RULES AND REGULATIONS

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF MASSAGE THERAPY

[49 PA. CODE CH. 20]

Massage Therapy

The State Board of Massage Therapy (Board) adopts §§ 20.1—20.54 to effectuate the Massage Therapy Law (act) (63 P. S. §§ 627.1—627.50).

Effective Date

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*. The Board will publish applications for licensure on its web site after the final-form rulemaking has been approved by the Office of Attorney General; however, applications will not be processed until the final-form rulemaking is published in the *Pennsylvania Bulletin*.

Statutory Authority

Sections 4(2) and 50 of the act (63 P. S. §§ 627.4(2) and 627.50) require the Board to promulgate regulations to effectuate the act.

Summary of Comments and the Board's Response

The Board received comments from Elite Continuing Education, Ormond Beach, Florida, a company that offers both correspondence and classroom education throughout the United States. The company urged the Board to permit its licensees to complete up to 12 hours of the 24 hours of required continuing education biennially through correspondence courses. The company provided information regarding the continuing education requirements in other states and the number of hours that other states permit licensees to complete through online or other distance education modalities. The company also suggested that the Board consider contracting with a company that tracks continuing education hours and require continuing education providers to report licensee hours to the company, a process used in Florida, which would enable the Board to audit 100% of its licensees.

The American Massage Therapy Association (AMTA) also suggested that the Board increase the number of hours of continuing education that a licensee could earn from distance education. Because of the nature of the practice of massage therapy, the Board believes the majority of licensees' ongoing education should be obtained from sources where the instructor is in the room and able to observe the licensee and provide feedback. In response to the comments, the Board increased the number of hours that may be earned from distance education sources from 6 to 8 hours. The Board has rewritten the provision to require that licensees complete at least 16 contact hours of continuing education, as the Board has already defined contact hour to mean in the physical presence of the instructor.

An individual in Pittsburgh suggested that the requirement that massage linens be washed with bleach is unnecessary, bad for the environment and destructive of the sheets and that washing in hot water with appropriate detergent is more than sufficient. Given that massage linens are used on unclothed persons, the Board believes that linens should be washed with bleach to ensure that any microbes transferred to the linens are killed.

The Pennsylvania Association of Private School Administrators (PAPSA) sent numerous comments. PAPSA stated that other Board licensees are provided verification of license for free and asked if the Board could do the same. The licensees of the Board will be provided the same verification services as are licensees of other boards within the Bureau of Professional and Occupational Affairs (BPOA). State board licensees are listed on the searchable web site www.licensepa.state.pa.us. A fee is not charged to access this web site. The fee for license verification in § 20.3 (relating to fees) is the fee charged for formal verification by the Board office, which is sent on Board letterhead. This verification is generally required when a licensee seeks to obtain licensure by reciprocity to another state. If the other state is satisfied with verifying the license through the web site, the licensee will not need to obtain verification from the Board office or pay the fee for license verification.

Regarding § 20.12 (relating to information that must be provided to prospective students), PAPSA stated that schools accredited by the National Accrediting Commission of Cosmetology Arts and Sciences are required to provide an overall licensure pass rate to students for programs at the school and that those schools will then have to provide a separate licensure pass rate only for their massage therapy programs. PAPSA expressed concern that this could be confusing to students. Schools that are licensed by the State Board of Private Licensed Schools and approved to offer training in massage therapy will be required to report the pass rate of graduates from the massage therapy training program on the massage therapy licensure examinations. The Board does not believe that students will be confused if the school also reports its overall pass rate on other examinations.

Regarding § 20.13 (relating to required knowledge base), PAPSA next noted that there were online sites that offer Nationally-recognized CPR courses that lead to a certificate. PAPSA suggested that online CPR course should not be accepted because of their brief duration and lack of supervised practice. The Board agrees that CPR courses should be taken from sources where there is an instructor present to correct a licensee's technique. The Board added language to § 20.13 to clarify its intent. In addition, the Board notes that it will place on its web site the list of approved CPR courses and will not allow distance education for CPR training.

Regarding § 20.14(b) (relating to student practice), PAPSA noted that some school administrators expressed concerns about the schools' liability that might arise from assigning homework to massage family and friends under indirect supervision. This subsection does not require schools to assign the performance of massage tasks as homework. Schools that have this concern do not have to assign massage tasks for homework.

PAPSA asked for clarification regarding § 20.14(f), which requires a school to maintain records for services provided by students for 3 years. The 3-year period would begin at the last date of service. The Board added language to clarify its intent.

Regarding § 20.21(c) (relating to application for temporary practice permit, initial licensure and licensure by

reciprocity), PAPSA asked whether associate degree students would be able to obtain licensure after completing 600 hours even though they still have a minimum of an additional 900 hours to complete to obtain their degree. The act requires that an individual complete a massage therapy program of at least 600 hours to be eligible for licensure. A student in a program of more than 600 hours would only be eligible for licensure if the school provided documentation that the student had completed the school's massage therapy program.

Regarding § 20.21(d)(3), PAPSA noted that massage therapy students were concerned that they might be unable to obtain a license because they were arrested or charged with a crime, although they were not convicted. PAPSA opined that the regulations extended the barrier to licensure for individuals who have been arrested or charged. PAPSA suggested that the provision should be changed to apply only to convictions and that the Board should provide guidelines for the review process of a conviction to help schools determine if a prospective student will be able to secure a license upon graduation. The act authorizes the Board to deny licensure only to individuals who have been convicted. The regulations do not expand the Board's authority. The act does not restrict the Board from obtaining information relevant to its mission of protecting the public. Obtaining this information from applicants will allow the Board to monitor the criminal process to ensure that it can take appropriate action if a licensee is convicted of a crime. The Board will limit the information that must be disclosed to criminal charges that have been filed. In addition, the Board will provide an explanation on its web site regarding its review of applicants with criminal records.

Regarding § 20.24 (relating to application requirements for existing practitioners), PAPSA asked whether applicants under section 5(b) of the act (63 P. S. § 627.5) would need to provide proof of CPR, submit a background check and provide proof of high school graduation or equivalent with their initial application. These applicants will be required to provide this information and any other information on the application form. Section 20.24(a) requires existing practitioner applicants to submit the information required under § 20.21(b), (c) and (d), which includes, in subsection (b)(1)—(4), a legal form of identification, a criminal history record information, CPR certification and proof of graduation from high school.

Regarding § 20.26(e) (relating to application requirements for temporary practice permits), PAPSA questioned the prohibition on temporary practice permit holders advertising their practice, holding themselves out as licensed massage therapists or using the initials L.M.T. PAPSA stated that a student could not build a practice and become gainfully employed if the student cannot market himself as a licensed massage therapist. Section 2 of the act (63 P. S. § 627.2) clearly defines a "massage therapist" as an individual who has been granted licensure by the Board. Neither students nor temporary practice permit holders have been granted licensure; therefore, neither students nor temporary practice permit holders may hold themselves out as licensed massage therapists or may advertise that they hold a license when they do not. Moreover, § 20.14 limits student practice. The normal process for a massage therapy student to obtain licensure should be quite short. The National Certification Board for Therapeutic Massage and Bodywork (NCBTMB) and the Federation of State Massage Therapy Boards (FSMTB) report test scores to the Board electronically and the Board can obtain test results on a daily basis. Therefore, a student who tests promptly after completing an educational program could obtain licensure within a matter of a few weeks.

Regarding § 20.33 (relating to continuing education content and providers), PAPSA asked whether at least 6 hours of pedagogical technique be counted towards meeting the continuing education requirement for massage therapy faculty. The act specifies that continuing education develop the skills as a massage therapist, not as a teacher. Therefore, massage therapy faculty will be required to take continuing education courses regarding massage therapy techniques, not teaching techniques.

PAPSA asked whether § 20.51(3) (relating to massage therapy treatment areas), which requires that massage therapy treatment areas provide "illumination for cleaning," was a necessary provision. This paragraph requires that the illumination be adequate for the purpose of cleaning, meaning bright enough to determine areas that might need cleaning, which is a level of brightness not generally used in a treatment area during treatment.

The Pennsylvania Physical Therapy Association (PPTA) provided comments to the Board. PPTA stated its concern with § 20.41 (relating to scope of practice), specifically objecting to the list of soft tissue manifestations and the use of the words "treat" and "treatment." PPTA also objected to the Board's use of the term "therapeutic massage techniques." PPTA suggested that the term should be replaced with "massage therapy techniques." PPTA suggested that the Board provide a definition of the term "treatment plan." Regarding § 20.26, PPTA indicated confusion with what level of services an individual with a temporary practice permit was authorized to perform and suggested the Board further define the level of supervision required. Finally, regarding § 20.34 (relating to penalty for failure to complete continuing education), PPTA questioned whether an individual who had failed to complete required continuing education could practice on an expired license.

The Board received similar comments from the Insurance Federation of Pennsylvania (IFP) opposing proposed § 20.41, which IFP viewed as overly broad and vague. IFP suggested using "tonic relief" to describe the "level of treatment" to be achieved by massage therapy. IFP also suggested that the Board include the statutory limitation from section 17 of the act (63 P. S. § 627.17), which provides that licensure of massage therapists does not mandate insurance companies to provide new coverage for massage therapy services.

Representatives from PPTA and IFP did not attend the publicly announced meetings of the Board on June 29 and 30 and July 7, when the Board discussed these comments and its responses. The Board thoroughly addressed the comments from PPTA and IFP in this preamble, and, on September 15, 2010, delivered the final rulemaking and other regulatory documents to the House Professional Licensure Committee (HPLC), the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) and the Independent Regulatory Review Commission (IRRC). On that same date, the Board advised commentators that the final rulemaking package had been delivered and directed commentators to IRRC's web site to view the final rulemaking package. The HPLC was scheduled to meet to consider the final rulemaking on September 28, 2010.

On September 24, 2010, PPTA and IFP wrote to the HPLC and objected to the Board's final rulemaking package and urged the HPLC to disapprove the rulemaking and to express its disapproval to IRRC. In its

September 24, 2010, letter, PPTA reasserted that the Board's list of soft tissue manifestations should be stricken. PPTA also restated its objection to the Board's use of "treat," "treatment" and "therapeutic massage techniques." In its September 24, 2010, letter to the HPLC, IFP stated that the Board should strike its list of soft tissue manifestations. In addition, IFP renewed its request that the regulations repeat section 17 of the act.

On September 29, 2010, representatives of the HPLC and Legislature met with representatives of the Department of State, the Board, the Pennsylvania Massage Therapy Association, PPTA and IFP to discuss the concerns. The HPLC then asked the Board to withdraw the regulations. The Board agreed. The Board announced that it would meet in special session on October 12, 2010, to discuss possible amendments.

By way of letters dated October 8, 2010, received by the Board on October 12, 2010, PPTA and IFP provided additional comments to the HPLC and the Board. In its October 8, 2010, letter, PPTA provided its suggestion for the regulatory definition of massage therapists' scope of practice. PPTA suggested the Board delete references to "treatment" or "pain" and also asserted that the Board should delete references to "treatment objectives" in the final-form rulemaking. In its October 8, 2010, letter, IFP endorsed the changes proposed by PPTA and proposed additional amendments. First, IFP proposed that the Board delete statements suggesting that massage therapists "treat" soft tissue manifestations and instead state that massage therapists "provide palliative treatment" to soft tissue manifestations. IFP also proposed changes to the scope of practice proposal made by the HPLC.

The Board met on October 12, 2010, and discussed the proposals by PPTA, IFP and the HPLC. The Board entertained comments from the representatives of the HPLC and PPTA. The Board will generally accept the proposals made by PPTA, IFP and the HPLC and amend § 20.41(a). However, rather than create a new definition when "massage therapy" is already defined in the act, Board will amend this subsection to track the language in section 2 of the act. The Board rejects the suggestions of deviating from the statutory language "treatment of the soft tissue manifestations of the human body" to refer to "tonic treatment" or "palliative treatment." In addition to tracking the statutory language in § 20.41(a), the Board will delete the list of soft tissue manifestation which limited massage therapy practice in the proposed rulemaking. By deleting the list of soft tissue manifestations, the emphasis of the scope of practice provision is shifted to the "structured system of touch, pressure movement, holding and treatment" in the act and away from the Board's prior emphasis on what is touched, applied pressure, moved, held or treated. The system of touch, pressure, movement, holding and treatment that traditionally comprise Western massage therapy includes both soft tissue manipulation (effleurage, petrissage, tapotement, vibration and friction) and active and passive joint movements. The act also specifically includes lymphatic techniques and myofacial release techniques in the definition of "massage therapy." Tracking the statutory language in the regulation neither enlarges nor contracts the scope of practice permitted under the act. The Board will retain § 20.41(b), which provided for both the statutory prohibitions on massage therapists' practice and additional regulatory prohibitions. The Board also adds new subsection (c) that tracks section 17 of the act.

Regarding the use of "therapeutic massage techniques," the Board recognizes that this terminology may be overly restrictive because these techniques comprise only a part of massage therapy practice and massage therapists may employ massage therapy techniques that are not considered "therapeutic massage techniques." As noted by PPTA, physical therapists are also authorized to provide massage under section 2 of the Physical Therapy Practice Act (63 P. S. § 1302), which defines "physical therapy" to include "the treatment of the individual through the utilization of the effective properties of physical measures such as . . . massage . . . ." Other licensed professionals may also employ some therapeutic massage techniques. See, for example, section 2 of The Professional Nursing Law (63 P. S. § 212), which defines the "practice of professional nursing" to include "treating human responses to actual or potential health problems through such services as . . . provision of care supportive to or restorative of life and well-being." The Board will change "therapeutic massage techniques" to "massage therapy" throughout the final-form rulemaking. This will also eliminate the need to define "therapeutic massage techniques." Finally, the Board amends "treatment plan" to "massage therapy treatment plan."

In its comments on the proposed rulemaking and in its September 24, 2010, letter, PPTA objected to allowing an applicant to practice without supervision for up to 6 months after graduation from a massage therapy program but before passing a licensure examination. The act does not limit the practice of temporary practice permit holders; therefore, the Board did not limit the practice of these individuals. Unlicensed persons, including temporary practice permit holders, are forbidden from using the title "L.M.T." or holding themselves out as licensees.

FSMTB also submitted comments. FSMTB opined that the Board should accept only the Massage and Bodywork Licensure Examination (MBLEx), which is offered by FSMTB. The act recognizes the two examinations offered by the NCBTMB as well as the MBLEx. The Board believes it is constrained to do the same.

FSMTB pointed out a typographical error when the Board referred to the organization as "FSBMT." The error has been corrected.

FSMTB pointed out that fees paid to it are refunded, minus a processing fee. The Board made this correction by deleting § 20.23(d) (relating to licensure examinations).

FSMTB noted that it does not restrict the number of times a candidate can fail the MBLEx without having to undertake some intervention before subsequent attempts. FSMTB opined that it would be difficult for the Board to monitor compliance with its limitation in § 20.23(e), and that attempting to enforce the provision could result in the disparate treatment of applicants for licensure by examination and applicants for licensure by reciprocity. The Board agrees and deleted § 20.23(e) from the final-form rulemaking.

Regarding § 20.33, FSMTB asked that it be added to the list of preapproved providers of continuing education, even though FSMTB does not currently provide continuing education review and approval services and apparently does not have definite plans to do so. The Board believes it would be inappropriate to prospectively approve FSMTB's continuing education process before it has been developed.

AMTA submitted comments on several sections of the proposed rulemaking. Regarding § 20.24, AMTA opined that a student who will graduate from a massage therapy education program "on or before the approval and passage of these rules and regulations" should be included as an

existing practitioner. AMTA also stated that "many of the students begin working for employers in the state in the latter portions of their programs. Excluding them would greatly affect business at these establishments and place an undue burden on a student who until this point would have been grandfathered in."

Subsection 5(b)(1) of the act requires an individual seeking licensure as an existing practitioner to, on the effective date of the subsection, "demonstrate that the applicant has conducted a business and been an active participant in that business which was mainly the practice of massage therapy." The subsection became effective on October 9, 2010. Individuals who can demonstrate that they were in the active practice of massage therapy on that date, and who comply with the other provisions of the act, can be considered existing practitioners. The effective date of the final-form rulemaking does not affect an individual's status as an existing practitioner. Once the regulations have been passed, § 20.14 will prohibit massage therapy students from practicing except in the clinical training program operated by the student's school. Students are permitted to practice specific techniques that are being learned as part of the massage therapy education program, but may not receive any compensation, including a gratuity, for practicing these techniques. Therefore, once the regulations become final, students will no longer be able to be employed as massage therapists.

AMTA next expressed concern about individuals who have taken a maternity leave or a sick/short-term disability leave during the last 5 years and questioned whether these individuals could qualify for licensure under section 5(b) of the act. One of the ways that an existing practitioner can qualify for licensure is if the existing practitioner can demonstrate that he has been in "active, continuous practice for at least 5 years immediately preceding the effective date of this section." The final-form rulemaking, which allows a practitioner to demonstrate the required 5 years of practice through tax documents and other means, allow an individual to obtain licensure even if the individual took a period of maternity leave. Several other licensing boards have period of practice requirements and the Board is not aware of any difficulties in determining whether an applicant is qualified for licensure despite having taken maternity or a short term disability leave.

AMTA next explained its historic levels of membership and asked for applicants who were at the associate level in 2007 to be permitted to use that membership level to show the first of the past 5 years as a practitioner. Associate level membership was for students and new graduates, but was discontinued on November 30, 2004. After November 20, 2007, individuals were required to participate at the professional level. It is the Board's understanding that AMTA requires, as a prerequisite to professional level membership, that an individual have completed a minimum of 500 hours of massage therapy instruction or hold a National certification. Therefore, professional members of AMTA will qualify for licensure under section 5(a)(3)(iii) of the act and do not need to apply for licensure under section 5(a)(3)(i) of the act.

AMTA suggested that the Board increase the number of continuing education hours that can be completed online to 8 hours. The Board has done so. AMTA questioned how the Board would address individuals with disabilities such as deafness who rely on online continuing education and whether requirements would be placed on continuing education providers to make accommodations for those who are disabled. A mechanism is provided in 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) by which an individual may request a waiver of a regulatory provision when the individual's circumstances frustrate compliance. The Board will strive to be considerate and treat licensees fairly. As for requiring, through its regulations, continuing education providers to provide accommodations for the disabled, the Board believes that Federal law governs the provision of accommodations.

AMTA also queried whether working toward a degree in a related field, such as kinesiology, at a 2- or 4-year college could count toward meeting the continuing education requirement. The act requires that continuing education courses be related to massage therapy practice. Not all classes in fields such as kinesiology are related to massage therapy practice. An individual may apply to the Board to receive continuing education credit for college courses and provide a detailed syllabus that will allow the Board to determine if continuing education credit can be granted.

Finally, AMTA noted that some of its members expressed concern about the number of continuing education hours required by the Board. The General Assembly determined the number of hours required biennially and the Board cannot deviate from that number.

Regarding § 20.41, AMTA stated that some people hold dual positions within their offices and asked how this would be regulated as to what services they can do and when they can do those services. AMTA gave the example that in the cosmetology field esthetics must be done in a separate room from massage therapy and asked if the individual holds both licenses, can they perform esthetics and massage in the same room. AMTA also asked whether a massage therapist who is also a chiropractic assistant can use devices such as a muscle stimulation unit. Each licensing board regulates the practice of a particular profession or occupation with a defined scope of practice. While practicing and holding oneself out as a massage therapist, an individual shall practice within the scope of practice of a massage therapist. If the same individual also holds another license, that individual can practice within the scope of that license when practicing the other profession and holding himself out as that type of licensee. It is the Board's understanding that the State Board of Cosmetology restricts the practice of cosmetology and its related subfields, such as esthetics, to the floor space of the cosmetology salon. Therefore, it would appear to the Board that massage therapy cannot be practiced within the floor space of the cosmetology salon, regardless of who is performing the massage therapy services. The Board is not familiar with the scope of practice of a chiropractic assistant but would reiterate its opinion that individuals may practice within the scope of practice of the profession or occupation they are practicing and holding themselves out as practicing during any period of time.

Regarding § 20.42(a)(14) (relating to standards of professional conduct), which requires a licensee to display his license in a location clearly visible to clients, AMTA expressed concern with listing the licensee's home address on documents that would be in the plain sight of clients. The Board does not require the licensee to display their home address in plain sight of clients; in fact, the Board would encourage licensees to cover their home addresses, such as with black construction paper, when displaying their licenses. However, licenses must be displayed so that the public can know that an individual possesses the license.

Regarding § 20.42(a)(15), which requires licensees to include their license number in advertisements, AMTA asked whether a massage therapist who works for a spa has to have the therapist's license number posted in the spa's advertisement and asked how would a spa with multiple therapists be required to post each therapist's number in the advertising. The provision provides for what a massage therapist shall do; it does not regulate spas. If a massage therapist advertises his practice, the massage therapist shall include the license number in the advertisement. If a business, such as a spa, advertises massage therapy services without naming a massage therapist, the spa is not subject to the regulation. The Board notes, however, that businesses providing massage therapy may only provide massage therapy by licensed individuals.

The Board received a comment from an individual asking the Board to amend the medical device restriction to be open ended, specifically so that licensees could use Spray and Stretch topical anesthetic skin refrigerant. According to the commenter, the product was classified as a medical device by the United States Food and Drug Administration under the authority to approve prescription devices used by health care practitioners under 21 CFR 801.109 (relating to prescription devices). The General Assembly defined "massage therapy" to exclude massage therapists from practicing medicine or using medical procedures or prescribing medicines for which a license to practice the healing arts is required. Massage therapists are not considered practitioners of the healing arts in this Commonwealth and are not permitted to use medical devices in their practice.

On June 9, 2010, the HPLC voted not to take formal action on the Board's proposal until the final rulemaking was submitted and provided the Board with five comments. First, the HPLC requested that the Board define "treatment plan" and asked why a massage therapy student would be developing or modifying a treatment plan on his own. The Board added a definition for the term. Section 20.13 requires a massage therapy education to provide students with skills in the area of the development, implementation and modification of treatment plans. The Board's proposed rulemaking did not allow a massage therapy student to develop or modify a treatment plan on his own. Proposed § 20.14 did not mention treatment plans.

The HPLC next asked the Board to explain its rationale for the inclusion of business subjects in the knowledge base curriculum and continuing education courses for massage therapy. The HPLC commented that this inclusion is inconsistent with continuing education courses of other professions or occupations when business management courses, in particular, are prohibited. The final-form rulemaking provides for at least 25 contact hours of education, out of the minimum 600 hours of required instruction, in professional ethics, and business and law regarding a massage therapy business. Because many massage therapists run their own businesses, the Board believes that some minimal amount of education should be provided to students to give them a better chance of being successful in their practice. Section 20.33(a) requires that creditable continuing education "be designed to advance the licensee's professional knowledge and skills related to the practice of massage therapy as defined in section 2 of the act." In response to a commenter's suggestion that the Board should allow a business class to be creditable toward the continuing education requirement, the Board, in the preamble to the proposed rulemaking, noted that the act "restricts the granting of credit for taking courses to build one's business." The Board does not believe that the proposed rulemaking indicated that business courses constitute creditable continuing education.

The HPLC noted that a procedure was not presented for licensure by endorsement and that § 20.21 is referenced in § 20.26(b). The Board used "reciprocity" and "endorsement" interchangeably. The Board conformed its language use to the act, which uses "reciprocity."

The HPLC next questioned whether an applicant whose license is refused has due process rights to appeal after unfavorable results from the hearing. The hearing is the Board's provision of the applicant's due process right to be heard. Under 2 Pa.C.S. § 702 (relating to appeals), aggrieved parties have the right to appeal a final determination by a governmental unit to Commonwealth Court.

Finally, the HPLC questioned the definition of "contact hour" in § 20.1 (relating to definitions), which combines the length of time (50 to 60 minute period of instruction) and the circumstances (in the physical presence of an instructor or supervisor) and § 20.32(b) (relating to continuing education hours, maintenance of certificates of completion) provides for a maximum of 6 hours of continuing education in correspondence courses. The HPLC questioned whether the correspondence courses are in 50 to 60 minute periods to meet the quantitative aspect of the definition. The Board anticipates that the course provider would determine the amount of content that would take an average person 50 to 60 minutes to work through, as is done by the boards within the BPOA. For clarity, the Board rewrote § 20.32(c) to delete the reference to correspondence courses and instead refer to the number of hours that shall be taken as "contact hours," a term defined in § 20.1. In addition, the Board deleted "contact" from § 20.32(b), which was inadvertent; ethics courses do not need to be taken in the physical presence of the instructor, a requirement most relevant to therapeutic technique classes.

IRRC submitted comments on July 7, 2010. IRRC recommended that the Board define "soft tissue manifestations," "therapeutic massage techniques," "treatment," and "treatment plan." The Board attempted to define "soft tissue manifestation" by listing manifestations that massage therapists could treat. The regulation has since been amended. Because the General Assembly used the term "soft tissue manifestations" in the act and did not define it, the Board will not again define the term after the HPLC requested that the definition be amended. The term "therapeutic massage techniques" is no longer used and does not need to be defined. The Board defined "treatment" and "massage therapy treatment plan" consistent with the act.

IRRC next commented that the Board's definition of "sexual harassment" should refer to conduct that is "unwanted" or "unwelcome" because Human Relations Commission provisions regarding unlawful employment actions use these terms. The Board disagrees that these terms belong in regulations governing the conduct of massage therapists. On the contrary, a massage therapist is prohibited from deliberate physical contact of a sexual nature with a client even if the contact is "wanted" or "welcome" because professional ethics prohibit this type of personal contact within the professional relationship.

IRRC asked how the Board determined that the proposed fees were appropriate. Regarding the reasonableness of its fees for services in § 20.3, the Board based the fees on reports made by the Department's revenue office.

Fee report forms showing the costs for providing the services were attached to the Regulatory Analysis Form required under the Regulatory Review Act (71 P. S. §§ 745.1-745.12) and IRRC's regulation in 1 Pa. Code § 307.2(c)(1) (relating to delivery of a final-form regulation). The fee report forms show the amount of time expended in processing fee for service items and the amount of overhead charged based on that amount of time.

With regard to education programs under § 20.11 (relating to minimum hour requirements for massage therapy programs), IRRC asked how the Board determined the appropriate number of hours in each subject area that a massage therapy curriculum would be required to provide. The Board reviewed the standards set by massage therapy education program accrediting bodies and the regulations of other states. The Board's final-form rulemaking reflects industry standards for the number of hours in particular subject areas for a massage therapy curriculum.

Regarding § 20.13, IRRC asked for more specificity regarding the legal requirements to be taught to massage therapy students in schools this Commonwealth. The Board amended § 20.13 to refer to Pennsylvania legal requirements, which include licensure requirements and standards of conduct. IRRC also asked the Board to add language to clarify what level of "knowledge" massage therapy education shall provide to its students. The Board declines to add clarifying language because it believes that massage therapy schools already know that they shall educate their students sufficiently to enable the students to pass a licensure examination and practice massage therapy.

Regarding student practice, IRRC asked what was the basis for the 3-year time period to maintain records of student practice in a school's clinical program. The Board based the time period on the 2-year tort statute of limitations and added an additional year. IRRC also suggested relating the provision to the date of service. As previously noted in the response to a similar suggestion from PAPSA, the Board added language to inform the regulated community that records shall be kept for 3 years from the last date of service.

Regarding § 20.14(g), IRRC suggested that the final-form rulemaking include the means by which schools could comply with the requirement that students be identified as students when they are performing services in a student clinic. The Board believes that the schools already identify student clinics as such and that each school can determine the best way to identify students. Some ways already in use include signs, nametags and requiring clients to sign an acknowledgement that a student will perform the massage.

IRRC raised the same concern as the HPLC regarding the Board's interchangeable use of "endorsement" and "reciprocity" in § 20.21. The Board made the language consistent in the final-form rulemaking. IRRC questioned how the Board determined that requiring criminal history records for every state the applicant had lived for the past 5 years was an appropriate limit on the years of review. The provision is for verification purposes only; an applicant is required to disclose criminal convictions. Criminal history records show all convictions, even those that occurred 15 or 20 years ago. The 5-year limitation is geographical and the Board's thinking is that if an applicant is moving from state to state to avoid detection of a criminal history, he would likely move more often than every 5 years.

IRRC asked about the Board's requirement that applicants disclose arrests. This issue was addressed in response to the same inquiry by PAPSA. IRRC erroneously states that the act only permits the Board to refuse licensure to an applicant who has been convicted of a felony under The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101—780-144) or comparable law in another jurisdiction or the United States. However, section 9(a)(1) of the act (63 P. S. § 627.9(a)(1)) authorizes the Board to refuse licensure to an applicant who has been convicted of a crime of moral turpitude or an offense that would constitute a felony in this Commonwealth. In addition, section 5(a)(1) of the act requires that applicants demonstrate good moral character.

Regarding § 20.21(d)(4) and (5), IRRC also questioned whether a licensed professional would make the determination of whether an applicant is unable to practice with reasonable skill and safety due to mental or physical conditions or impairment based on the use of drugs or alcohol. Individuals would be referred to the Professional Health Monitoring Program and an appropriate professional would conduct the evaluation. However, if an applicant contests the findings, a hearing is held before the Board and the applicant may present expert testimony on the subject of their ability to practice safely. Other licensing boards that have successfully used this process for many years do not provide extensive regulatory provisions regarding these matters and the Board does not believe there is a need for these regulations to include extensive sections regarding these matters. Finally, IRRC suggested that the Board delete the phrase "any other type of material" from subsection (d)(4) because it is vague. The phrase comes directly from the act and thus is retained.

IRRC next asked for the basis for a 6-month period of time for an applicant to supply missing documentation for an application. The time period was chosen to conform to the length of time that an applicant can practice on a temporary practice permit.

IRRC also suggested that § 20.22 (relating to procedure for licensure denial) reference who will conduct evaluations and licensee appeal rights. The Board added a reference to the Professional Health Monitoring Program and to section 9(c) of the act. IRRC asked whether an applicant would be notified of the results of an evaluation. The applicant would have to obtain the evaluation directly from the evaluator.

IRRC questioned the 90-day time frame for applicants to reapply for the examinations; these are requirements of the testing organizations placed in the regulations to inform applicants. The Board corrected the typographical reference to FSMTB. IRRC also questioned the process of monitoring the additional hours of instructions required under § 20.23(e) for applicants who have failed a licensure examination multiple times to obtain additional hours of instructions. The Board removed the limit on the number of times an applicant could fail the examinations before being required to take more coursework.

IRRC questioned the Board's use of the date October 9, 2010, in § 20.24(c). The date is required under the act. IRRC, like AMTA, asked about new graduates; the Board addressed this issue in its response to AMTA's comments. IRRC also suggested that the Board define "existing practitioners." The Board believes this term is defined in the act.

IRRC next asked what services could be performed by a temporary practice permit holder. The act does not limit the services and the Board does not believe that the services should be limited.

Regarding § 20.32(g), IRRC asked under what circumstances the Board would determine an audit was necessary. A certain percentage of the licensee population will be audited at random, as is done by most of the licensing boards.

Regarding § 20.41, IRRC asked how the Board would regulate "overlapping licensure." The Board can only regulate the practice of massage therapy; other licensing boards regulate the practice of the professions they oversee. IRRC also recommended that the Board, in its final-form rulemaking, set forth a list of services that dual licensees can perform. The Board cannot define in regulation what services dual licensees can perform; it can only define what services licensed massage therapists can perform. The Board believes its regulation sets forth the scope of practice of licensed massage therapists consistent with the act.

Regarding § 20.42, IRRC asked how the Board would address a situation if a soft tissue manifestation is also a symptom of an underlying condition. The Board is aware that soft tissue manifestations may be symptoms of an underlying condition; for example, some massage therapists provide services solely on referral from a physician and report to the referring physician. The act authorizes licensed massage therapists to apply a system of structured touch, pressure, movement, holding and treatment of the soft tissue manifestations of the human body with the primary intent to enhance health; thus, while a licensed massage therapist does not treat an underlying disease, a licensed massage therapist does provide treatment to soft tissue manifestations to enhance health by treating the soft tissue manifestations of an underlying disease. Section 20.42(a)(5) requires a licensed massage therapist to refer a client to an appropriate health care profession when indicated. If a complaint were filed against a licensee regarding licensee misconduct or a licensee exceeding the permitted scope of practice, the Board would hold a hearing to determine the facts and issue an adjudication, as required under 2 Pa.C.S. §§ 501—508 and 701—704 (relating to the Administrative Agency Law). The Board has the authority to discipline a licensee who exceeds the scope of practice of a licensed massage therapist.

Finally, IRRC asked how a massage therapist would act to safeguard a client from incompetent, abusive or illegal practices, as required under § 20.42(a)(11). By way of example, the Board would point to *Stephens v. State Board of Nursing*, 657 A.2d 71 (Pa. Cmwlth. Ct. 1995), wherein the Commonwealth Court affirmed a decision of the State Board of Nursing disciplining a licensee for failing to safeguard a patient from incompetent or abusive practices when a nurse waited 10 minutes before intervening on a patient's behalf when a nurse aide was teasing a patient and failed to report the nurse aide to the facility. A licensed massage therapist might fail to safeguard a client if the licensed massage therapist witnessed another licensed massage therapist or other health care worker, such as a nurse aide or physical therapist, abusing a patient and failed to intervene and report the matter to the proper authorities.

During its review of the rulemaking at its October 12, 2010, meeting, the Board corrected § 20.21(b)(2). The subsection required applicants to have the State Police send the applicant's criminal history record directly to the Board; however, the Board recently learned that the state policy would release the criminal history record only to the applicant. The amended version will permit an applicant to obtain his record and forward the record to the Board.

The Board made additional amendments for clarity. First, in § 20.3, the Board added a fee for the application for a temporary practice permit which had been inadvertently omitted from the proposed rulemaking. In addition, in describing the fee for verification of licensure, the Board added the terminology of a "letter of good standing," which is the terminology used in many other states to describe what boards in the BPOA refer to as verification of licensure.

The Board amended § 20.13(a)(6) to add "Pennsylvania" to "legal requirements" since Pennsylvania massage therapy education should provide students with knowledge about Pennsylvania requirements. Subsection (a)(9) was amended from "basic CPR" to "CPR resulting in a Board-approved certification" to add clarity. Board-approved CPR sources have been noted on the Board's web site. Subsection (c)(4) was amended to correct a typographical error where "decision making" was inadvertently left in the sentence after "utilizing . . ." was added to conform the paragraph to the other paragraphs in subsection (c). Subsection (c)(6) was amended to correct an incorrect reference.

In § 20.14, the Board amended subsection (c) to incorporate the substantive provisions of subsections (d) and (e) and deleted subsections (d) and (e). The addition of "or other source" was to encompass any other way that a payment might be set up, such as from the clinic as an entity. Subsection (e) is unnecessary as the prohibition in subsection (c) covers what was prohibited by subsection (e).

The Board deleted the reference to providing documents regarding an applicant having been arrested from § 20.21(d)(3). The Board was informed that the charging documents are the first official documents regarding a criminal complaint, not arrest documents.

In § 20.22, the Board provided additional information regarding how an applicant would participate in an evaluation; specifically, the applicant would contact the BPOA's Professional Health Monitoring Program. The Board added this information so an applicant would know what part of the BPOA to contact if the applicant wished to discuss an impairment issue before applying for licensure.

The Board also made minor amendments to § 20.24. First, in § 20.24(c)(2), the Board added the requirement that an applicant sign the copy of Federal tax form Schedule C if the applicant submits that form. The Board added the signature requirement to conform § 20.24(c)(2) and § 20.24(c)(1), which required that Federal tax returns be signed. In addition, the Board amended § 20.24(c)(3) to require that the proof of membership in a Board-approved professional association be sent directly from the association. This requirement will eliminate the ability of an applicant to provide fraudulent documentation. The same requirement for direct production of documents was added to § 20.24(f) regarding the transcript from an educational institution.

In § 20.31(a) and (b) (related to expiration, renewal and reactivation of license), the Board added the license expiration and renewal dates as the approximate date that the rulemaking is likely to become final is now known. In § 20.31(d), the Board separated out reporting

requirements that had previously been together. The separation allowed the Board to draw more attention to each separate requirement. A longer period was allowed for reporting reciprocal discipline, as this is generally less serious. In subsection (e), language was changed from referring to a "wall certificate" to an "updated license" to reduce confusion about what a wall certificate might be. If a wall certificate is issued by the Board, it is only issued once, upon initial licensure. The Board also deleted the reference in subsection (f) to "signed" in a requirement that a document be both signed and notarized. "Signed" was removed because "notarized" implies signed; a notary notarizes a signature.

For clarity, the Board amended § 20.32 (related to continuing education hours, maintenance of certificates of completion) at subsection (c) to state the requirement in a positive statement rather than a negative statement. Subsection (d) was clarified to require CPR courses to be taken through contact hours, not online courses, to reflect the Board's belief that CPR is best learned through a "hands on" experience.

The Board amended § 20.33(d) to provide that the Board's approval of a proposed continuing education course would be valid for 2 years from the date the course is first given for credit provided the faculty and learning objectives are unchanged. The Board thought it would have been overly restrictive to have its approval of a course valid for only one presentation of the course and would have placed an undue burden on a course provider to reapply for approval if the provider wanted to present the same course more than once. On the other hand, the Board thought some time limit was appropriate. The Board determined that a 2-year approval period would adequately address both concerns.

Finally, the Board amended § 20.34 based on PPTA's concern that the this section would permit an individual to practice when his license is expired. Massage therapy licensees are not permitted to practice on an expired license. The imposition of a civil penalty for failure to complete mandatory continuing education is the most common form of discipline imposed by all licensing boards in the BPOA. The Board is not clear what additional penalty PPTA believes should be imposed against massage therapy licensees who fail to complete continuing education. The continuing education model in the proposed rulemaking was relatively new and was adopted by the State Board of Nursing. The Board determined that it should adopt the more traditional model, which is used by the State Board of Physical Therapy, because it is easier to understand. Therefore, § 20.34(b)—(d) was deleted and subsection (a) was amended.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have a fiscal impact on massage therapists because there is a cost to licensure and license renewal. Fees, except biennial renewal fees, are based on an estimate of the amount of time required to perform the service to an individual and the type of staff required to perform the service. Biennial renewal fees are developed by the BPOA's Bureau of Finance and Operations and are used to sustain the day-to-day operations of the Board. The final-form rulemaking may have a fiscal impact on individual licensees if massage therapists do not already abide by the minimum safety and cleanliness requirements set forth by the Board. Minor paperwork and recordkeeping requirements are placed on massage therapy schools and providers of continuing education for massage therapists.

The final-form rulemaking will not otherwise have fiscal impact nor impose additional paperwork on the private sector, the general public or the Commonwealth and its political subdivisions.

Sunset Date

The Board continuously monitors its regulations. Therefore, a sunset date has not been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 27, 2010, the Board submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 2428 (May 8, 2010), 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, on November 17, 2010, the final-form rulemaking was deemed approved by the HPLC. On November 17, 2010, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC approved the final-form rulemaking on November 18, 2010.

Under section 5.1(j.2) of the Regulatory Review Act, on November 17, 2010, the final-form rulemaking was deemed approved by the HPLC and the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 18, 2010, and approved the final-form rulemaking.

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) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

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

(3) The amendments made to the final-form rulemaking do not expand the scope of the proposed rulemaking published at 40 Pa.B. 2428.

(4) This final-form rulemaking is necessary and appropriate for administering and enforcing the authorizing act identified in this preamble.

Order

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

(a) The regulations of the Board, 49 Pa. Code, are amended by adding §§ 20.2, 20.11, 20.12, 20.25, 20.43 and 20.51—20.54 to read as set forth at 40 Pa.B. 2428 and by adding §§ 20.1, 20.3, 20.13, 20.14, 20.21—20.24, 20.26, 20.31—20.34, 20.41 and 20.42 to read as set forth in Annex A.

(b) The Board shall submit this order, 40 Pa.B. 2428 and Annex A to the Office of General Counsel and the Office of Attorney General as required by law.

(c) The Board shall certify this order, 40 Pa.B. 2428 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*.

ROBERT C. JANTSCH,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 7000 (December 4, 2010).)

Fiscal Note: Fiscal Note 16A-721 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 20. STATE BOARD OF MASSAGE THERAPY

GENERAL PROVISIONS

§ 20.1. Definitions.

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

Act—The Massage Therapy Law (63 P. S. §§ 627.1—627.50).

Board—The State Board of Massage Therapy.

Client—Any individual, group of individuals, or organization to which an L.M.T. provides massage therapy services.

Contact hour—A 50 to 60 minute period of instruction related to the practice of massage therapy in the physical presence of an instructor or supervisor.

Draping—The use of linens to cover a massage therapy client to preserve client privacy and modesty, to maintain professional boundaries and for client warmth.

FSMTB—The Federation of State Massage Therapy Boards.

Immediate supervision—The supervisor or instructor is within visual or audible range of the individual being supervised.

In-class—In the physical presence of an instructor or under the immediate supervision of a clinical supervisor.

Indirect supervision—The supervision provided by a clinical supervisor or instructor who has given a student instructions on the performance of massage therapy activities, assigned for credit, that are to be practiced outside of class or clinic.

Informed consent—A process wherein the massage therapist and a competent client or the client's guardian come to a mutual understanding of the massage therapy treatment, including objectives, benefits and any risks.

L.M.T.—Licensed Massage Therapist.

MBLEx—Massage and Bodywork Licensure Examination of the Federation of State Massage Therapy Boards.

Massage therapy treatment plan—Written documentation that addresses soft tissue manifestations, needs and concerns of the client, including identifying indications, contraindications and precautions of massage therapy within the scope of the act, how the needs and concerns will be addressed, massage therapy goals and how progress will be assessed.

NCBTMB—National Certification Board for Therapeutic Massage and Bodywork.

NCETM—National Certification Examination for Therapeutic Massage.

NCETMB—National Certification Examination for Therapeutic Massage and Bodywork.

NESL—National Examination for State Licensure, an option offered by the NCBTMB which allows individuals to take the NCETM or NCETMB without obtaining National certification.

Professional relationship—The relationship between a massage therapist and a client which shall be deemed to exist from the first professional contact or consultation and continue thereafter until 6 months after the last date of a professional service.

Sexual abuse—Conduct which constitutes a violation of any provision of 18 Pa.C.S. (relating to crimes and offenses) related to sexual offenses (See 18 Pa.C.S. §§ 3121—3130 (relating to definition of offenses).)

Sexual harassment—Deliberate or repeated comments, gestures or physical contacts of a sexual nature.

Sexual impropriety—The term includes the following offenses during the professional relationship:

(i) Making sexually demeaning or sexually suggestive comments about or to a client, including comments about a client's body or clothing.

(ii) Unnecessarily exposing a client's body or watching a client dress or undress, unless the client specifically requests assistance due to disability.

(iii) Discussing or commenting on a client's potential sexual performance or requesting details of a client's sexual history or preferences.

(iv) Volunteering information to a client about one's sexual problems, preferences or fantasies.

(v) Behavior, gestures, or expressions to a client that are seductive or of a sexual nature.

(vi) Using draping practices that reflect a lack of respect for the client's privacy.

Sexual intimacies—Romantic, sexually suggestive or erotic behavior or soliciting a date.

Sexual violation—Sexual conduct, during the professional relationship, between a massage therapist and a client, including any of the following:

(i) Indecent exposure.

(ii) Touching, with the massage therapist's body or an object, the genitals or any sexualized body part of the client for any purpose other than appropriate examination or treatment or when the client has refused or withdrawn consent.

(iii) Encouraging a client to masturbate in the presence of the massage therapist or masturbating while a client is present.

(iv) Providing or offering to provide treatment in exchange for sexual favors.

Supervisor—A licensee or instructor who meets the qualifications under section 13(3) of the act (63 P. S. § 627.13(3)).

Treatment—The use of massage therapy where the primary intent is to enhance the health and well-being of the client.

§ 20.3. Fees.

(a) The following fees are charged for services provided by the Board:

Application for licensure	$65
Application for temporary practice permit	$65
Verification of licensure or letter of good standing	$15
Certification of licensure history	$25
Reactivation of license	$65
Restoration after suspension or revocation	$65
Approval of continuing education program	$65

(b) The following fees are charged to sustain the operations of the Board:

Biennial renewal of license	$75

(c) In addition to the application fee prescribed in subsection (a), which is payable directly to the Board, a candidate for the MBLEx shall be responsible for any fees charged by the FSMTB for taking the examination.

(d) In addition to the application fee prescribed in subsection (a), which is payable directly to the Board, a candidate for the NESL, the NCETM or the NCETMB shall be responsible for any fees charged by the NCBTMB for taking the examinations.

EDUCATION

§ 20.13. Required knowledge base.

(a) Massage therapy education must provide students with knowledge of the following:

(1) Massage and bodywork assessment and application.

(2) Contraindications and precautions for massage therapy.

(3) Anatomy and physiology.

(4) Kinesiology.

(5) Pathology.

(6) Pennsylvania legal requirements.

(7) Business practices.

(8) Professional ethics.

(9) CPR resulting in a Board-approved certification.

(10) Communicable diseases and universal precautions.

(11) Power differentials and other therapeutic boundary issues as they relate to client interaction.

(12) Fundamentals of human behavior and respect for clients in the practice of massage therapy.

(b) Massage therapy education must provide students with the practical skills to:

(1) Administer fundamental massage therapy for the treatment of soft tissue manifestations of the human body.

(2) Safely utilize topical preparations, thermal and cryogenic modalities, hydrotherapy and movements that lengthen and shorten soft tissues within the client's normal range of motion.

(3) Maintain safe and effective body mechanics in the application of massage therapy.

(4) Locate and palpate muscle attachments, muscle bellies and other anatomical landmarks necessary for the practice of massage therapy.

(5) Use draping/coverage practices that address both function and safety.

(c) Massage therapy education must provide students with additional skills in the following areas:

(1) Development, implementation and modification of a massage therapy treatment plan that addresses client soft tissue manifestations, needs and concerns, including identifying indications, contraindications and precautions of massage therapy within the scope of the act.

(2) Obtaining informed consent regarding the risks and benefits of the massage therapy treatment plan and application and modification of the massage therapy treatment plan as needed.

(3) Using effective interpersonal communication in the professional relationship.

(4) Utilizing an ethical decision making process that conforms to the ethical standards of the profession, as set forth in this chapter and in the codes of ethics of massage therapy professional associations.

(5) Establishing and maintaining a practice environment that provides for the client's safety and comfort.

(6) Establishing and maintaining client records, professional records and business records in compliance with § 20.42(a)(19) (relating to standards of professional conduct).

§ 20.14. Student practice.

(a) A student enrolled in an approved massage therapy program may practice massage therapy by providing services under immediate supervision as part of a clinical training program operated by the school in which the student is obtaining credit.

(b) A student, while enrolled in an approved massage therapy program, may perform techniques learned in class under indirect supervision.

(c) A student may not receive payment from the school, client, or other source for providing massage therapy services; however, a student may accept a nominal gratuity voluntarily given by a client in a clinical training program operated by the school in which the student is obtaining credit.

(d) Massage therapy schools shall maintain records of services provided by students in a clinical training program for at least 3 years from the last date of service.

(e) Students providing services as part of a clinical training program operated by a school shall be clearly identified to the public as students.

LICENSURE

§ 20.21. Application for temporary practice permit, initial licensure and licensure by reciprocity.

(a) Application forms may be obtained from the Board and are posted on the Board's web site.

(b) An applicant for licensure shall submit to the Board a completed and signed application form, the application fee as set forth in § 20.3 (relating to fees) and the following documents:

(1) A copy of a legal form of identification, such as a valid driver's license, a current passport, or a valid State identification card.

(2) An official Criminal History Record Information check from the State Police or other state agency for every state in which the candidate has resided during the past 5 years. The reports must be dated within 6 months of the date of application.

(3) CPR certification, that is valid for at least 6 months following the date of application. A list of Board-approved CPR providers will be posted on the Board's web site.

(4) Proof of graduation from high school or the equivalent.

(c) An applicant shall request that the applicant's massage therapy school send directly to the Board the applicant's official transcript showing successful completion of a massage therapy program in the subject matter and hours required by the act and this chapter. If a school is no longer in operation, the Board may accept a copy of the official transcript from the school's record depository.

(d) An applicant shall provide a written explanation and copies of all relevant documents as requested by the Board if:

(1) The applicant is under investigation or has ever been denied professional licensure or disciplined by any professional licensing authority of the Commonwealth or any other jurisdiction of the United States or a foreign country.

(2) The applicant has surrendered a massage therapy license or other professional license in this Commonwealth or any other jurisdiction of the United States or a foreign country.

(3) The applicant has been charged with or convicted of a misdemeanor or felony in this Commonwealth or any other jurisdiction of the United States or a foreign country.

(4) The applicant is unable to practice massage therapy with a reasonable skill and safety by reason of use of alcohol, drugs, narcotics, chemicals or any other type of material.

(5) The applicant is unable to practice massage therapy with a reasonable skill and safety by reason of illness or as a result of any mental or physical condition.

(e) An applicant shall verify that the applicant has read, understood and will comply with the act and this chapter.

(f) An applicant is responsible for ensuring that the Board receives all required documentation. If the application is incomplete, the Board will notify the applicant by means of first class mail, within 8 weeks of the receipt of the application, that the application is incomplete.

(g) Applicants shall supply the missing documentation within 6 months from the date the application is executed by the applicant. After that time, if the documentation has not been submitted, the application will be denied and the application fee forfeited. An applicant who wishes to reapply shall submit a new application and application fee.

(h) An applicant whose name changes during the application process or whose name has changed since the applicant completed massage therapy school shall notify the Board in writing and submit, with the notification of name change, the appropriate supporting documentation (such as, marriage certificate, divorce decree, court documents showing a legal name change).

(i) An applicant whose address changes shall notify the Board in writing and submit both the old and new address to the Board.

(j) If any other information requested on the application changes after the date the applicant submits the application to the Board for licensure, the applicant shall immediately notify the Board, in writing, of the change. Failure to update an application may subject an applicant to refusal of the license or a licensee to discipline under section 9(a)(4) of the act (63 P. S. § 627.9(a)(4)).

§ 20.22. Procedure for licensure denial.

(a) The Board will inform the applicant, in writing, of the basis upon which the Board has refused the license. The Board will provide the applicant with an opportunity to demonstrate, at a hearing, that the license should be issued.

(b) If information submitted with the application indicates that an applicant may be unable to safely practice massage therapy, the Board will require the applicant to contact the Bureau of Professional and Occupational Affairs' Professional Health Monitoring Program and participate in an evaluation to determine if the applicant can safely practice. An applicant may contest the results of the evaluation at a hearing. The Board will provide an applicant who refuses to participate in an evaluation with an opportunity to demonstrate, at a hearing, that the license should be granted.

(c) In a case when the Board refuses to issue a license, the Board will issue a written final decision setting forth the grounds for the refusal and informing the applicant of the applicant's right to a hearing under section 9(c) of the act (63 P. S. § 627.9(c)).

§ 20.23. Licensure examinations.

(a) The Board adopts the NCETM and NCETMB, including the NESL option, and MBLEx as approved examinations for initial licensure under section 7 of the act (63 P. S. § 627.7).

(b) An individual who plans to take the MBLEx offered by the FSMTB shall contact the FSMTB directly to apply for examination. The FSMTB will issue the candidate an Authorization to Test, which the candidate may use to schedule the examination. Candidates are responsible for registering for the licensure examination date and site. Candidates who are unable to test within 90 days of the date the FSMTB issued the candidate's Authorization to Test will be required to reapply as a new candidate subject to all application and fee requirements in place at that time.

(c) An individual who plans to take the NCETM or NCETMB examinations, including the NESL option offered by the NCBTMB, shall contact the NCBTMB directly to apply for examination. The NCBTMB will issue the candidate an Authorization to Test, which the candidate may use to schedule the examination. Candidates are responsible for registering for the licensure examination date and site. Candidates who are unable to test within 90 days of the date the NCBTMB issued the candidate's Authorization to Test will be required to reapply as a new candidate subject to all application and fee requirements in place at that time.

§ 20.24. Application requirements for existing practitioners.

(a) Existing practitioners shall submit, by January 2, 2012, an application, application fee and the information required under § 20.21(b), (c) and (d) (relating to application for temporary practice permit, initial licensure and licensure by reciprocity) if applicable, and shall be subject to the provisions of § 20.21(e)—(i).

(b) Existing practitioners shall establish that they have conducted a business and been an active participant in that business which was mainly the practice of massage therapy by submitting one of the following:

(1) A signed copy of the applicant's Federal tax return for the previous year, that lists the applicant's occupation as massage therapist.

(2) A signed copy of Schedule C of the applicant's Federal income tax return for the previous year demonstrating that the individual has reported income from the practice of massage therapy.

(3) Proof of professional or practitioner membership level or above in a professional association approved by the Board.

(4) For applicants who have been employed as massage therapists, a notarized statement from the applicant's employer (on a form provided by the Board) attesting that the individual is a practicing massage therapist, a copy of the employer's business card or letterhead, and a copy of the applicant's Federal W-2 or 1099 form.

(c) Existing practitioners applying for licensure under section 5(b)(3)(i) of the act (63 P. S. § 627.5(b)(3)(i)) shall demonstrate that they have been in active, continuous practice for at least 5 years immediately preceding October 9, 2010, by submitting one of the following:

(1) Signed copies of the applicant's tax returns for the past 5 years, each listing the applicant's occupation as massage therapist.

(2) Signed copies of Schedule C of the Federal income tax returns for the past 5 years demonstrating that the applicant has reported income from the practice of massage therapy.

(3) Proof, sent directly from a Board-approved professional association, of at least 5 years membership at the professional or practitioner level or above in the professional association.

(4) For applicants who have been employed as massage therapists, a notarized letter from the applicant's employer (on a form provided by the Board) attesting that the individual has practiced massage therapy for at least the last 5 years, a copy of the employer's business card or letterhead, and copies of the applicant's Federal W-2 or 1099 forms for the last 5 years.

(d) Existing practitioners applying for licensure under section 5(b)(3)(ii) of the act shall have the certification agency provide, directly to the Board, evidence that the practitioner passed a massage therapy examination that is part of a certification program accredited by the National Commission for Certifying Agencies.

(e) Existing practitioners applying for licensure under section 5(b)(3)(iii) of the act shall request that their educational program provide an official transcript directly to the Board to demonstrate that the practitioner completed at least 500 hours of instruction in massage and related subjects. Transcripts generated in a language other than English shall be translated into English at the applicant's expense by a professional translation service and verified to be complete and accurate.

(f) Existing practitioners applying for licensure under section 5(b)(3)(iv) of the act shall demonstrate, through certificates of completion, official transcript provided directly from the educational institution, or correspondence from the practitioner's instructor, that the practitioner completed at least 100 hours of instruction in massage and related subjects and passed the NESL option of the NCBTMB.

(g) Existing practitioners applying for licensure under section 5(b)(3)(v) of the act shall demonstrate, through certificates of completion, official transcript provided directly from educational institution, or correspondence from the practitioner's instructor, that the practitioner completed at least 100 hours of instruction in massage and related subjects and passed the MBLEx.

§ 20.26. Application requirements for temporary practice permits.

(a) An applicant for a temporary practice permit shall submit an application form provided by the Board.

(b) In addition to the completed application form, an applicant for a temporary practice permit shall comply with the application procedures under § 20.21(b)(1)—(3) and (c) (relating to application for temporary practice permit, initial licensure and licensure by reciprocity), and shall be subject to the provisions of § 20.21(d) and (e).

(c) A temporary practice permit will expire on the earlier of 6 months from the date of issuance or on the date the candidate fails the licensure examination.

(d) Individuals who have been issued a temporary practice permit will be considered licensees for purposes of applying section 9 of the act, pertaining to refusal, suspension and revocation of licenses.

(e) Individuals who have been issued a temporary practice permit may not hold themselves out as a licensed massage therapist, use the initials L.M.T. or advertise their practice of massage therapy.

LICENSURE RENEWAL AND REACTIVATION

§ 20.31. Expiration, renewal and reactivation of license.

(a) *Expiration of license.* Licenses expire on January 31 of each odd-numbered year beginning in 2013, regardless of the date of issuance. Licenses are renewable for a 2-year period beginning each October 31 of each even-numbered year beginning in 2012.

(b) *Practice prohibited.* A licensee may not practice massage therapy in this Commonwealth after the last day of January of the renewal year unless the license has been renewed.

(c) *Renewal application.* A licensee shall:

(1) Apply for licensure renewal online or on the form provided by the Board.

(2) Pay the biennial renewal fee as set forth in § 20.3 (relating to fees).

(3) Submit proof of current certification in CPR.

(4) Submit verification of completion of at least 24 hours of Board-approved continuing education.

(5) Submit verification that the licensee has read, understood and will comply with the act and this chapter.

(d) *Reporting requirements.*

(1) Disclosure of licensure or discipline in another jurisdiction. A licensee who becomes licensed to practice massage therapy in another jurisdiction shall report this information on the biennial renewal form or within 90 days of licensure, whichever occurs sooner. Disciplinary action taken in another jurisdiction shall be reported to the Board on the biennial renewal form or within 90 days, whichever is sooner.

(2) Disclosure of the filing of formal criminal charges (information or indictment). A licensee shall report, on the biennial renewal form or within 30 days, whichever occurs sooner, the filing of any criminal charges, the licensee's sentencing on any criminal charges or the licensee's admission into an accelerated rehabilitative disposition program.

(e) *Licensure documentation.* Upon renewing a license, a licensee will receive an updated license and wallet-size card that will show the next expiration date of the license. A licensee who renews online may print a temporary license that may be used until the biennial license is received.

(f) *Inactive status.* A license may be placed on inactive status by the licensee notifying the Board during the online renewal process or in a notarized statement that the licensee wishes to have the license marked inactive. The licensee shall immediately return all licensure documents to the Board and may not practice massage therapy in this Commonwealth until the licensee's license is reactivated and renewed.

(g) *Reactivation.* The holder of an inactive or expired license to practice massage therapy may reactivate and renew the license within 5 years from the date of its expiration by submitting:

(1) An application to the Board.

(2) Payment of the current biennial renewal fee as set forth in § 20.3.

(3) Certificates of attendance at continuing education courses required under § 20.32 (relating to continuing education hours; maintenance of certificates of completion) for the previous biennial renewal period.

(4) Current CPR certification.

(5) An affidavit of nonpractice within this Commonwealth.

(h) *Late fees.* A licensee who practiced massage therapy on an inactive or expired license will be subject to late fees as prescribed by the Bureau of Professional and Occupational Affairs Fee Act (63 P. S. §§ 1401-101—1401-501) upon renewal.

(i) *Disciplinary action authorized.* A licensee who practiced massage therapy on an inactive or expired license may be subject to discipline by the Board under section 9(a)(7) of the act.

(j) *Demonstration of competence after 5 years.* The holder of an inactive or expired license to practice massage therapy will not be reactivated and renewed if more than 5 years have passed from the date of the license expiration unless the licensee has demonstrated current competence to practice. To demonstrate current competence to practice, a licensee must either prove continuous active practice in another jurisdiction during the past 5 years or achieve a passing score on a licensure examination approved for entry into practice in this Commonwealth.

§ 20.32. Continuing education hours, maintenance of certificates of completion.

(a) Licensees shall complete a minimum of 24 hours of continuing education in the field of massage therapy as set forth in section 4(6) of the act (63 P. S. § 627.4(6)) and § 20.33 (related to continuing education content and providers) in the 2-year period immediately preceding the application for license renewal. To be creditable, continuing education must meet the requirements for Board approval set forth in this section and § 20.33.

(b) Licensees shall complete a minimum of 4 hours of continuing education in professional ethics in each biennial renewal period.

(c) A minimum of 16 hours of continuing education shall be earned through contact hours.

(d) Courses for the renewal of the licensee's CPR certification shall be earned through contact hours and may not be used to meet the biennial continuing education requirement.

(e) Licensees shall retain the certificates of completion from continuing education courses for a minimum of 5 years.

(f) A licensee who is unable to complete the required continuing education shall request a waiver or extension from the Board at least 60 days prior to the expiration of the license. The request must include details about the licensee's illness, emergency or hardship, including documentation such as a letter from the licensee's physician or a copy of the licensee's military orders. The Board will respond in writing either granting or denying a request for waiver or extension.

(g) Licensees may be audited to ensure their compliance with the continuing education requirements.

§ 20.33. Continuing education content and providers.

(a) Continuing education must be designed to advance the licensee's professional knowledge and skills related to the practice of massage therapy as defined in section 2 of the act (63 P. S. § 627.2).

(b) The following continuing education providers are approved to offer creditable continuing education provided they comply with subsections (a), (c) and (d):

(1) Schools of massage therapy in this Commonwealth operating under section 5(a)(3) of the act (63 P. S. § 627.5(a)(3)).

(2) Schools of massage therapy approved by the Board or accredited by a National accrediting agency recognized by the United States Department of Education.

(3) The American Massage Therapy Association and its state chapters.

(4) NCBTMB-approved providers.

(5) Associated Bodywork and Massage Professionals.

(c) Continuing education providers shall provide certificates of completion to massage therapists that include the name of the massage therapist, name of the course provider, title of the course, date of the course, and number of hours.

(d) Continuing education providers shall retain documentation of the participants in their continuing education programs for at least 5 years.

(e) Providers of continuing education who are not listed in subsection (b) may apply to the Board for approval of a continuing education course by submitting an application and paying the application fee under § 20.3 (relating to fees). The Board will approve only courses that are designed to advance the knowledge and skills of licensees relative to massage therapy as defined in section 2 of the act and that are taught by approved faculty. Approved faculty include massage therapists licensed in the state in which they practice if licensure is required in that state, physical therapists, physicians, professional nurses and chiropractors. Other instructors with demonstrated expertise may be approved on a case-by-case basis. Course

approval is valid for 2 years from the date the course is first given for credit provided the faculty and learning objectives are unchanged.

(f) An L.M.T. may submit a course offered by a continuing education provider not listed in subsection (b) by filing an application with the Board for approval of a continuing education course and paying the application fee set forth in § 20.3. The Board will approve only courses that are designed to advance the knowledge and skills of licensees relative to massage therapy as defined in section 2 of the act and that are taught by approved faculty, as set forth in subsection (e).

(g) The Board reserves the right to reject a continuing education course submitted by a massage therapist who is audited for compliance if the course is outside the scope of practice of massage therapy as defined in the act. A licensee will be notified of the rejection of a course and will be provided the opportunity to apply additional courses the licensee has taken or to take additional courses to meet the continuing education requirement.

§ 20.34. Penalty for failure to complete continuing education.

Applicants for license renewal shall provide, on forms provided by the Board, a signed statement verifying whether continuing education requirements have been met. Failure to complete a minimum of 24 hours of continuing education in a biennial period may subject a licensee to discipline under section 9(a)(7) of the act (63 P. S. § 627.9(a)(7)) in accordance with the schedule of civil penalties at § 43b.23 (relating to schedule of civil penalties—massage therapists).

SCOPE AND STANDARDS OF PRACTICE

§ 20.41. Scope of practice.

(a) Massage therapists apply a system of structured touch, pressure, movement, holding and treatment of the soft tissue manifestations of the human body in which the primary intent is to enhance the health and well-being of the client. Massage therapy includes:

(1) The external application of water, heat, cold, lubricants and other topical preparations.

(2) Lymphatic techniques.

(3) Myofascial release techniques.

(4) The use of electro-mechanical devices which mimic or enhance the action of the massage techniques.

(b) Massage therapy practice does not include:

(1) The diagnosis or treatment of impairment, illness, disease or disability.

(2) Medical procedures.

(3) Chiropractic manipulation—adjustment.

(4) Physical therapy mobilization—manual therapy.

(5) Therapeutic exercise.

(6) Ordering or prescribing drugs or treatments for which a license to practice medicine, osteopathic medicine, nursing, podiatry, optometry, chiropractic, physical therapy, occupational therapy, or other healing art is required.

(7) The application of high velocity/low amplitude force further defined as thrust techniques directed toward joint surfaces.

(8) The use of equipment or devices that require a prescription (for example, ultrasound, diathermy or electrical neuromuscular stimulation).

(c) Licensure under the act may not be construed as requiring new or additional third-party reimbursement or otherwise mandating coverage under 75 Pa.C.S. Chapter 17 (relating to financial responsibility) or the Workers' Compensation Act (77 P. S. §§ 1—1041.4 and 2501—2506).

§ 20.42. Standards of professional conduct.

(a) A massage therapist shall:

(1) Maintain current knowledge of the application of massage therapy, including indications, contraindications and precautions.

(2) Undertake a specific technique or use a product or equipment only if the massage therapist has the necessary knowledge, training or skill to competently execute the technique.

(3) Base decisions and actions on behalf of a client on sound ethical reasoning and current principles of practice.

(4) Provide treatment only where there is an expectation that it will be advantageous to the client.

(5) Refer to an appropriate health care professional when indicated in the interest of the client.

(6) Discuss with clients which massage therapy modalities and techniques will be utilized and the benefits of these modalities and techniques, the objectives, and that participation is voluntary and that consent to treatment or participation may be withdrawn at any time.

(7) Obtain written consent prior to performing breast massage.

(8) Modify or terminate the massage therapy session at any time upon request of the client.

(9) Keep client information private and confidential. This standard does not prohibit or affect reporting mandated under State or Federal law to protect children, older adults, or others.

(10) Use safe and functional coverage/draping practices during the practice of massage therapy when the client is disrobed. Safe and functional coverage/draping means that the client's genitals and gluteal cleft and the breast area of female clients are not exposed and that massage or movement of the body does not expose genitals, gluteal cleft or breast area. With voluntary and informed consent of the client, the gluteal and breast drapes may be temporarily moved in order to perform treatment of the area.

(11) Act to safeguard clients from incompetent, abusive or illegal practices of other massage therapists or caregivers.

(12) Continuously maintain current CPR certification.

(13) Be clean, fully-clothed and professional in dress and appearance.

(14) Display the massage therapist's current license with expiration date in a location clearly visible to clients or, when practicing offsite, display the massage therapist's wallet card.

(15) Include the massage therapist's license number in all advertisements.

(16) Conspicuously display the massage therapist's name and the title L.M.T. or the words "Licensed Massage Therapist" on an identification badge or directly on clothing worn in the public areas where massage therapy services are being provided.

(17) Cooperate with the Board, the Department of State or the Bureau of Enforcement and Investigation in the investigation of complaints filed under the act.

(18) Provide massage therapy records immediately upon demand of the Board or its authorized agents.

(19) Maintain massage therapy records for at least 3 years from the last date that services were provided to the client.

(20) Educate clients about maintaining the beneficial effects of massage therapy treatment when indicated by a massage therapy treatment plan.

(21) Obtain the written permission of a parent or guardian, or their representative, prior to providing massage therapy services to a minor.

(22) Require that a parent or guardian, or their representative, be physically present in the room during treatment of a minor.

(b) A massage therapist may not:

(1) Psychologically or physically abuse a client.

(2) Violate a client's boundaries with regard to exposure, privacy or disclosure.

(3) Utilize techniques that are contraindicated based on the client's condition.

(4) Falsify or knowingly make incorrect entries into the client's record or other related documents.

(5) Intentionally expose a client's genitals, gluteal cleft or the breasts of a female client except temporarily to perform therapeutic treatment of the area.

(6) Engage in sexual harassment, sexual impropriety, sexual violation or sexual abuse.

(7) Engage in sexual intimacies during the professional relationship.

(8) Perform or offer to perform any services for clients other than those connected with giving massage therapy treatments as defined in section 2 of the act (63 P. S. § 627.2), unless the massage therapist has additional training and licensure, if required, to perform those services.

(9) Knowingly permit another individual to use the massage therapist's license or temporary permit for any purpose.

(10) Knowingly aid, abet or assist another person to violate or circumvent a law or this chapter.

(11) Misappropriate equipment, materials, property or money from an employer or client.

(12) Refuse a client's request for a refund for the unearned portion of prepaid or packaged massage therapy services. This provision does not apply to gift certificate purchases.

[Pa.B. Doc. No. 11-4. Filed for public inspection December 30, 2010, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 62]

[L-2008-2069115]

Licensing Requirements for Natural Gas Suppliers

The Pennsylvania Public Utility Commission (Commission) on June 16, 2010, adopted a final rulemaking order which revises the Commission' natural gas supplier licensing regulations regarding level of security needed and forms of security used to satisfy statutory security requirements for licensing.

Executive Summary

In its October 2005 Report to the General Assembly, the Commission found that there was not effective competition in this Commonwealth's retail natural gas market. The finding was based in part on the low number of natural gas suppliers (NGSs) participating in the market. Docket No. I-00040103. The amount of financial security required for NGS licensing was identified as a possible barrier to market entry and participation.

Based on the Commission's finding, stakeholders met to discuss ways to increase effective competition. The Staff's Report on the SEARCH collaborative suggested the use of reasonable criteria for adjusting the security amount required for NGS licensing and the use of NGS accounts receivable in natural gas distribution company (NGDC) Purchase of Receivables (POR) Programs as an acceptable type of security. On September 11, 2008, the Commission issued a proposed rulemaking order revising PUC NGS licensing regulations. The order was published at 39 Pa.B. 1657 (April 4, 2009). A 60-day comment period was established. Seven parties and the Independent Regulatory Review Commission filed comments. The Commission issued its final rulemaking order on June 16, 2010.

This final rulemaking revises § 62.111: (1) to permit the use of NGS accounts receivable in a Commission-approved POR program to satisfy part of, or all of an NGS' security requirement; and (2) to list possible triggering events for adjusting the security amount and reasonable criteria for the adjustment of the security amount. This section also includes an annual reporting requirement for NGDCs on the adjustment of security amounts, and a list of Commission procedures, formal and informal, that an NGS may use to resolve a dispute over security with an NGDC. The Commission believes that the final regulation better balances an NGS's ability to provide adequate security to maintain its license with an NGDC's actual risk of financial loss in the event of supplier default.

Public Meeting held
June 16, 2010

Commissioners Present: James H. Cawley, Chairperson; Tyrone J. Christy, Vice Chairperson, statement follows; Wayne E. Gardner; Robert F. Powelson

Licensing Requirements for Natural Gas Suppliers; SEARCH Final Order and Action Plan: Natural Gas Supplier Issues; Doc. No. L-2008-2069115, I-00040103F0002

Final Rulemaking Order

On December 8, 2008, we issued a proposed rulemaking order that set forth revisions to the security requirements for licensing natural gas suppliers at 52 Pa. Code

§ 62.101—62.114. In its September 11, 2008 Final Order and Action Plan regarding the Commission's *Investigation into the Natural Gas Supply Market: Report on Stakeholder's Working Group*,[1] Docket No. I-00040103F0002 (SEARCH Order), the Commission had determined that one way to increase effective competition in the retail natural gas market was to revise the security requirements in regard to the amount of security that was needed and the types of security that could be used. Before us today is an order that finalizes the revisions to the Commission's NGS licensing regulations on these matters.

Discussion

Background

Section 2208(c)(1)(i) of the Public Utility Code establishes the security requirements for the issuance and maintenance of an NGS license. The section also authorizes the natural gas distribution company (NGDC) to determine the amount and form of the bond or other security that is required for an NGS license. This section reads as follows:

> (c) *Financial fitness.*—
>
> (1) In order to ensure the safety and reliability of the natural gas supply service in this Commonwealth, no natural gas supplier license shall be issued or remain in force unless the applicant or holder, as the case may be, complies with all of the following:
>
> (i) *Furnishes a bond or other security in a form and amount to ensure the financial responsibility of the natural gas supplier.* The criteria each natural gas distribution company shall use to determine the amount and form of such bond or other security shall be set forth in the natural gas distribution company's restructuring filing. In approving the criteria, commission considerations shall include, but not be limited to, the financial impact on the natural gas distribution company or an alternative supplier of last resort of a default or subsequent bankruptcy of a natural gas supplier. The commission shall periodically review the criteria upon petition by any party. The amount and form of the bond or other security may be mutually agreed to between the natural gas distribution company or the alternate supplier of last resort and the natural gas supplier or, failing that, shall be determined by criteria approved by the commission.

66 Pa.C.S. § 2208(c)(1)(i) (emphasis added).

The Commission's NGS licensing regulations became effective on publication in the *Pennsylvania Bulletin* on July 21, 2001. 31 Pa.B. 3943. *Licensing Requirements for Natural Gas Suppliers*, Order entered April 19, 2001 at Docket No. L-00000150. Section 62.111 addresses bonds and other security. See 52 Pa. Code § 62.111.

In the SEARCH Order, the Commission identified NGDC security requirements as one barrier to supplier participation in the retail market.[2] Referencing the SEARCH Report, the SEARCH Order discussed the criteria used by the NGDC in establishing a security level and the extent of the Commission's authority under the law to modify security requirements:

> The criteria that are to be used by the NGDC to set the amount and form of the security were established in each company's restructuring proceeding. The level of security is based on a formula that takes into account the NGDC's exposure to costs. For the retail supply market, this formula involves the peak day demand estimate for capacity, number of days' potential exposure in a billing cycle, and commodity estimates for quantity and cost. Offsets to the amount of security that a NGS must provide may include calls on capacity, receivable purchases or receivable pledges. NGDC costs related to supplier default as set forth in section 2207(k) of the Public Utility Code may also be taken into account when establishing the amount of security required. 66 Pa.C.S. § 2207(k). SEARCH Report, pp. 18-19.
>
> If a NGDC and NGS cannot come to a mutual agreement, the level or form of security is determined by criteria approved by the Commission. See 66 Pa.C.S. § 2208(c)(1). These criteria were established in the Commission's NGS licensing regulations and are to be used to determine security levels and acceptable forms for the security when voluntary agreement is not reached. See 52 Pa. Code § 62.111. Section 62.111(c) permits the use of the irrevocable letters of credit, corporate parental or other third party guaranty, and real or personal property. Personal property would include the use of escrow account or the pledge or purchase of receivables. 52 Pa. Code § 62.111(c). SEARCH Report, pp. 18-19.
>
> Also, an individual NGDC's security requirement, including the level of security, is subject to periodic review by the Commission. 66 Pa.C.S. § 2208(c). See also, *UGI Utilities, Inc.—Gas Division v. PA PUC*, 878 A. 2d 186 (Pa. Cmwlth. 2005) appeal den. 586 Pa. 732; 890 A.2d 1062 (2005) (the Commission has discretion to approve criteria to be used to determine the financial security necessary based upon financial impact on the NGDC by a default by an NGS). Thus, a supplier is not without a remedy to address unreasonable security requirements of an NGDC on a case-by-case basis.

SEARCH Order, pp. 23-24.

The SEARCH Order also discussed the suppliers' position that uniformity in the use of security instruments across NGDC service territories, and greater acceptance of other types of security by the NGDCs would decrease costs for suppliers and remove a barrier to supplier entry and participation.

> However, the SEARCH Report states that suppliers observe that the use of security instruments is not uniform among the companies and contend that this variability is a barrier to market entry and multi-system participation. Suppliers also raised concerns about the escalating cost of security to match the growth of their sales, and opined that there should be a limitation on the frequency of review of required security levels, with specific triggers for that review, such as a percentage change in pool size. SEARCH Report, p. 19.
>
> Suppliers also view the NGDC's acceptance of only certain financial instruments as a barrier to market entry. Suppliers prefer to use corporate guarantees as the predominant practice. Further, to ensure fairness and remove a possible barrier for market entry, suppliers believe that specific criteria for acceptable financial instruments should be established in a

[1] The Stakeholders had been convened based on the Commission finding that "effective competition" did not exist in the retail natural gas market in accordance with 66 Pa.C.S. § 2204(g) (relating to investigation and report to General Assembly). See *Investigation into the Natural Gas Supply Market: Report to the General Assembly on Competition in Pennsylvania's Retail Natural Gas Supply Market*, Order entered at Docket No. I-00040103.

[2] This subject is fully discussed in the SEARCH Report in Section I (Creditworthiness/Security) at pp. 18-21.

regulation or order rather than permitting companies to set those through tariffs. SEARCH Report, p. 19.

Establishing standard language for the form of the financial instrument used for security and reasonable criteria for the amount of security should assist NGSs in obtaining security in an acceptable form and amount, while aiding the NGDC in collecting a claim against the security in the event of supplier default. North American Energy Standards Board (NAESB) forms and business practices could be reviewed for appropriateness to develop uniform language to address this issue. SEARCH Report, p. 21. Also, the use of a POR program should be examined as a way to reduce the level of required security, to lessen the need for frequent credit reviews and to ameliorate adjustments in security level that might normally be triggered by changes in a company's creditworthiness rating, which can occur for reasons unrelated to its immediate business interaction and relationships. SEARCH Report, p. 21.

SEARCH Order, pp. 24-25.

After our review of the SEARCH Report, we determined that it was in the public interest to initiate a rulemaking to address security requirements related to NGS licensing. SEARCH Order, p. 25. Our goal was to update the security requirement in the regulations "to better balance the ability of NGS firms to provide adequate security with the NGDC's risk of a supplier default." Specific matters that were to be addressed included: (1) the use of NGS accounts receivable in purchase of receivables programs as fulfillment of some part, or all of security requirements; (2) the adoption of standard language for financial instruments used for security; and (3) the development of reasonable criteria for NGDCs to use to establish the amount of security necessary for licensing purposes. SEARCH Order, p. 26.

The proposed rulemaking order was entered on December 8, 2008, and was published on April 4, 2009, in the *Pennsylvania Bulletin* at 39 Pa.B. 1657. The order established a 60-day comment period. No reply comments were permitted to be filed.

Comments were filed by seven interested parties: the Energy Association of Pennsylvania (EAPA)[3]; the NGS Parties,[4] the Retail Energy Supply Association (RESA)[5]; Philadelphia Gas Works (PGW); National Fuel Gas Distribution Company (NFG); PECO Energy Company (PECO) and Equitable Gas Company (Equitable). The Independent Regulatory Review Commission (IRRC) also filed comments.

We have reviewed and addressed these comments below.

Comments

§ 62.111—Suppliers Serving Large Customers (over 300 Mcf annually)

As a general comment, Equitable states that modifications to § 62.111 should make it clear that the security provisions apply only to those natural gas suppliers who offer service to residential customers and small commercial and industrial customers that consume less than 300 Mcf annually. Equitable also expresses the opinion that an NGS that offers service to large commercial and industrial customers should be permitted and required to determine appropriate security with the NGDC outside the parameters of this section. Equitable Comments, Appendix A, p. 1.

Resolution

The definition of "natural gas supplier" at 66 Pa.C.S. § 2202 does not categorize a supplier by the class of customers it serves, nor by the volume of natural gas its customers consume. In fact, the only criterion in the definition is that the natural gas supplier provides retail natural gas supply service as opposed to wholesale gas service. For this reason, we see no need to make a distinction between suppliers based on the volume of gas that customers consume, especially since we are attempting to create a more competitive retail market by adopting consistent requirements for suppliers. Accordingly, we will not make the requested change.

As to Equitable's comment that it should be able to determine appropriate security for an NGS that offers service to large commercial and industrial customers outside the parameters of this section, we will note that an NGDC and a supplier can always come to a mutual agreement on the amount of security that the NGS must provide. 66 Pa.C.S. § 2208(c)(1)(i) (relating to requirements for natural gas suppliers; financial fitness). The only caveat is that the NGDC must apply the criteria used as the basis for such an agreement to other agreements with other similarly situated suppliers so as to avoid discriminatory or anticompetitive conduct. See 66 Pa.C.S. § 2209 (relating to market power remediation); 52 Pa. Code §§ 62.141—62.142 (relating to standards of conduct).

§ 62.111(c)(1)(i)—Security Amount

RESA proposes the addition to the regulation of a formula that would be used to calculate the amount of security that will be required to operate on an NGDC's system. The formula is that "security cannot exceed the NGS' customers' MDQ [Maximum Daily Quantity] times the peak forecasted NYMEX [New York Mercantile Exchange] price for the next 12 months and for upstream capacity to the city gate times 10 days." RESA Comments, p. 4.

RESA also suggests a baseline creditworthiness standard, which if met, would satisfy the section 2208(c) security requirement and would obviate the need for the supplier to post additional security. The standard would entail the supplier having a minimum investment grade credit rating or its equivalent from two of three credit rating agencies. RESA Comments, pp. 5-6. RESA states that the minimum threshold security requirement is warranted to reflect the reduced risk associated with an NGS that has a favorable investment grade/credit rating. RESA Comments, p. 7.

EAPA comments that financial security requirements for NGSs are necessitated by section 2207(k) that permits the NGDC, acting as the supplier of last resort (SOLR), to charge customers returning from a defaulting supplier the rates the supplier would have charged the customer for the remainder of the billing cycle. 66 Pa.C.S.§ 2207(k) (relating to rate after service discontinued [by a defaulting supplier]). EAPA Comments, pp. 1-2. This section specifically provides that:

[3] Natural gas industry members of EAPA include Columbia Gas of PA, Dominion Peoples, Equitable Gas, National Fuel Gas Distribution Corp., PECO Energy Co., Philadelphia Gas Works, and UGI Utilities, Inc.

[4] The NGS Parties include Agway Energy Services, LLC, Gateway Energy Services Corporation, Interstate Gas Supply, Inc., and Vectren Retail, LLC.

[5] RESA is a non-profit trade association whose members are involved in the wholesale generation of electric generation and the competitive supply of natural gas to residential, commercial and industrial customers. RESA's members include Commerce Energy, Inc., Consolidated Edison Solutions, Inc., Direct Energy Services, LLC, Exelon Energy Company, Gexa Energy, Green Mountain Energy Company, Hess Corporation, Integrys Energy Services, Inc., Liberty Power Corporation, RRI Energy, Sempra Energy Solutions LLC, SUEZ Energy Resources NA, Inc., and US Energy Savings Corporation.

> any difference between costs incurred by the supplier of last resort and the amounts payable by the retail gas customer shall be recovered from the natural gas supplier or from the bond or other security provided by the natural gas supplier without recourse to any retail gas customer not otherwise contractually committed for the difference.

66 Pa.C.S. § 2207(k).

The supplier's bond or other security pays the NGDC or the SOLR the difference between the cost of the replacement gas supply for returning customers from a defaulting supplier and the amount that the NGDC or SOLR can collect from those customers for the gas supply under the defaulting supplier's agreement.

EAPA also comments that financial risks imposed by section 2207(k) vary from NGDC to NGDC. For NGDCs that have on-system storage facilities, native natural gas production and ample pipeline capacity, the financial risk of obtaining supply during peak periods may be relatively small. EAPA Comments, p. 2. For those NGDCs who do not, the financial risks may be relatively large. The bond or other security provided by the NGS ensures the financial responsibility of the supplier, but ultimately ensures "the safety and the reliability of the natural gas supply service in this Commonwealth." See 66 Pa.C.S. § 2208(c)(1)(i). EAPA Comments, p. 2.

Resolution

Section 2208(c)(1) requires that a supplier provide a bond or other security to ensure its financial responsibility so it can be licensed as an NGS. 66 Pa.C.S. § 2208(c)(1). The purpose of the security is to ensure the financial responsibility of the supplier and the safety and the reliability of the natural gas supply. 66 Pa.C.S. § 2208(c)(1). Specifically, the security can be used to pay, in part, for the costs of replacement gas supply for customers of suppliers who return to default service.

Section 62.111(c)(1) has always recognized that the starting point for setting the security for a licensee was the amount that would satisfy the statutory requirement in 66 Pa.C.S. § 2207(K). Section 62.111(c)(1) reads as follows:

> (1) The amount of the security should be reasonably related to the financial exposure imposed on the NGDC or supplier of last resort resulting from the default or bankruptcy of the licensee. At a minimum, the amount of security should materially reflect the difference between the cost of gas incurred and the supplier's charges, if any, incurred by the NGDC or supplier of last resort during one billing cycle.

52 Pa. Code § 62.111(c)(1).

This preliminary security amount could then be adjusted upward or downward based on the criteria set forth in § 62.111(c)(1)(i)(A)—(E).

In reviewing the comments to this rulemaking, we discovered that the use of the phrase "at minimum" in the second sentence as well as the paraphrasing of statutory language from section 2207(k) has created some confusion. For this reason, we will revise this sentence by deleting the phrase "at minimum" and the word "material," and by incorporating the exact statutory language from section 2207(k). This revision should make the method for establishing the preliminary security amount required for licensing more understandable. This amount will then be the security amount ordinarily required, unless one or more of the criteria set forth in § 62.111(c)(1)(i)(A)—(E) warrant an upward or downward adjustment to that amount.

While we agree that an NGS's credit rating may be taken into account by an NGDC in establishing the amount of security, we cannot adopt RESA's proposal to eliminate the security requirement upon the showing of some baseline creditworthiness standard. Risks vary from supplier to supplier, and thus, financial exposure posed by suppliers operating on NGDC systems vary from NGDC to NGDC making a baseline creditworthiness standard based solely on credit or investment ratings difficult, if not impossible, to establish for use in the statewide retail market. However, we understand that some NGDCs do not require an NGS to post additional security when the NGS has a high credit rating, or is backed by a highly rated parental or other corporate guaranty. To the extent that an NGDC has adopted such a standard, we will direct that the NGDC include this standard in its tariff. This will ensure that all NGSs have notice of the standard and will further ensure that the standard is applied in a non-discriminatory manner to all NGSs. We have also revised § 62.111(c) to require NGDCs to include this information in their tariffs.

In regard to the RESA's suggestion to use a standardized formula to calculate the security amount, the law provides NGDCs with the discretion to set the security amount for licensing, and states that the criteria used "shall include, but not be limited to, the financial impact on the natural gas distribution company . . . of a default or subsequent bankruptcy of a natural gas supplier." 66 Pa.C.S. § 2208(c)(1)(i). Because the NGDC may take into account criteria other than the cost of replacement gas when establishing a security amount for a supplier, we do not believe that it appropriate to adopt one standard formula to calculate the security amount for use by all NGDCs. Accordingly, we will not adopt RESA revision to the regulations at this time.

We note, however, that some NGDCs may use their own formulas to calculate the level of security for NGSs operating on their systems. These formulas were established in the NGDCs' restructuring proceedings for the retail supply market. These formulas involve the peak day demand estimate for capacity, the number of days potential exposure in the billing cycle and the commodity estimates for quantity and cost. SEARCH Report, p. 18-19. Again, to promote transparency of credit requirements for licensing, we will direct an NGDC that uses a formula to calculate security amounts to include the formula with other applicable rules for its use in its tariff. We have also revised § 62.111(c) to require NGDCs to include this information in their tariffs.

While the NGDC has the discretion to set the level of security, the Commission has the authority to approve criteria to be used to determine the appropriate amount of security based upon financial impact on the NGDC of a supplier's default, and may review NGDC decisions regarding the application of these criteria. Nevertheless, we expect that the NGDC will establish a security amount that is reasonably related to its financial exposure. See *UGI Utilities v. Pennsylvania Public Utility Commission*, 878 A.2d 186, 192 (Pa. Cmwlth. 2005) (*UGI Utilities*) (the law provides for a "reasonably related" financial security requirement, not the worst case scenario as determined by the NGDC, which is contrary to the intentions of the statute to promote competition and choice in the natural gas industry).

However, when an NGS believes that the amount of security that it is being required to post to obtain a license is too high and it cannot come to an agreement with the NGDC regarding an alternative amount, it may

file a formal complaint against an NGDC. The Commission has adjudicated complaints from suppliers against NGDCs alleging high security amounts, and, based on the record presented, has adjusted security when it was warranted. See *UGI Utilities*, supra. Alternatively, a supplier may follow the procedures to dispute an NGDC's determination of the security amount set forth in § 62.111(c)(8)(i) and (ii) that are discussed below.

§ 62.111(c)(1)(ii)—Adjustment of Security Amount

Section 62.111(c)(1)(ii) states that the amount of the security may be adjusted, but not more often than every six months, and the adjustments must be reasonable. It then lists criteria upon which these adjustments must be based. In response to suppliers' complaints about the frequency of security level adjustments and the need for specific triggering events for creditworthiness reviews and security adjustments, we proposed to revise the criteria to make them more stringent. The regulation was revised so that only changes in the NGS's operation that would materially affect the NGDC system operation or reliability or changes that would materially affect the NGS's creditworthiness could trigger a review and adjustment of security.

We have divided the comments filed to this section into two parts to facilitate their disposition.

A. *Six Month Time Restriction*

EAPA and NFG propose eliminating the six months limit on adjusting security and recommends reliance on reasonableness of the requirement to protect against rapid and random changes in security. The argument is that allowing changes more frequently than every 6 months will permit the NGS to maintain different security levels in the winter and the summer because the NGDC will no longer fear being locked into a security amount in the event of a change in circumstances. This would not be a burden to the NGSs and would provide greater flexibility for both parties. As an alternative, NFG suggests a limit or freeze on NGS customer enrollments. EAPA Comments, p. 3; NFG Comments, p. 5.

Resolution

The Commission understands the utility of eliminating the six months restriction on adjusting security amounts and will delete it from § 62.111(c)(1)(ii). We believe that elimination of this restriction will allow the NGDC to establish seasonable levels of security for NGSs operating on its system. We will substitute the phrase "as circumstances warrant" for the deleted language.

B. *Triggering Events for Adjustment in Security Amount; Adjustments in Advance of Possible Default; Need to Define Modifiers "Significant" and "Materially" for Clarity*

The EAPA offers revisions to the proposed regulation to achieve two purposes: (1) to ensure that security is provided in advance of supplier default that it is sufficient to cover the financial risk to the NGDC; and (2) to allow for adjustment of the security amount when there is a significant increase in customer number, change in class of customer served or significant change in the volume of gas supplied by the NGS.

PGW states that security levels should be adjusted when there is a significant change in volume of gas provided by the supplier. This change in volume would be independent of an increase in the number of customers since a current commercial or industrial customer could significantly increase its purchase of gas from a supplier and thus significantly increase the financial exposure of PGW and its customers. PGW and Equitable suggest that a 10% increase in volume would represent a significant increase in volume that would justify an adjustment in the amount of security. NFG and Equitable agree that an increase in gas volume may be more important than an increase in the number of customers. NFG also suggests that the Commission should evaluate a means of tying the ability to adjust security requirements to commodity prices. Equitable Comments, Appendix A, p. 1; NFG Comments, p. 3. PECO supports a threshold of a 25% increase in the projected quantity of natural gas that suppliers deliver or an increase in the projected volume of gas consumed to trigger an increase in security requirements. PECO Comments, pp. 2-3.

The EAPA states that the "25% change in customers" trigger for adjustment of security amount is arbitrary and does not consider a change in the volume of natural gas supplied. If the parties cannot agree on the meaning of the term "significant," the proposed § 62.111(c)(6) provides a means to resolve the dispute. Thus, prescriptive triggers can be avoided and the final sentence of the proposed regulation at § 62.111(c)(i)(ii)(C) can be deleted. EAPA Comments, p. 3.

IRRC states that this provision should be revised to reflect the impact on the NGDC's financial risk of changes in volume delivered or consumed as well as changes in the number of customers. IRRC also states that the PUC should specify the percentage change in volume that could trigger an adjustment to the amount of security required. IRRC Comments, p. 2.

In regard to timing, NFG states that directing a change in security only if an event materially affects system operations or reliability potentially subjects all customers to unnecessary risk that could have been avoided if an NGS was required to post appropriate security before it materially impacted system operations. In other words, NFG believes it is appropriate to have sufficient security to cover material impacts on the system operations before, and not after, the event occurs. In addition, NFG states that an early warning of a supplier's default could be discerned from a pattern of operating violations that may not, at the time, have been material. NFG Comments, pp. 2-3.

PGW recommends that the criteria that would trigger an adjustment in the level of security for an NGS should be expanded to include "significant changes in a licensee's recent operating history that materially affected NGDC system operations or reliability on other NGDC systems." PGW Comments, pp. 2-3.

NFG objects to the use of the phrases "significant changes" and "materially affects" because they are too broad and ambiguous for regulations. NFG also characterizes the "materiality" clause (as affecting system reliability) as a loophole that would only benefit potentially unreliable NGSs. NFG Comments, pp. 3-4. NFG recommends deletion of this language.

IRRC states that "significant changes" should be defined or clearly explained in § 62.111(c)(1)(ii)(A) and (B). IRRC also states that the term "material affects" in § 62.111(c)(1)(ii)(A), (B) and (E) should be defined in each instance or include the criteria that are to be used in each instance to determine if there is a material effect. IRRC's Comments, p. 1.

Resolution

In regard to circumstances that may warrant a change in the level of security, we agree that a substantial change in volume of gas sold by a supplier could warrant

an adjustment of the security amount, and so we will revise § 62.111(c)(1)(i)(C) to add "change in volume of gas" as a triggering event for adjusting security amounts.

However, security adjustments for changes in the price of natural gas require more careful consideration. We can foresee that price volatility could cause an NGDC to request an ever escalating amount of security for a short term period. The NGS would then be obliged to request a change in security when prices fell. Accordingly, we will add a provision that a 25% change in the unit price of gas averaged over a consecutive 30 day period will constitute a significant change in price that would support a change in security level.

In regard to the percentage change in the number of customers served, we will follow IRRC's comment and better define the changes that may be considered to be a significant change that could trigger a change in security levels. Specifically, we have revised § 62.111(c)(1)(ii)(C) to add a time element so that a significant change in customer number would be a change of 25% averaged over a consecutive 30 day period. We have added this same qualification to better define a change in volume of gas delivered that could trigger a change in security amount. We note that a 25% benchmark may appear to be overly generous, but it cuts both ways. Just as a 25% increase in customers would act as a triggering event that would allow an NGDC to increase an NGS's security amount, a 25% decrease in customers would act as an event that would allow a supplier to request a decrease in security amount.

We have revised the following sections to add language that explain circumstances relating to credit rating services and investment rating services that could materially affect a licensee's creditworthiness:

• Section 62.111(c)(1)(ii)(B)—when two of five listed credit rating companies change the licensee's credit rating.

• Section 62.111(c)(1)(ii)(D)—when a two of the five listed investment ratings service change the licensee's ratings of its issued securities.

As now revised, § 62.111(c)(1)(ii)(B) would be applicable to a supplier's credit score for obtaining a bond or letter of credit from an insurance company or bank or other surety. Section 62.111(c)(1)(ii)(D), as now revised, may be most applicable to situations where the NGDC has agreed to to accept a corporate, parental or other third-party guaranty as security. See § 62.111(c)(2)(iii). To ensure that a supplier's change in rating was not a mistake or fluke, we added the requirement that two of the five listed major ratings companies would need to make the change in rating to trigger an adjustment in the security amount.

In response to IRRC's comment, we have also revised § 62.111(c)(2)(ii)(E) to explain that an NGDC system's operation or reliability could be materially impacted when a supplier fails to deliver natural gas supply sufficient to meet its customers' needs on five separate occasions within a 30 day period, or fails to comply with NGDC operational flow orders as defined at 52 Pa. Code § 69.11 (relating to definitions). These are only two examples of how an NGDC could be impacted when a supplier defaults on gas delivery volumes.

In regard to the comments that urge that changes in an NGS's operating history on other NGDC systems that materially affect system operation and reliability should also be considered as a basis for adjusting the security amount, we agree. A record of an NGS's compliance with other NGDC system requirements is a fair predictor of its future compliance with another NGDC's system requirements. For this reason, we believe that the operating history of an applicant or a licensee on other NGDC systems may also be considered by an NGDC when it establishes the initial security amount necessary for the applicant to be licensed as an NGS in Pennsylvania. Accordingly, we have revised both §§ 62.111(c)(1)(i)(A) and 62.111(c)(1)(ii)(A) consistent with this discussion.

Finally, for consistency, we added a reference to § 62.111(c)(i)(A)—(E), as now revised, in § 62.111(c)(1)(i)(D) to better explain the phrase "information that materially affects a licensee's creditworthiness" in regard to establishing the initial security amount for NGS licensing requirement.

§ 62.111(c)(2)—Types of Security

This section lists the legal and financial instruments that shall be acceptable for security. In the proposed rulemaking order, we revised the list to include escrow accounts, accounts pledged to the NGDC or sold by the supplier in an NGDC purchase of receivables program, and "calls on capacity" or other operational offsets that may be mutually agreeable to NGDC and NGS.

In its comments, NFG argues that accounts receivable that are 'sold' cannot be used as security by anyone. NFG states that the financial exposure imposed by an NGS on an NGDC may be reduced by a purchase of receivables program. The accounts receivable will not be a security instrument, but it will lower the financial exposure of the NGDC through the ability of the NGDC to "off-set" any potential liabilities incurred by the NGS with payments due under the POR. NFG Comments, pp. 5-6.

Equitable states that the final regulations for POR programs have not yet been established so it is premature to include receivables as a type of acceptable security. Currently Equitable forwards NGS receivables once per calendar month. Equitable questions whether it would be acceptable for the NGDC to retain 100% of the NGS receivables if the NGS fails to deliver gas during a winter month. Equitable also states that an NGDC should be allowed to retain 100% of NGS receivables in the event of a mid-month NGS failure to deliver, and receivables considered to be acceptable security. The receivables would be used to satisfy the NGS obligations with the balance, if any, payable to the NGS. Equitable notes that NGSs have historically failed during periods of a run-up in gas prices. Equitable Comments, Appendix A, pp. 1-2.

PECO states that if an NGDC purchases NGS customer receivables, the receivables belong to the NGDC and the NGDC acquires the increased risk of uncollectible accounts. NGDCs should not be required to use those receivables to satisfy NGS security requirements. PECO Comments, p. 4.

IRRC states that the PUC needs to provide further justification for including accounts receivable as acceptable security. This direction is based on comments that receivables cannot quickly be converted to cash, and alone, should not be an acceptable form of security. IRRC Comments, p. 2.

RESA suggests adding an additional operational offset to be used as security in § 62.111(c)(2)(vi): "netting NGDC gas supply purchases against NGS collateral requirements." RESA Comments, p. 7.

NFG comments that "cash" should be added as a form of security. NFG also comments that "escrow accounts" should be deleted as a type of security because of the administrative expenses involved in maintaining such an account. NFG Comments, p. 5.

Resolution

The use of the word "sold" in the provision that permitted purchase of receivables to be used as security collateral was to provide flexibility to NGDCs in designing "purchase of receivables" programs (POR). Because of the legal ambiguity unintentionally created, we have replaced the word "sold" with "assigned."

In response to IRRC's comment regarding the need to justify the use of receivables as a security, we note that accounts receivable represent a future stream of income owed to the NGS, and thus, are an asset. As such, receivables are NGS personal property, a type of security that has been recognized as an acceptable form of security since the regulations were first promulgated on July 21, 2001. See 52 Pa. Code § 62.111(c)(3); 31 Pa.B. 3943. By way of further explanation, in POR programs NGS receivables are pledged or are assigned to the NGDC, thereby transferring an asset to the NGDC which, in turn, reduces the financial risk to the NGDC in the event of an NGS default on its obligations, e.g., failure to deliver gas in the necessary quantities. The discounting of NGS receivables in an NGDC's POR accounts for the risk of uncollectibles, and reduces the NGDC's overall financial exposure by improving the quality of those NGS accounts receivable which now belong to the NGDC. For these reasons, we believe that receivables in a POR program are an acceptable form of security. We will also adopt RESA's suggestion and will add the "netting" of "NGDC gas supply purchases from the NGS" against "NGS security requirements" as another example of an operational offset that is acceptable as security in § 62.111(c)(2)(vi).

In addition, we will clarify that NGS receivables in a POR program, or any of the other financial or legal instruments or property, real or personal, listed as acceptable forms of security in § 62.111(c)(2) need not by itself satisfy the entire security amount. The NGS may offer to provide one or more these forms of security to satisfy the total security amount required for licensing.

We will also revise this section to add "cash" as an acceptable type of security at § 62.111(c)(2)(vii). However, we will not eliminate the use of "escrow accounts" as suggested by NFG. We understand that there may be additional costs involved with maintaining an escrow account, but if the NGDC and NGS are both agreeable to its use, responsibility for the maintenance cost is just another point for agreement.

Ideally, the NGS and the NDC will come to an agreement on the amount and the form of security that the NGS will need to provide to maintain its license. However, the NGDC's determinations in regard to the security amount or the forms of security it will accept is subject to Commission review and must be reasonable in regard to the individual supplier and consistent in regard to all suppliers to guard against discriminatory or anti-competitive conduct. See 52 Pa. Code § 62.111(c).

§ 62.111(c)(4)—Use of NAESB Standards

This proposed section states that, when practicable, the NGDC shall use applicable North American Energy Standards Board (NAESB) forms or language for financial and legal instruments.

In its comments, Equitable believes that the use of forms and language in security instruments should also be at the discretion of the NGDC and proposes the following language:

> When practicable and in the NGDC's discretion, the NGDC shall use applicable North American Energy Standards Board forms or language for financial and legal instruments that are used for security.

In regard to § 62.111(c)(4), Equitable states that the use of forms and language in security instruments should be at the discretion of the NGDC. Equitable Comments, Appendix A, p. 2.

Resolution

The Commission declines to revise this section. The standardization of business practices, including forms, was identified as a means to increase supplier participation in the statewide retail natural gas supply market. SEARCH Order, pp. 26-33. NAESB has developed numerous forms that are in use in the natural gas industry today. While NAESB business practices, forms and language for financial and legal instruments will be examined more thoroughly in the rulemaking, Natural Gas Distribution Company Business Practices, Order entered May 1, 2009 at Docket No. L-2008-2069117, we see no reason not to encourage their use, where practical, here.

§ 62.111(c)(5)—Annual Reporting Requirements

Proposed § 62.111(c)(5) imposes an annual reporting requirement on the NGDCs. The purpose of this reporting requirement is to gather information about the NGDC's application of established criteria to set and adjust levels of security for suppliers that operate on the NGDC's system. The report will be filed with the Commission's Secretary.

PGW comments that § 62.111(c)(5)(iv), which requires that the NGDC report "the number of times in the last quarter that the NGDC determined that a change in the level of security was needed for a supplier to maintain its license," should be changed to the number of times in the last year. PGW Comments, p. 5. EAPA provided the same comment. EAPA Comments, p. 4.

In its comments, EAPA offers revisions to streamline and consolidate the new reporting requirements and clarifies that it is not the NGDC, but the Commission who grants the license. EAPA states that its revisions underscore that the amount and form of the security should be reasonably related to the financial exposure imposed on the NGDC or SOLR resulting from a potential default or bankruptcy of the NGS. The criteria established for security must "ensure the financial responsibility" of the licensee in the event of default or bankruptcy, and EAPA's proposed revisions use that specific wording. EAPA Comments, p. 4.

Resolution

The Commission has proposed an annual reporting requirement to gather information about the criteria used by NGDCs to establish security amounts and the rules used by NGDCs to adjust security amounts to obtain, and maintain an NGS license. See 52 Pa. Code § 62.111(c)(5). The information collected will be used to study the criteria and rules used by the NGDCs to establish and adjust security amounts for NGSs operating on their systems. The data will also be used to evaluate the consistency of the application by an NGDC of its criteria and rules to NGSs operating on its system. It is envisioned that the collected data may also be used to

standardize these criteria and rules so that they may be included for use by all NGDCs in a standardized supplier coordination tariff.

Based on the comments, we have revised the reporting requirements to clarify that it is the Commission and not the NGDC that grants an NGS a license. While § 62.111(b) makes it clear that the purpose of the security requirement for licensing is to ensure the licensee's financial responsibility, we have added EAPA's suggested language that reiterates this point in regard to security that the licensee must have in place to maintain its license in § 62.111(c)(5)(ii). We also revised § 62.111(c)(5)(iv) to delete language that requests data be reported "for the last quarter" as being inconsistent with an annual reporting requirement.

§ 62.111(c)(6)—Dispute Resolution Procedures

Proposed § 62.111(c)(6) lists four Commission processes that an NGS may pursue if it is unable to reach an agreement with the NGDC on the form or amount of security to be provided: informal mediation; alternate dispute resolution with the OALJ; litigation of a formal complaint; and petition for Commission review of NGDC criteria for security levels. The first alternative presented, informal mediation, may be requested by filing a dispute with the Commission's Secretary. The Secretary will assign the complaint to the appropriate bureau that will act as the mediator between the NGS and the NGDC.

In its comments, RESA suggests that the Commission add a provision that lists the Commission processes, formal and informal that an NGS may pursue to resolve a dispute with the NGDC on the form and/or amount of security. RESA Comments, p. 9.

NFG states that there is no mention of the Office of Competitive Market Oversight[6] in the dispute resolution section and states that attempting to resolve the dispute through the OCMO should be required before an NGS can attempt to obtain other Commission intervention by filing a formal complaint. NFG Comments, p. 6. PECO comments that supplier complaints should be initially referred to the OCMO for mediation and advisory purposes. PECO Comments, p. 5.

NFG also states that the section does not explain how the financial security should be handled pending the resolution of the dispute. NFG suggests that in order to protect system reliability and NGDC ratepayers, an NGS must post the required security in order to provide or continue to provide service on the NGDC system pending the dispute resolution. NFG Comments, p. 7. PECO comments that the Commission should clarify its intent that NGSs continue to provide service to customers during disputes. PECO Comments, p. 5.

Equitable states that the NGDC should have the right of appeal to the Commission from a bureau decision concerning NGS security. Equitable Comments, Appendix A. p. 3. EAPA supports the dispute resolution provision and suggests revising it to require the NGS first to attempt to resolve the issue with the NGDC: to assign the dispute to the OCMO; and to require an existing licensee to post the adjusted security amount requested by the NGDC until the dispute is resolved. The rationale is to ensure that there is adequate security in place to cover the financial exposure of the NGDC while the dispute is being resolved. EAPA Comments, p. 5.

[6] In the SEARCH Action Plan, the Commission directed that an independent unit be created within the Commission to oversee the development and the functioning of the competitive retail natural gas market. SEARCH Order, pp. 8-10 and Ordering Paragraph 5. The unit, the Office of Competitive Market Supply, was created within the Office of the Director of Operations by Secretarial Letter dated January 9, 2009 at Docket No. M-2009-2082042.

IRRC states that several commentators noted that the regulation does not address the NGS's responsibilities to customers during the dispute resolution process. IRRC suggests that, in the final form regulation, the Commission should clarify the responsibilities of all parties during the pendency of the dispute. IRRC Comments, p. 2.

Resolution

We have not identified the Office of Competitive Market Office as the Commission office that will mediate a dispute about the amount of security because we did not want to limit our ability in making such assignments. In § 62.111(c)(8)(1), we did expand the list of bureaus that will be involved in informal mediation to include an "office, or other designated unit." The term "other designated unit" is intended to include working groups composed of staff and other stakeholders.

We have included a requirement that the NGS must contact the NGDC and attempt to resolve the dispute over the security amount before filing for Commission intervention through informal mediation, alternative dispute resolution or litigation. We agree that the parties should make an initial attempt to resolve the differences between themselves. However, we do not see the necessity of requiring an existing licensee to go through an informal mediation process before it may file a formal complaint with the Commission. Accordingly, we will not adopt this suggestion.

We also will not adopt the suggestion that we provide for a right of appeal to the Commission from a bureau decision concerning NGS security because it is unnecessary. Section 5.44 of the Commission's Rules of Practice and Procedure already permits a party to appeal the decision of Commission staff. See 52 Pa. Code § 5.44 (relating to petitions for appeal from actions of the staff).

In response to IRRC's comment, we have added § 62.111(c)(9) that clarifies the responsibilities of the NGS and the NGDC to all parties, including customers, during the pendency of a dispute, including the requirement that the NGS post the amount of security requested by the NGDC. The Commission notes that it expects that the security amount requested by the NGDC will be a good faith estimate necessary to ensure the financial responsibility of the supplier as this amount may be subject to change or refund depending on the ultimate resolution of the dispute.

§ 62.111(c)(7)—NGS Request for Change in Security

RESA states that the NGDCs should be permitted to request a peak (winter) and off-peak (summer) security calculation to reflect the decrease in customer load and thus, a reduction to the NGDC's risk of supplier default, during the off-peak period. This formula, which is based on the New York's Uniform Business Practices, would calculate security based on the published gas price forecasts, as well as the cost of capacity (generally calculated as the weighted average cost of capacity), which would most accurately reflect the costs and risks an NGDC would face upon supplier default. RESA Comments, p. 4.

RESA also requests the addition of a provision that permits an NGS to request a reduction in security upon certain conditions including a rating upgrade to the minimal rating level of two of the three following agencies: Standard and Poor's Rating Services, Moody's Investor Service, Inc. and Fitch, Inc., or a significant decrease in the total usage of the supplier's customers for 30 days; or a significant decrease in gas supply cost lasting for 30 days. RESA further proposes that a significant reduction

be defined as a reduction of 25% in total customer load or in gas supply costs. This addition would further reduce market entry barriers for suppliers and ensure broader participation by existing suppliers. RESA Comments, p. 6.

IRRC suggests that the regulation permit suppliers to request a reduction in security under certain circumstances where it is apparent that there is a reduction in the risk of supplier default. IRRC states that RESA recommends that specific criteria be used in demonstrating the reduction of risk and a 5-calendar day time limit within which the NGDC must make its decision. IRRC questions if there is an existing process by which the supplier can seek decreased security requirements. If there is a process, then it should be included in this regulation. If there is no process in place, the Commission should consider including one in the final form regulations. IRRC Comments, p. 1.

Resolution

The Commission first notes that the elimination of the 6 month restriction on adjusting security amounts in § 62.111(c)(1)(ii) should facilitate seasonal levels of bonding, and permit a supplier to ask for reduction in security when the risk of financial exposure to the NGDC decreases.

The Commission has provided criteria for the adjustment of security in § 62.111(c)(1)(ii)(A)—(E) that may be used by the NGDC to increase the security amount when financial risk to the NGDC is increased, and by the NGS to request a reduction in security amount when the financial risk to the NGDC decreases. Section 62.111(c)(7) sets forth a procedure, including specific deadlines for response, that may be used by the NGS to request a decrease in security amount when the NGS is unable to come to agreement with an NGDC for a lower security amount. We believe that these revisions are consistent with and satisfy RESA's and IRRC's comments on this issue.

Conclusion

The Commission adopts the regulation revised herein as final. This rulemaking revises § 62.111 to include, inter alia, the development of reasonable criteria for establishing the initial security amount and for adjusting the security amount for an NGS license, regardless of whether the request for the adjustment is made by the NGDC or the NGS. Also established is an NGDC annual reporting requirement that will permit the Commission to collect data relating to the adjustment of security amounts and the triggering events, financial or operational, or both, that triggered the adjustment. The revision also permits the use of escrow accounts, cash, and NGS accounts receivable in a Commission-approved POR program to reduce the total security requirement. Finally, § 62.111(c)(7) establishes a process by which a supplier can request a reduction in security amount, and § 62.111(c)(8) sets forth an informal procedure that may be used by the NGS in lieu of filing a formal complaint to resolve a dispute with an NGDC over the amount of security required for licensing. The Commission believes that these regulations, as revised, better balance the ability of an NGS to provide adequate security to maintain its license with an NGDC's actual risk of financial loss in the event of supplier default.

Accordingly, under 66 Pa.C.S. §§ 501, 2203(12) and 2208, sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202), known as the Commonwealth Documents Law, and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1, 7.2, and 7.5, section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732.204(b)), section 745.5 of the Regulatory Review Act (71 P. S.§ 745.5) and section 612 of The Administrative Code of 1929 (71 P. S. § 232) and the regulations promulgated thereunder in 4 Pa. Code §§ 7.231—7.234, the Commission adopts as final the amendments to § 62.111 as set forth in Annex A; *Therefore*,

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 62, are amended by amending § 62.111 to read as set forth in Annex A.

2. The Secretary shall submit this order and Annex A to the Office of Attorney General for approval as to legality.

3. The Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.

4. The Secretary shall submit this order and Annex A for review by the designated standing committees of both houses of the General Assembly, and for review and approval by IRRC.

5. The Secretary shall certify this order and Annex A with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

6. This amendment shall become effective upon publication in the *Pennsylvania Bulletin*.

7. The contact persons for this final-form rulemaking are Annunciata Marino, FUS, (717) 772-2151 (technical) and Patricia Krise Burket, Assistant Counsel, (717) 787-3464. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Review Assistant, Law Bureau, (717) 772-4597.

8. A copy of this order and Annex A shall be served on all jurisdictional natural gas distribution companies, natural gas suppliers, the Office of Consumer Advocate, the Office of Small Business Advocate and all other parties that filed comments at Doc. No. L-2008-2069115, Licensing Requirements for Natural Gas Suppliers.

9. Within 30 days after the date that this amendment becomes effective, all natural gas distribution companies shall file with the Commission's Secretary revised tariff pages consistent with this order and this amendment. The natural gas distribution company shall serve a copy of this compliance filing on all natural gas suppliers licensed in its service territory.

ROSEMARY CHIAVETTA,
Secretary

Statement of Vice Chairman Tyrone J. Christy

Before the Commission for consideration is the Final Rulemaking Order in the above captioned matter, recommending approval of revisions to the Commission's security requirements for licensing of natural gas suppliers (NGSs) at 52 Pa. Code §§ 62.101—62.114. This rulemaking resulted from our September 11, 2008 Final Order and Action Plan regarding the Commission's *Investigation into the Natural Gas Supply Market: Report on Stakeholder's Working Group (SEARCH Order)*, Docket No. I-00040103F0002. In the SEARCH Order, the Commission determined that one way to increase effective

competition in the retail natural gas market was to revise the NGS licensing regulations in regard to the level of security needed and the forms of security that could be used to satisfy the statutory security requirement for licensing. Seven parties filed comments in response to the proposed rulemaking order: the Energy Association of Pennsylvania (EAPA); Philadelphia Gas Works (PGW); National Fuel Gas Distribution Company (NFG); Equitable Gas Company (Equitable); PECO Energy (PECO); the NGS Parties and the Retail Energy Supply Association (RESA).

I am concerned about one aspect of the proposed revisions to our licensing requirements, that being the inclusion of accounts receivable pledged or assigned to a natural gas distribution company (NGDC) by a supplier participating in a NGDC purchase of receivables (POR) program as an acceptable form of security. It is important to note that financial security requirements for NGSs are necessitated by Section 2207(k) of the Public Utility Code, 66 Pa.C.S. § 2207(k), which requires a NGDC, acting as supplier-of-last-resort, to charge customers returning from a defaulting NGS the rates the NGS would have charged the customer for the remainder of the billing cycle. The statute provides, "Any difference between the cost incurred by the supplier of last resort and the amount payable by the retail gas customer shall be recovered from the natural gas supplier or from the bond or other security provided by the natural gas supplier. . . ." The purpose of the bond or other security is to ensure the financial responsibility of the NGS.

The addition of accounts receivable as a form of security has created significant concerns from several of the parties submitting comments to this rulemaking proceeding. The EAPA states that participation in a NGDC POR program by a NGS may reduce the financial risk or exposure created by the default or bankruptcy of a NGS and may impact the amount of security necessary, but participation in the program cannot in itself be the security. NFG states that the notion that an entity could use something it has sold or pledged as security is fundamentally flawed. NFG avers that the receivables may reduce the financial exposure imposed by a NGS on a NGDC, but the impact will not be a security instrument. PGW states that receiving a pledge of accounts receivable is not as simple as receiving a bond, a letter of credit or being the beneficiary of money deposited into escrow. PGW avers that it is simply not possible for a supplier to provide a security interest in accounts receivable that it does not own. Equitable and PECO have submitted similar concerns on this issue and state that receivables do not adequately mitigate risk for NGDCs and should not be eligible for use as security.

I must respectfully dissent, partially, from the majority's decision today on this one aspect of the proposed rulemaking as I agree with the aforementioned comments that receivables pledged or assigned to a NGDC by a NGS participating in the NGDC's POR program should not be included as an acceptable security instrument or property. While I agree that the amount of receivables under a POR program may reduce the financial exposure by a NGS on a NGDC, that reduced financial exposure should be considered in the context of the overall NGDC formula for security. This formula would consider, among many details, the current level of customers, the volume of natural gas delivered and the average price of natural gas. As a result, I would have preferred that the proposed regulations rely upon adjustments to the level of security by the aforementioned issue and excluded the use of POR program receivables as a form of NGS security.

TYRONE J. CHRISTY,
Vice Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 6752 (November 20, 2010).)

Fiscal Note: Fiscal Note 57-266 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 62. NATURAL GAS SUPPLY CUSTOMER CHOICE

Subchapter D. LICENSING REQUIREMENTS FOR NATURAL GAS SUPPLIERS

§ 62.111. Bonds or other security.

(a) A license will not be issued or remain in force until the licensee furnishes proof of a bond or other security. See section 2208(c)(1)(i) of the act (relating to requirements for natural gas suppliers).

(b) The purpose of the security requirement is to ensure the licensee's financial responsibility. See section 2208(c)(1)(i) of the act.

(c) The amount and the form of the security, if not mutually agreed upon by the NGDC and the licensee, shall be based on the criteria established in this section. The criteria shall be applied in a nondiscriminatory manner. The Commission will periodically review the established criteria upon petition by any party. The NGDC shall include the rules, formulas and standards it uses to calculate and adjust security amounts in a tariff.

(1) The amount of the security should be reasonably related to the financial exposure imposed on the NGDC or supplier of last resort resulting from the default or bankruptcy of the licensee. The amount of security should reflect the difference between the cost of gas incurred by the NGDC or supplier of last resort and the amount payable by the licensee's retail gas customers during one billing cycle.

(i) The amount of security established under this paragraph may be modified based on one or more of the following:

(A) The licensee's past operating history on the NGDC's system and on other NGDC systems, including the length of time that the licensee operated on the NGDC system, the number of customers served and past supply reliability problems.

(B) The licensee's credit reports.

(C) The number and class of customers being served.

(D) Information that materially affects a licensee's creditworthiness as set forth in subparagraph (ii)(A)—(E).

(E) The licensee's demonstrated capability to provide the volume of natural gas necessary for its customers' needs.

(ii) The amount of the security may be adjusted as circumstances warrant. The adjustments must be reasonable and based on one or more of the following criteria:

(A) A change in a licensee's recent operating history on the NGDC system or on other NGDC systems that has

materially affected NGDC system operation or reliability. A change that could materially affect NGDC system operation or reliability may occur when a supplier fails to deliver natural gas supply sufficient to meet its customers' needs, or fails to comply with NGDC operational flow orders as defined in § 69.11 (relating to definitions).

(B) A change in a licensee's credit reports that materially affects a licensee's creditworthiness. A licensee's creditworthiness could be materially affected when two of the following credit rating companies change the licensee's credit rating:

(I) Dun & Bradstreet.

(II) Standard & Poor's Rating Services, Inc.

(III) TransUnion LLC.

(IV) Equifax, Inc.

(V) Experian Information Solutions, Inc.

(C) A significant change in the number of customers served, in the volume of gas delivered, or in the unit price of natural gas or a change in the class of customers being served by the licensee. A change over a consecutive 30-day period of 25% in the number of customers served, in the volume of gas delivered or in the average unit price of natural gas would represent a significant change.

(D) A change in operational or financial circumstances that materially affects a licensee's creditworthiness. A licensee's creditworthiness could be materially affected when two of the following investment rating companies change the licensee's rating of its issued securities from an investment grade or good rating to a speculative or moderate credit risk rating, and vice versa:

(I) Standard & Poor's Rating Services, Inc.

(II) Moody's Investment Service, Inc.

(III) Fitch, Inc.

(IV) A. M. Best Company, Inc.

(V) DBRS, Inc.

(E) A change in the licensee's demonstrated capability to provide the volume of natural gas necessary for its customers' needs that materially affects NGDC system operation or reliability. A change that could materially affect NGDC system operation or reliability may occur when a supplier fails to deliver natural gas supply sufficient to meet its customers' needs on five separate occasions within a 30-day period, or fails to comply with NGDC operational flow orders as defined in § 69.11.

(2) The following legal and financial instruments and property shall be acceptable as security:

(i) Bond.

(ii) Irrevocable letter of credit.

(iii) Corporate, parental or other third-party guaranty.

(iv) Escrow account.

(v) Accounts receivable pledged or assigned to an NGDC by a licensee participating in the NGDC's purchase of receivables program that has been approved by the Commission as being consistent with Commission orders, guidelines and regulations governing the programs.

(vi) Calls on capacity, netting NGDC gas supply purchases from the NGS against NGS security requirements, or other operational offsets as may be mutually agreed upon by the NGDC and the NGS.

(vii) Cash.

(3) In addition to the requirements in this section, small suppliers with annual operating revenues of less than $1 million may utilize real or personal property as security with the following supporting documentation:

(i) A verified statement from the licensee that it has clear title to the property and that the property has not been pledged as collateral, or otherwise encumbered in regard to any other legal or financial transaction.

(ii) A current appraisal report of the market value of the property.

(4) When practicable, the NGDC shall use applicable North American Energy Standards Board forms or language for financial and legal instruments that are used as security.

(5) The NGDC shall file an annual report with the Secretary no later than April 30 of each year. The report must contain the following information for the prior calendar year:

(i) The criteria that is used to establish the amount of security that an applicant must provide to the NGDC in order to be granted a license by the Commission.

(ii) The criteria that is used to determine the amount of security that a licensee must provide to ensure its financial responsibility in order to maintain a license.

(iii) The criteria that is used to determine that a change in the amount of security is needed for the licensee to maintain a license.

(iv) The number of instances in the last year that the NGDC determined that a change in the amount of security was needed for a licensee to maintain its license. For each instance, the following information shall be reported:

(A) The name of the licensee involved.

(B) The date of the NGDC's determination.

(C) The reason for the determination.

(D) The licensee's response to the NGDC determination.

(v) The types of legal instruments, financial instruments and property, real and personal, that the NGDC accepted as security for licensing purposes. For each security type reported, the following information shall be reported:

(A) The name of the applicant or licensee involved.

(B) The name and address of the bank, company or other entity that is acting as the surety or guarantor.

(C) The amount of security.

(D) The date that the security was posted.

(6) When an NGDC determines that an adjustment in the amount or type of security that a licensee must provide to maintain its license is warranted, the NGDC shall provide notice of its determination to the licensee in writing. The NGDC's determination must be based on the criteria in paragraphs (1), (2) and (3). The licensee shall comply with the NGDC's determination no later than 5 business days after the date that the licensee was served with notice of the NGDC's determination. When the licensee disagrees with the NGDC's determination, the licensee may file a dispute with the NGDC in accordance with paragraph (8).

(7) A licensee may request that the NGDC adjust the amount or type of security the licensee must provide to

maintain its license. The licensee shall provide its request in writing to the NGDC. The request must be based on criteria in paragraphs (1), (2) and (3). The NGDC shall make its determination on the request and provide a written response to the licensee within 5 business days after the date that the request was made. When the NGDC agrees to the requested adjustment in security, the licensee shall post the security within 5 business days after the date that the licensee was served with notice of the NGDC's determination. When the licensee disagrees with the NGDC's determination, the licensee may file a dispute with the NGDC in accordance with paragraph (8).

(8) When there is a dispute relating to the form or amount of security, the applicant or licensee shall notify the NGDC of the dispute and attempt to resolve the dispute. If a resolution is not reached within 30 days after the date that the NGDC is notified of the dispute, the applicant or the licensee may:

(i) Submit the dispute to the Secretary for assignment to the appropriate bureau, office, or other designated unit for informal mediation and resolution. A party dissatisfied with the staff determination may file a petition for appeal from a decision made by the Bureau under § 5.44 (relating to petitions for appeal from staff) or may file a formal complaint with the Commission under §§ 5.21 and 5.22 (relating to formal complaints generally; and content of formal complaint).

(ii) File a formal complaint with the Commission and request alternative dispute resolution by the Office of Administrative Law Judge.

(iii) File a formal complaint with the Commission and proceed with the litigation of the complaint.

(iv) File a petition with the Commission and request review of the criteria used by the NGDC.

(9) When a licensee submits a dispute or files a formal complaint relating to an adjustment in security by an NGDC, the following obligations apply:

(i) The licensee shall provide to the NGDC the adjusted security amount as directed by the NGDC. The licensee shall maintain the adjusted amount of security until the dispute or complaint is resolved or until directed otherwise by the Commission.

(ii) The licensee shall continue to operate on the NGDC system in accordance with system operation and business rules and practices until the dispute or complaint is resolved or until directed otherwise by the Commission.

(iii) The licensee shall cause to be delivered to the NGDC system natural gas supply in the volume necessary to fulfill its customers requirements and provide customer support services until the dispute or complaint is resolved or until directed otherwise by the Commission.

(iv) The NGDC shall permit the licensee to continue to operate on the NGDC system until the dispute or complaint is resolved or until directed otherwise by the Commission.

(d) The licensee shall submit to the Commission documentation demonstrating that it has complied with the bonding or security requirement. One copy of each bond, letter of credit, or other financial or legal instrument or document evidencing an agreement between the licensee and the NGDC shall be submitted to the Commission.

(e) Licensee liability for violations of 66 Pa.C.S. (relating to the Public Utility Code) and Commission orders and regulations is not limited by these security requirements.

[Pa.B. Doc. No. 11-5. Filed for public inspection December 30, 2010, 9:00 a.m.]

Title 61—REVENUE

DEPARTMENT OF REVENUE

[61 PA. CODE CH. 1001]

Amendments to Pennsylvania Gaming Cash Flow Management

The Secretary of Revenue, under 4 Pa.C.S. Part II (relating to Pennsylvania Race Horse Development and Gaming Act) (act), specifically section 1501 of the act (relating to responsibility and authority of department), amends Chapter 1001 (relating to Pennsylvania gaming cash flow management). The act of January 7, 2010 (P. L. 1, No. 1) (Act 1) further amended the act to authorize table games in this Commonwealth. The Department of Revenue (Department) adopts this final-omitted rulemaking to facilitate its responsibilities of cash flow management of table game revenue under the act.

Because of time constraints associated with implementation of Act 1, the Department, under section 204 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204), known as the Commonwealth Documents Law (CDL), and the regulation thereunder, 1 Pa. Code § 7.4 (relating to omission of notice of proposed rulemaking), finds that notice of proposed rulemaking, under the circumstances, is impracticable and, therefore, may be omitted.

The Department's justification for utilizing the final-omitted rulemaking process is that it is in the public interest to implement the regulations for the cash flow management of table game revenue to facilitate prompt implementation of its responsibilities as defined by the act.

Purpose of Final-Omitted Rulemaking

The timely adoption of this final-omitted rulemaking will provide procedures for the administration and distribution of gross table game revenue.

The act legalizes the operation of table games at a number of venues across this Commonwealth. The Pennsylvania Gaming Control Board (Board) has the primary responsibility for regulatory oversight of gaming activity in this Commonwealth and is separately promulgating regulations in 58 Pa. Code Part VII (relating to Gaming Control Board).

Explanation of Regulatory Requirements

The Department is amending Chapter 1001 to promulgate regulations necessary to implement the cash flow management of table game revenue in this Commonwealth for accurate accounting and collection of revenues due the Commonwealth from table gaming operations.

A broad change has been made throughout the regulations to add "and certificate holder" to the term "licensed gaming entity." For purposes of the regulations, the two terms are used in tandem. Other amendments to the regulations include the following:

Sections 1001.1 and 1001.2 (relating to scope; and purpose) are amended to add the term "gross table game revenue."

Section 1001.3 (relating to definitions) amends the following definitions: "annual minimum distribution" is revised to reflect changes to section 1403(c)(3) of the act (relating to establishment of State Gaming Fund and net slot machine revenue distribution); "CCS" is revised to accurately reflect the parameters of the system; and "fund" is amended by adding "and gross table game revenue."

In addition, three definitions are added to facilitate the responsibilities of cash flow management of table game revenue under this act: "certificate holder," "General Fund" and "gross table game revenue."

Section 1001.4(b) (relating to calculations of credit against tax and Race Horse Improvement Daily Assessment) is amended to reflect changes to sections 1406(a)(2) and (2.1) of the act (relating to distributions from Pennsylvania Race Horse Development Fund).

"Certificate holders" is added to the heading of § 1001.5 (relating to administration and distribution of moneys held by licensed gaming entities, certificate holders and the Commonwealth). The term "General Fund" is added in subsection (a). Subsection (b) contains new paragraphs that are inserted regarding "deposits and transfers of gross table game revenue to Treasury by certificate holders." Former subsection (b) is renumbered to subsection (c) and has been amended to delete "on the same banking day" to reflect a change in Department procedure. Former subsection (c) is renumbered to subsection (d). Subsection (d)(1) and (2) contains new references to appropriate sections of the act regarding distributions of local share assessments.

The heading and text of § 1001.6 (relating to administration of amounts deposited by licensed gaming entities and certificate holders with Treasury to pay Commonwealth gaming related costs and expenses) are amended to remove the "($5 million)" references and add "certificate holders." Language has been inserted with references to the appropriate section of the act.

Section 1001.7 (relating to deposits of license, permit and other fees) has been amended to include new language regarding deposits of table game fees and fines within the General Fund.

Section 1001.8 (relating to State Gaming Fund transfers) contains several amendments. Subsection (b)(2) is amended to replace the January 1 publication date of the annual inflation adjustment notice with February 1. This new date reflects a more accurate time frame for filing the notice. The Department is required to utilize the Consumer Price Index, which is released in January, for the annual inflation adjustment. Subsection (c)(1) and (2) have been amended to add language regarding the certificate holders' reporting of table game revenue to the Department.

Section 1001.10(b) (relating to Pennsylvania Race Horse Development Fund transfers) is amended to add language referencing exceptions in the act regarding distributions from the Pennsylvania Race Horse Development Fund.

Fiscal Impact

The Department determined that the final-omitted rulemaking will have minimal fiscal impact on the Commonwealth.

Paperwork

The final-omitted rulemaking will not generate substantial paperwork for the public or the Commonwealth.

Effectiveness/Sunset Date

The final-omitted rulemaking will become effective upon publication in the *Pennsylvania Bulletin*. The regulations are scheduled for review within 5 years of publication. A sunset date has not been assigned.

Contact Person

The contact person for an explanation of the final-form rulemaking is Mary R. Sprunk, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on November 3, 2010, the Department submitted a copy of the final-omitted rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Finance and the Senate Committee on Finance. On the same date, the final-omitted rulemaking was submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506).

Under section 5.1(j.1) of the Regulatory Review Act, on December 15, 2010, the final-omitted rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on December 16, 2010, and approved the final-omitted rulemaking.

Findings

The Department finds that:

(1) Under section 204 of the CDL, the Department also finds that the proposed rulemaking procedures in sections 201 and 202 of the CDL (45 P. S. §§ 1201 and 1202) are unnecessary because it is in the public interest to expedite this rulemaking that reduces the burden to the taxpayer.

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

Order

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

(a) The regulations of the Department, 61 Pa. Code Chapter 1001, are amended by amending §§ 1001.1—1001.8 and 1001.10 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

(c) The Secretary 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*.

C. DANIEL HASSELL,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 41 Pa.B. 118 (January 1, 2011).)

Fiscal Note: 15-450. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 61. REVENUE

PART IX. PENNSYLVANIA GAMING CASH FLOW MANAGEMENT

CHAPTER 1001. PENNSYLVANIA GAMING CASH FLOW MANAGEMENT

GENERAL PROVISIONS

§ 1001.1. Scope.

This chapter establishes procedures for the administration and distribution of all net slot machine revenue, gross table game revenue, collection of tax and collection of other assessments under the act. In addition, this chapter clarifies the administrative procedures for transferring the statutorily established amounts of funding as prescribed in the act.

§ 1001.2. Purpose.

The purpose of this chapter is to notify prospective licensed entities and certificate holders, as well as the general public, of the procedures and requirements for distributing net slot machine revenue, gross table game revenue, collection of tax and collection of other assessments.

§ 1001.3. Definitions.

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

* * * * *

Annual minimum distribution—As provided under the act, 2% of the gross terminal revenue of the licensed gaming entity or $10 million, whichever is greater.

* * * * *

CCS—The central control computer system controlled by the Department and accessible by the Board, to which all slot machines communicate for the purpose of recording, reviewing, reporting and auditing real-time information regarding the events that occur during the operation of a slot machine. The system calculates the taxes and assessments due daily and provides information to the Department to track daily deposits.

Certificate holder—As defined in section 1103 of the act (relating to definitions).

* * * * *

Fund—A fiscal and accounting entity with a self-balancing set of accounts recording cash and other financial resources, together with all related liabilities and residual equities or balances and the changes therein, that are segregated for the purpose of carrying on specific activities or attaining certain objectives established for the receipt of gross terminal revenue distributions and gross table game revenue under the act.

General Fund—The fund into which general, non-earmarked revenues of the Commonwealth are deposited and from which monies are appropriated to pay the general expenses of the Commonwealth.

Gross table game revenue—As defined in section 1103 of the act.

* * * * *

§ 1001.4. Calculations of credit against tax and Race Horse Improvement Daily Assessment.

(a) *Credit against tax.* The amount of the credit must be equal to the difference between the tax calculated at the rate in effect when a license was issued to the licensed gaming entity and certificate holder and the tax calculated at the increased rate. The credit shall be applied on a dollar-for-dollar basis but may not extend beyond the 10-year period following the initial issuance of the license.

(b) *Race Horse Improvement Daily Assessment.* The amount of this assessment shall be calculated in accordance with section 1405(b) of the act (relating to Pennsylvania Race Horse Development Fund).

§ 1001.5. Administration and distribution of moneys held by licensed gaming entities, certificate holders and the Commonwealth.

(a) *Application of section.* This section applies to the collection of tax, the collection of other assessments and all transfers of moneys to and from the General Fund, State Gaming Fund, Pennsylvania Gaming Economic Development and Tourism Fund, Pennsylvania Race Horse Development Fund and any other fund as specified in this chapter.

(b) *Deposits and transfers of gross table game revenue to Treasury by certificate holders.*

(1) Certificate holders shall make computations of table game revenue in accordance with section 13A62 of the act (relating to table game taxes), on a daily basis and report the computed amount to the Department on a weekly basis on the form and in the manner prescribed by the Department.

(2) A deposit is required to be made at the time the report is submitted to the Department into the Department's collection account established to collect the taxes and assessments.

(c) *Deposits and transfers to Treasury by licensed gaming entities.*

(1) The Department will notify each licensed gaming entity, Treasury and Office of the Budget of the actual amount each licensed gaming entity shall be required to deposit with Treasury as calculated by the CCS in accordance with sections 1323, 1403 and 1405—1407 of the act. A licensed gaming entity shall make deposits with Treasury after receipt of the Department's notice to the licensed gaming entity and by the date and times specified by the Department.

(2) Payments shall be electronically transferred by the licensed gaming entities and available to the Commonwealth by the deadline established by the Department. Moneys shall be deposited in the Department's Collection Account.

(3) System problems or failures, such as power outages and states of emergency, will not excuse the licensed gaming entity from making the required deposits in a timely manner. The licensed gaming entity shall immediately notify the Department and the Board of any of these problems.

(4) The Department will maintain records of deposits to the Department's Collection Account under this chapter and will share information, as practicable, to assist Treasury in its reconciliation of deposits into its Concentration Account.

(5) The administration of assessments will be as follows:

(i) *Proration of assessment.* Upon imposition of the annual minimum distribution amount, as specified in section 1403(c)(3) of the act (relating to establishment of State Gaming Fund and net slot machine revenue distri-

bution), regardless of whether the minimum is subject to the budgetary limitations of section 1403 of the act, the required minimum shall be prorated for that portion of the municipality's fiscal year that the Board determines that the licensed gaming entity was actually in operation.

(ii) *Limitation of assessment.* Upon imposition of the minimum distribution upon the licensed gaming entity, the required minimum shall be paid in accordance with the administrative procedures of this section.

(6) The Department reserves the right, upon notice served upon the licensed gaming entity and the Board, to temporarily disable the licensed gaming entity's slot machines through the CCS until the Department receives verification that the required deposit has been made.

(d) *Distributions of local share assessments.*

(1) *Distributions of local share assessments to municipalities.* If a licensed gaming entity and certificate holder fails to reach the requisite annual minimum distribution as required under the act within 15 days following the end of the municipality's fiscal year, the Department will notify the licensed gaming entity and certificate holder of the shortfall and the amount to be remitted. A licensed gaming entity and certificate holder shall remit the difference required to meet the requisite annual minimum distribution as required under the act within 15 days following the end of the municipality's fiscal year. The licensed gaming entity and certificate holder shall remit the required payment to the Department for distribution in accordance with sections 1403(c)(3) and 13A63(c) of the act (relating to establishment of state gaming fund and net slot machine revenue distribution; and local share assessment). Distributions specified in this chapter shall be made by the licensed gaming entity and certificate holder to the Department, no later than 15 days from the Department's notice of the shortfall.

(2) *Distributions of local share assessments to counties.* The Department will make distributions in accordance with sections 1403(c)(2) and 13A63(b) of the act. If the minimum distribution exceeds the applicable annual municipal allocation cap in section 1403(c)(3) of the act, the amount in excess of the municipal allocation cap shall be distributed by the Department in accordance with section 1403(c)(2) of the act.

§ 1001.6. Administration of amounts deposited by licensed gaming entities and certificate holders with Treasury to pay Commonwealth gaming related costs and expenses.

(a) No later than 2 business days prior to the commencement of slot machine operations, the licensed gaming entity and certificate holder shall make all deposits required under section 1401 of the act (relating to slot machine licensee deposits) in the Department's Collection Account. Upon transfer of the deposit into Treasury's Concentration Account, the deposit shall be credited to an account established in Treasury for the licensed gaming entity and certificate holder. The account established shall also be used to recognize and account for all future deposits required from the licensed gaming entity and certificate holder by the Department for administrative costs and all future withdrawals made by the Department for reimbursement of administrative costs.

(b) Each licensed gaming entity and certificate holder shall maintain a minimum account balance with Treasury in accordance with section 1401 of the act.

(c) Moneys related to this account shall be transferred to the Department's Collection Account and from Treasury by EFT or other methods of funds transfer in accordance with § 1001.5(c) (relating to administration and distribution of moneys held by licensed gaming entities, certificate holders and the Commonwealth).

(d) Reimbursement of Commonwealth expenses will be as follows:

(1) The Department will issue to the licensed gaming entity and certificate holder, periodic assessments of expenses incurred by the Board, Department, Office of Attorney General and the Pennsylvania State Police, regarding expenses directly related to the licensed gaming entity and certificate holder, under budgets approved by the Board and upon appropriation by the General Assembly as required in section 1402.1 of the act (relating to itemized budget reporting). Expenses not included in budgets approved by the Board may not be assessed against the licensed entity under this section.

(2) Expenses incurred by the Commonwealth and assessed to the licensed gaming entity and certificate holder shall be charged back to the licensed gaming entity and certificate holder and deducted from the licensed gaming entity's and certificate holder's account, as specified in section 1401 of the act (relating to slot machine licensee deposits) and this section.

(3) General administrative costs of the Commonwealth not specifically assessed to a licensed gaming entity and certificate holder under paragraph (1), shall be borne by each licensed gaming entity and certificate holder on a pro rata basis, at the discretion of the Secretary of Revenue until all Category 1 and Category 2 licensed gaming entities and certificate holders are operating as permitted under the act.

§ 1001.7. Deposits of license, permit and other fees.

The fees for manufacturers' and suppliers' licenses, employment permits and other licenses and permits as the Board may require, excluding license fees paid for Categories 1, 2 and 3 licenses under sections 1209 and 1305 of the act (relating to slot machine license fee; and Category 3 slot machine license), shall be deposited with Treasury into a restricted receipt account within the State Gaming Fund. Fees to be paid under section 13A61 of the act (relating to table game authorization fee) and fees related to table games to be paid under section 1208 of the act (relating to collection of fees and fines) shall be deposited within the General Fund in accordance with section 13A61(f). The fees deposited within the Gaming Fund will be transferred from a restricted receipt account into a restricted revenue account of the State Gaming Fund to be used by the Board to pay its operating expenses. License fees paid for Categories 1, 2 and 3 licenses under sections 1209 and 1305 of the act shall be paid into the State Gaming Fund in accordance with sections 1209(d) and 1305 of the act.

§ 1001.8. State Gaming Fund transfers.

(a) *Application of section.* This section applies to the transfers of moneys to and from the State Gaming Fund.

(b) *Quarterly distributions.* Quarterly distributions from the State Gaming Fund to counties or municipalities in which a licensed facility is located, as determined by the Board, and as specified in Chapter 14 of the act (relating to revenues), shall be performed in accordance with the Governor's Management Directive 305.4 (relating to payments to counties), § 1001.5 (relating to administration and distribution of moneys held by licensed gaming entities, certificate holders and the Commonwealth) and the following provisions:

(1) The Department will submit payment requisitions, accompanied by documentation, to the Office of the Budget for payment through Treasury.

(2) The Department will determine the annual inflation adjustment and will publish notice of the inflation adjustment in the *Pennsylvania Bulletin* by February 1 of each year.

(3) The Department will make distributions quarterly, no later than 30 days following the end of each calendar quarter.

(c) *Tax, assessments and credit against tax.*

(1) Determinations of gross terminal revenue and the calculations of taxes and other assessments due will be determined by the Department based on the actual calculations by the CCS and the certificate holders' weekly reports of table game revenue made to the Department.

(2) Except in the case of gross table game revenue which will be self-reported to the Department by the certificate holders, the Department will notify each licensed gaming entity and Treasury of the amount of tax and other assessments due to the Commonwealth.

(3) Each licensed gaming entity and certificate holder shall deposit the amount specified in paragraph (2) into the Department's Collection Account, in the manner prescribed under § 1001.5(c).

(4) The Department will enter into an agreement with each licensed gaming entity setting forth the terms and conditions of any credit against tax as claimed by the licensed gaming entity.

(5) Taxes and other assessments due as determined by the Department shall remain payable by the licensed gaming entity and certificate holder to the Department in accordance with section 1501(a) of the act (relating to responsibility and authority of department) regardless of any discrepancies between the licensed gaming entity's and certificate holder's calculation and that of the Department's or amounts contested by any party concerning the credit against taxes due. Resolution of disputed payments due will be addressed by the Department through adjustments it makes to its calculation of future payment amounts due. The Department may make adjustments to its calculation of future payment amounts due after resolution of any dispute regarding the amount of taxes due. The Department will provide notice to the Board of the final calculations of taxes due under this subsection.

(6) Any remittance due that is caused by the imposition of the tax or other assessments on nonbanking days as well as holidays shall be remitted by the licensed gaming entity and certificate holder on the next banking day. For example, any tax that has accrued on Independence Day shall be transferred on the following banking day.

(d) *Imposition of a penalty.* Failure to comply with this section that results in the failure to transmit the requisite amounts to the Department's Collection Account shall result in the imposition of a penalty of 5% per month up to a maximum of 25% of the amounts due and unpaid by the licensed gaming entity and certificate holder. Payments made by a licensed gaming entity toward delinquent amounts, including penalties, shall be allocated to the licensed gaming entity's delinquency in accordance with the priority of payments as specified under section 209 of the Taxpayers' Bill of Rights (72 P. S. § 3310-209).

§ 1001.10. Pennsylvania Race Horse Development Fund transfers.

(a) Prior to making each Race Horse Improvement Daily Assessment against a licensed gaming entity, the Department will determine the amount of each licensed gaming entity's gross terminal revenue.

(b) Except as provided in section 1406(a)(2) and (2.1) of the act (relating to distributions from Pennsylvania Race Horse Development Fund), 18% of the gross terminal revenue of each Category 1 licensed gaming entity shall be returned to each active and operating Category 1 licensed gaming entity that conducts live racing subject to the assessment cap in section 1405(c) of the act (relating to Pennsylvania Race Horse Development Fund), and subject to the allocations specified in section 1406(a)(1)(i)—(iii) of the act.

(c) Procedures concerning Pennsylvania Race Horse Development transfers are as follows:

(1) Department personnel will notify the respective licensed gaming entity and Treasury of the actual amount each licensed gaming entity shall be required to deposit in the Department's Collection Account as determined by the CCS. Deposits shall be made on the same banking day as the date of the notice by the Department.

(2) Moneys shall be transferred by the licensed gaming entity by EFT or other method as the Department may require and shall be deposited in the Department's Collection Account prior to being transferred to Treasury's Concentration Account.

(3) System problems or failures, such as power outages and states of emergency, will not excuse the licensed gaming entity from making the required deposits in a timely manner. The licensed gaming entity shall immediately notify the Department and the Board of any of these problems.

(4) The Department will maintain records of the Department's Collection Account under this chapter and will share information as practicable, to assist Treasury in its reconciliation of deposits to its Concentration Account.

(d) The Department will notify each active and operating Category 1 licensee conducting live racing, Treasury and Office of the Budget of the amounts each active and operating Category 1 licensee conducting live racing will receive. An eligible Category 1 licensee will receive from Treasury a weekly payment from the Pennsylvania Race Horse Development Fund in accordance with the act. The deposits required under section 1406(a)(1)(ii) of the act will be deducted by the Department before making the payment to each active and operating licensee and transferred to the appropriate State fund, under section 1406 of the act.

(1) Payments will be electronically transferred by the Commonwealth and will be available to the licensee by the deadline established by the Department.

(2) Both Treasury and the Department will maintain records of distributions under this chapter and will share information, as practicable, to assist each agency in its reconciliation process.

(e) For purposes of the calculations and distributions of section 1406(a) of the act, live racing will be determined annually, and as a Category 1 licensed gaming entity commences live racing in accordance with section 1303(b) of the act (relating to additional Category 1 slot machine license requirements).

[Pa.B. Doc. No. 11-6. Filed for public inspection December 30, 2010, 9:00 a.m.]

Title 67—TRANSPORTATION

DEPARTMENT OF TRANSPORTATION

[67 PA CODE CH. 83]

Corrective Amendment to 67 Pa. Code § 83.5

The Department of Transportation has discovered a discrepancy between the agency text of 67 Pa. Code § 83.5 (relating to other physical and medical standards) as deposited with the Legislative Reference Bureau and as published at 40 Pa.B. 5813 (October 9, 2010) and the official text as published in the *Pennsylvania Code Reporter* (Master Transmittal Sheet No. 433). Subsection (b) (relating to disqualification on provider's recommendation) was inadvertently omitted.

Therefore, under 45 Pa.C.S. § 901: The Department of Transportation has deposited with the Legislative Reference Bureau a corrective amendment to 67 Pa. Code § 83.5. The corrective amendment to 67 Pa. Code § 83.5 is effective as of December 4, 2010, the date the defective official text was announced in the *Pennsylvania Bulletin*.

The correct version of 67 Pa. Code § 83.5 appears in Annex A.

Annex A

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

Subpart A. VEHICLE CODE PROVISIONS

ARTICLE IV. LICENSING

CHAPTER 83. PHYSICAL AND MENTAL CRITERIA, INCLUDING VISION STANDARDS RELATING TO THE LICENSING OF DRIVERS

§ 83.5. Other physical and medical standards.

(a) *General disqualifications.* A person who has any of the following conditions will not be qualified to drive:

(1) Unstable diabetes mellitus leading to severe hypoglycemic reactions or symptomatic hyperglycemia unless there has been a continuous period of at least 6 months free from a disqualification in this paragraph. Once the diabetic condition has stabilized, and as long as the individual has not had another disqualifying episode within the last 6 months, the driving privilege may be restored. The individual shall submit to a diabetic examination, which includes an HbA1C test as well as a vision screening, and the treating health care provider shall certify on a completed form provided by the Department that the individual has been free from a disqualifying episode. Thereafter, the individual shall submit to a diabetic examination, which includes an HbA1C test as well as a vision screening, in accordance with the following schedule:

(i) Six months after the diabetic examination required in this paragraph, the individual shall submit to a follow-up diabetic examination and the treating health care provider shall certify, on a completed form provided by the Department, that the individual has been free from a disqualifying episode.

(ii) Twelve months after the previous diabetic examination, the individual shall submit to a follow-up diabetic examination and the treating health care provider shall certify, on a completed form provided by the Department, that the individual has been free from a disqualifying episode.

(iii) Twenty-four months after the previous diabetic examination, the individual shall submit to a follow-up diabetic examination and the treating health care provider shall certify, on a completed form provided by the Department, that the individual has been free from a disqualifying episode.

(iv) Forty-eight months after the previous diabetic examination, the individual shall submit to a follow-up diabetic examination and the treating health care provider shall certify, on a completed form provided by the Department, that the individual has been free from a disqualifying episode.

(v) Diabetic examination may be required more frequently if recommended by the treating health care provider.

(vi) Providing the condition of the individual remains under good control, the individual will not be required to submit to additional diabetic examinations.

(2) A waiver may be granted if an individual has been previously free from severe hypoglycemic reactions or symptomatic hyperglycemia for the preceding 6 months and the subsequent severe hypoglycemic reaction or symptomatic hyperglycemia occurred while the individual was under the treating health care provider's care, during or concurrent with a nonrecurring transient illness, toxic ingestion or metabolic imbalance. This waiver will only be granted if the treating health care provider submits written certification indicating it is a temporary condition or isolated incident not likely to recur.

(3) Cerebral vascular insufficiency or cardiovascular disease which, within the preceding 6 months, has resulted in one or more of the following:

(i) Syncopal attack or loss of consciousness.

(ii) Vertigo, paralysis or loss of qualifying visual fields.

(4) Periodic episodes of loss of consciousness which are of unknown etiology or not otherwise categorized, unless the person has been free from episode for the year immediately preceding.

(b) *Disqualification on provider's recommendation.* A person who has any of the following conditions will not be qualified to drive if, in the opinion of the provider, the condition is likely to impair the ability to control and safely operate a motor vehicle:

(1) Loss of a joint or extremity as a functional defect or limitation.

(2) Impairment of the use of a joint or extremity as a functional defect or limitation.

(i) The provider should inform the patient of the prohibition against driving due to the functional impairment.

(ii) The provider shall inform the Department in writing of the impairment if the condition has lasted or is expected to last longer than 90 days.

(3) Rheumatic, arthritic, orthopedic, muscular, vascular or neuromuscular disease.

(i) The provider should inform the patient of the prohibition against driving due to the functional impairment.

(ii) The provider shall inform the Department in writing of the impairment if the condition has lasted or is expected to last longer than 90 days.

(4) Cerebral vascular insufficiency or cardiovascular disease which, within the preceding 6 months, has resulted in lack of coordination, confusion, loss of awareness, dyspnea upon mild exertion or any other sign or symptom which impairs the ability to control and safely perform motor functions necessary to operate a motor vehicle.

(5) Mental disorder, whether organic or without known organic cause, as described in the current Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association, 1700 18th Street NW, Washington, DC 20009, especially as manifested by the symptoms set forth in subparagraphs (i)—(iii). While signs or symptoms of mental disorder may not appear during examination by the provider, evidence may be derived from the person's history as provided by self or others familiar with the person's behavior.

(i) Inattentiveness to the task of driving because of, for example, preoccupation, hallucination or delusion.

(ii) Contemplation of suicide, as may be present in acute or chronic depression or in other disorders.

(iii) Excessive aggressiveness or disregard for the safety of self or others or both, presenting a clear and present danger, regardless of cause.

(6) Periodic episodes of loss of attention or awareness which are of unknown etiology or not otherwise categorized, unless the person has been free from episode for the year immediately preceding, as reported by a licensed physician.

(7) Use of any drug or substance, including alcohol, known to impair skill or functions, regardless whether the drug or substance is medically prescribed.

(8) Other conditions which, in the opinion of a provider, is likely to impair the ability to control and safely operate a motor vehicle.

(c) *Driving examination.* A person who has any of the conditions enumerated in subsection (b)(1), (2), (3) or (8) may be required to undergo a driving examination to determine driving competency, if the Department has reason to believe that the person's ability to safely operate a motor vehicle is impaired. The person may be restricted to driving only when utilizing appropriate adaptive equipment.

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