put in a regulatory requirement. Instead, the Board is working with the Department of Health to make available to pharmacies pamphlets on topics such as addiction, HIV/AIDS and cocaine. Information about how to obtain these materials will be available on the Board's web site upon final-form rulemaking. The next qualification PMS noted was that syringes should be kept in the prescription area of the pharmacy. The proposed rulemaking required that needles and syringes be kept in the prescription area and that requirement has not changed in the final-form rulemaking.

PMS next noted that drug paraphernalia laws should be reviewed and changed to accommodate the proposal. The Board believes that no change in the laws pertaining to drug paraphernalia is necessary to implement the regulation. Needles and syringes are not, per se, drug paraphernalia. Drug paraphernalia is defined in The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101—780-144) (Drug Act), in pertinent part, as, "all equipment, products and materials of any kind which are used, intended for use or designed for use in . . . injection . . . or otherwise introducing into the human body a controlled substance in violation of this act. It includes, but is not limited to . . . (11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injected controlled substances into the human body." Determination of whether an object is drug paraphernalia depends on the intent of the person distributing the object. To be classified as drug paraphernalia, the distributor must have the specific intent that the item be used with controlled substances. *Commonwealth v. Lacey*, 344 Pa. Super. 576, 582, 496 A.2d 1256 (1985). "The [Drug] Act includes a specific intent requirement to distinguish innocent transfers of multi-purpose items from illegal transfers of drug paraphernalia." *Id.* Specific intent means that it is not just foreseeable that the material will be used to inject controlled substances in violation of the Drug Act, but that is the purpose, object, plan, or goal of the person distributing the needle or syringe. Needles and syringes have many lawful uses including injecting insulin, allergy serums, fertility drugs, blood thinners, migraine medications, Epinephrine, lawfully prescribed steroids, vitamins and other additives in total parenteral nutrition, and use in home IV therapy. It can be argued that the specific intent of a pharmacist is to distribute syringes to use in conformity with law. Pharmacists cannot be held to reasonably know or believe that anyone purchasing needles and syringes without a prescription is using them to inject controlled substances. PMS also noted that the age limit and number of syringes should be eliminated as restrictions. The Board agrees and has amended the final-form rulemaking to eliminate those restrictions. Finally, PMS stated that more information be gathered from other states where needles and syringes are available over the counter regarding how they address the previously-mentioned issues and their results. The Board has been monitoring this topic going back to 2002. Since the Board first undertook the proposed package, the

Commonwealth is now one of only three states to still have a prescription requirement. The first states to remove this requirement did so back in the 1990s. The Board has gathered volumes of information about the efficacy of removing the requirement of a prescription to obtain needles and syringes in a pharmacy and is confident that it is prepared to address any issues that may arise with the amendment of the Board's regulations.

Several commentators wrote solely to express their support of the proposed amendment. These commentators included medical practitioners and educators. The Board thanks these commentators for their time and efforts in supporting this important amendment.

Statutory Authority

The amendment is authorized under sections 4(j) and 6(k)(1) and (9) of the Pharmacy Act (act) (63 P. S. §§ 390-4(j) and 390-6(k)(1) and (9)).

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no fiscal impact on the Board or the regulated community.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 15, 2007, the Board submitted a copy of the notice of proposed rulemaking, published at 37 Pa.B. 4652, to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on June 23, 2009, the final-form rulemaking was approved by the HPLC. On July 22, 2009, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on July 23, 2009, and approved the final-form rulemaking.

Additional Information

Individuals who need information about the rulemaking may contact Melanie Zimmerman, R.Ph., Executive Secretary, State Board of Pharmacy, P. O. Box 2649, Harrisburg, PA 17105-2649.

Findings

The Board finds that:

(1) Public notice of intention to adopt an amendment in § 27.18, 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 under those sections in 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

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

(4) The amendments to this final-form rulemaking do not enlarge the original purpose of the proposed amendment published at 37 Pa.B. 4652.

Order

The Board therefore orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 27, are amended by amending § 27.18 to read as set forth in Annex A, with ellipses referring to the existing text of the regulation.

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

(c) The Board shall certify this order and 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*.

MICHAEL A. PODGURSKI, R. Ph.,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 4832 (August 8, 2009).)

Fiscal Note: Fiscal Note 16A-5418 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 27. STATE BOARD OF PHARMACY STANDARDS

§ 27.18. Standards of practice.

* * * * *

(s) Sales of hypodermic needles and syringes shall be made by a pharmacist or under the direct, immediate and personal supervision of a pharmacist in accordance with the following:

(1) Hypodermic needles and syringes may be sold without a prescription.

(2) Hypodermic needles and syringes shall be kept in the prescription area of the pharmacy, as defined in § 27.1 (relating to definitions), and be accessible only by pharmacists and pharmacy personnel authorized to be in the prescription area of the pharmacy while the pharmacy is open.

* * * * *

[Pa.B. Doc. No. 09-1681. Filed for public inspection September 11, 2009, 9:00 a.m.]
