RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 127]

Air Quality Title V Fee Amendment

The Environmental Quality Board (Board) amends Chapter 127, Subchapter I (relating to plan approval and operating permit fees) to read as set forth in Annex A. This final-form rulemaking satisfies Federal and State obligations to establish a Title V annual emission fee sufficient to cover the reasonable direct and indirect costs of administering the operating permit program and other related requirements mandated under Title V of the Clean Air Act (CAA) (42 U.S.C.A. §§ 7661—7661f).

This final-form rulemaking was adopted by the Board at its meeting of September 17, 2013.

A. *Effective Date*

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

The final-form rulemaking will be submitted to the United States Environmental Protection Agency (EPA) upon publication for approval as a revision to the Commonwealth's State Implementation Plan (SIP) and as an amendment to the Title V Program Approval codified in 40 CFR Part 70, Appendix A (relating to approval status of state and local operating permits programs).

B. *Contact Persons*

For further information, contact Dean Van Orden, Assistant Director, Bureau of Air Quality, P. O. Box 8468, Rachel Carson State Office Building, Harrisburg, PA 17105-8468, (717) 783-9264; or Robert "Bo" Reiley, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the Pennsylvania AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.state.pa.us.

C. *Statutory Authority*

This final-form rulemaking is authorized under section 6.3 of the Air Pollution Control Act (act) (35 P. S. § 4006.3), which grants to the Board the authority to adopt regulations to establish fees to cover the indirect and direct costs of administering the air pollution control program, operating permit program required under Title V of the CAA, other requirements of the CAA (42 U.S.C.A. §§ 7401—7671q) and the indirect and direct costs of administering the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, the Small Business Compliance Advisory Committee and the Office of Small Business Ombudsman.

D. *Background and Purpose*

Title V annual emission fees are payable by the owners and operators of facilities in this Commonwealth that are classified as major sources of air pollution under section 501 of the CAA (42 U.S.C.A. § 7661) and are subject to the permitting provisions of Title V of the CAA. Section 502(b) of the CAA (42 U.S.C.A. § 7661a(b)) required the EPA to adopt rules establishing the minimum elements of Title V operating permit programs including a requirement that the owner or operator of all sources subject to the requirements obtain a permit under Title V of the CAA and pay an annual emission fee to state and local agencies sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of Title V of the CAA.

On July 30, 1996, the EPA granted full approval of the Commonwealth's Title V Operating Permits Program in accordance with Title V of the CAA and implementing regulations in 40 CFR Part 70 (relating to state operating permit programs). See 61 FR 39597 (July 30, 1996). Under 40 CFR 70.9(a) and (b) (relating to fee determination and certification), the state program must "require that the owners or operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs and shall ensure that any fee required by this section will be used solely for permit program costs." The fee schedule must result in the collection and retention of revenues sufficient to cover the permit program costs.

In addition to authorizing the establishment of fees sufficient to cover the permitting program required under Title V of the CAA, section 6.3(a) of the act also authorizes the Board to adopt regulations to establish fees to support the air pollution control program authorized by the act and not covered by fees required under section 502(b) of the CAA. The emission fees currently apply to emissions of up to 4,000 tons of any regulated pollutant. For Title V annual emission fee purposes, "regulated pollutant," as defined in section 502 of the CAA and § 127.705(d) (relating to emission fees), means a volatile organic compound, each pollutant regulated under sections 111 and 112 of the CAA (42 U.S.C.A. §§ 7411 and 7412) and each pollutant for which a National Ambient Air Quality Standard (NAAQS) has been promulgated, except that carbon monoxide shall be excluded from this reference.

The final-form rulemaking amends the Title V annual emission fee requirements in § 127.705. An adequate fee must result in the collection and retention of revenue sufficient to cover the costs of administering the air permit program as required under section 6.3 of the act. The Department has established a uniform Title V annual emission fee across this Commonwealth. The local air pollution control agencies in Allegheny and Philadelphia Counties collect the Title V annual emission fee revenue for sources under their jurisdictions. Minor clarifying amendments are made to § 127.701 (relating to general provisions).

The final-form amendment to the existing Title V annual emission fee is designed to cover all reasonable costs required to develop and administer the Title V permit requirements. These reasonable costs include the cost for certain activities related to major facility operations, including the review and processing of plan approvals and operating permits; emissions and ambient air monitoring; preparing applicable regulations and guidance; modeling, analyses and demonstrations; and preparing emission inventories and tracking emissions. Direct and indirect program costs include personnel costs, operating expenses such as telecommunications, electricity,

travel, auto supplies and fuel, and the purchase of fixed assets such as air samplers and monitoring equipment, vehicles and trailers.

To meet these obligations, the final-form rulemaking increases the Title V annual emission fee paid by the owner or operator of a Title V facility to $85 per ton of emissions of "regulated pollutant" for emissions of up to 4,000 tons of each regulated pollutant beginning with emission fees payable by September 1, 2014, for emissions occurring in calendar year 2013. The initial Title V annual emission fee, established at 24 Pa.B. 5899 (November 26, 1994), was $37 per ton of regulated pollutant for emissions of up to 4,000 tons of each regulated pollutant per Title V facility. As provided in § 127.705(e), the emission fee imposed under § 127.705(a) has been increased in each year after November 26, 1994, by the percentage, if any, by which the Consumer Price Index for the most recent calendar year exceeds the Consumer Price Index for the previous calendar year. Under the existing regulatory framework, the Title V annual emission fee has not been revised since 1994. The current Title V annual emission fee due September 1, 2013, for emissions occurring in calendar year 2012 is $57.50 per ton of regulated pollutant for emissions of up to 4,000 tons of each regulated pollutant. To collect fees sufficient to cover Title V program costs, the increase to the Title V annual emission fee is an increase of $27.50 per ton of emissions of each regulated pollutant from 2013 levels.

Title V annual emission fee revenues collected are no longer sufficient to cover program costs. Installation of air pollution control technology over the past 2 decades on major stationary sources, the retirement or curtailment of operations by major sources including certain refineries and coal-fired power plants and the conversion at many major facilities from burning coal or oil to burning natural gas has resulted in the decreased emission of regulated pollutants that are subject to the annual emission fee, and revenues collected have been decreasing as a result. The increase to the Title V annual emission fee considers the impact on collected Title V annual emission fee revenues from the retirement of certain sources and the announced retirement of sources, including certain electric generating units. The decline in interest rates paid on savings account balances has also affected the funds as the investments earn less interest in the current economy compared to the early years of the program.

Failure to adjust the emission fee structure to adequately cover program costs may cause significant reductions in the Title V staffing complement, currently 214 positions, and technical services. Reduced staffing will cause delays in processing and issuing plan approvals for Title V facilities and Title V operating permits, potentially resulting in delays for industry to implement new or improved processes and loss of revenue to industry, loss of jobs for the community and loss of tax revenue for the Commonwealth. New or modified sources of air pollution at Title V facilities cannot be constructed without a plan approval. The installation of air pollution control equipment requires Department approval of a plan approval application prior to the installation. Further, fewer staff to conduct inspections, respond to complaints and pursue enforcement actions will result in less oversight of industry compliance or noncompliance and in reduced protection of the environment and public health and welfare of the citizens of this Commonwealth.

Decreased revenues will also impact the Commonwealth's air monitoring network, which provides the data to substantiate the Commonwealth's progress in attaining and maintaining the NAAQS instituted by the EPA under the CAA. Decreased revenues could also impact the Small Business Stationary Source Technical and Environmental Compliance Assistance Program by reducing the amounts of grants and number of services available to small businesses. This could potentially lead to fewer viable small businesses and slow the economic recovery of this Commonwealth by reducing the numbers of available jobs. Further, a failure to attain and maintain the NAAQS and to satisfy the Commonwealth's obligations under the CAA could precipitate punitive actions by the EPA.

In accordance with 40 CFR 70.10(b) and (c) (relating to Federal oversight and sanctions), the EPA may withdraw approval of a Title V Permit Program, in whole or in part, if the EPA finds that a state or local agency has not taken "significant action to assure adequate administration and enforcement of the program" within 90 days after the issuance of a notice of deficiency (NOD). The EPA is authorized to, among other things, withdraw approval of the program and promulgate a Federal Title V Permit Program in this Commonwealth that would be administered and enforced by the EPA. In this instance, all Title V emission fees would be paid to the EPA instead of the Department. Additionally, mandatory sanctions would be imposed under section 179 of the CAA (42 U.S.C.A. § 7509) if the program deficiency is not corrected within 18 months after the EPA issues the deficiency notice. These mandatory sanctions include 2-to-1 emission offsets for the construction of major sources and loss of Federal highway funds ($1.06 billion in 2012 if not obligated for projects approved by the Federal Highway Administration). The increase in the Title V annual emission fee avoids the issuance of a Federal Title V Permit Program NOD; Federal oversight and mandatory CAA sanctions would also be avoided. The EPA may also impose discretionary sanctions which would adversely impact Federal grants awarded under sections 103 and 105 of the CAA (42 U.S.C.A. §§ 7403 and 7405).

The final-form rulemaking does not establish a fee structure for carbon dioxide and other greenhouse gases (GHG) including hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons and sulfur hexafluoride. On June 3, 2010, the EPA finalized the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule). See 75 FR 31514 (June 3, 2010). As the Tailoring Rule relates to the applicability of Title V annual emission fees for a "regulated pollutant" as defined in section 502 of the CAA, the EPA did not mandate revisions to state and local Title V programs to account for these emissions. See 75 FR 31514, 31585. The EPA reasoned that it would be difficult to apply this fee to GHGs, based on the large amount of GHG emissions relative to other pollutants and the need for better data to establish a GHG-specific fee amount. See 75 FR 31514, 31585. However, the EPA did commit to addressing this issue in a future rulemaking and to work with states to develop a workable fee approach. See 75 FR 31514, 31586. The EPA has not yet proposed a fee schedule under the CAA for GHG emissions. Consequently, the Board did not impose Title V emission fees for GHG emissions from stationary sources in this Commonwealth.

The Department consulted with the Air Quality Technical Advisory Committee (AQTAC) in the development of this final-form rulemaking. At its June 13, 2013, meeting, the AQTAC concurred with the Department's recommendation to advance the rulemaking to the Board for consideration as a final-form rulemaking.

The Department also conferred with the Citizens Advisory Council concerning the final-form rulemaking on July 16, 2013, and with the Small Business Compliance Advisory Committee on July 24, 2013.

E. *Summary of the Final-Form Rulemaking and Changes from Proposed to Final-Form Rulemaking*

The Board did not make changes to the rulemaking from proposed to final-form.

The final-form rulemaking amends § 127.701 to clarify that fees paid to the Department are deposited into the Pennsylvania Clean Air Fund. The final-form rulemaking also retained some additional editorial changes to this section.

The final-form rulemaking revises § 127.705 to establish a Title V annual emission fee of $85 per ton for emissions of up to 4,000 tons of regulated pollutant, beginning with the fees due by September 1, 2014, for emissions from Title V facilities occurring in the 2013 calendar year.

F. *Summary of Comments and Responses*

Major comments and responses on the proposed rulemaking

The Board approved publication of the proposed rulemaking at its November 20, 2012, meeting. The proposed rulemaking was published at 43 Pa.B. 677 (February 2, 2013). Three public hearings were held on March 5, 6, and 7, 2013, in Pittsburgh, Norristown, and Harrisburg, PA, respectively. The public comment period closed on April 8, 2013, for a 66-day public comment period.

Public comments were received from four commentators. The Independent Regulatory Review Commission (IRRC) also provided comments.

A commentator said that the proposed increase in the Title V fee shows that the Department has been operating at a level of insufficient funding. There was a concern about the Bureau of Air Quality's ability to purchase air sampling and monitoring equipment, perform modeling analysis and add monitors in the Marcellus Shale counties.

The Board disagrees. The significant drop in Title V revenue that has occurred recently is due to the installation of air pollution control equipment at Title V facilities, reductions in emissions from Title V facilities and the closure or deactivation of certain large facilities including electric generating units. The Department is able to purchase and operate air monitoring and other equipment using other funds. The Department has recently installed a permanent air monitoring site in Bradford County.

Some commentators opposed the proposed increase in the Title V fee.

The Board understands this resistance. There are both Federal and State obligations to amend the Title V emission fee to maintain the Federally-mandated Title V permitting program. For instance, section 502(b) of the CAA requires the Department to adopt rules to require the owners and operators of sources subject to the requirement to obtain a Title V permit to pay an annual fee sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the Title V permit program requirements. Similarly, section 6.3 of the act authorizes the establishment of fees sufficient to cover the indirect and direct costs of administering the air pollution control plan approval process and operating permit program required under Title V of the CAA.

A commentator believed that imposing a spike or jolt in the Title V emissions fee without phasing the increase in is inappropriate.

The Board did investigate the potential for increasing the Title V emission fee in phases. However, a phased-in emission fee increase would not address the projected deficit in the Clean Air Fund Title V Major Emission Facilities Account. A deficit of $7.235 million is projected for the Title V Major Emission Facilities Account by the end of Fiscal Year (FY) 2015-2016. Funds sufficient to support the program need to be collected before the fund is in deficit.

A commentator said that the current and proposed fee structure assumes that the amount of emissions correlate directly with the amount of resources needed to administer the Title V program. This is not true, as a smaller but more complex source may be more demanding of the Department's resources.

The Board agrees that the Title V annual emission fee is directly related to the quantity of emissions of regulated pollutant released from a facility and that a lower emitting facility may not be paying a fee representative of the administrative resources dedicated to that lower emitting facility. However, the Department has stated that it intends to conduct a comprehensive review of all air quality fees to develop an equitable and sustainable fee program. At this time, the Board thinks the most equitable and feasible approach to this issue is to ensure that the Title V fee revenues adequately cover the expense of the program.

A commentator asserted that the fees are substantially out of line with fees collected in other states with a strong manufacturing base.

The Board disagrees. The fee is similar to those in other states and will not place this Commonwealth at a competitive disadvantage. All states are required under the CAA to collect Title V annual emission fees and to adjust the fees annually based on the Consumer Price Index. Several nearby states have already taken action to address the issue of declining revenues due to declining emissions of regulated pollutants. Connecticut, Maryland, New York and New Jersey no longer limit emission fee applicability to 4,000 tons per regulated pollutant. In 2013, Connecticut's Title V emission fee is $301.09 per ton of regulated pollutant based on an "Inventory Stabilization Factor," upwards from a fee of $283.46 per ton imposed in 2012 and with no cap on the amount of emissions of regulated pollutants subject to this fee. In 2012, New York assessed a Title V annual emission fee ranging from $45 per ton of regulated pollutant for emissions of less than 1,000 tons per year to $65 per ton of regulated pollutant for emissions of more than 5,000 tons per year; the fee is applied to emissions up to 7,000 tons of any regulated pollutant. The New York Title V emission fee for 2013 has not changed from 2012 levels. For 2013, New Jersey imposes a Title V annual emission fee of $112.07 per ton of emissions of regulated pollutant with no cap on emissions, upwards from $106.67 per ton in 2012. Maryland's 2013 Title V fee is $55.70 plus a $200 base fee; Maryland does not have a cap on the amount of emissions of regulated pollutants subject to the fee. West Virginia's 2013 Title V annual emission fee is $31.87 per ton of emissions of regulated pollutant with a 4,000 ton cap. Virginia's 2013 Title V annual emission fee is $58.88 per ton of emissions of regulated pollutant (4,000 ton cap); further, in 2012 Virginia established additional Title V facility fees including yearly maintenance fees ranging

from $1,500 to $10,000 and Title V Permit application and Title V Permit renewal fees of $20,000 and $10,000, respectively.

A commentator recommended that the Board consider a facility cap as opposed to a fee per pollutant cap.

The Board disagrees. The fee per pollutant cap of 4,000 tons of a regulated pollutant is established in section 6.3 of the act. A revision to the cap would require legislative action and is beyond the scope of the final-form rulemaking.

The commentator thought that imposing an increase for the current calendar year is essentially a "retroactive tax" because the regulated community did not have prior knowledge of the proposal.

The Board disagrees with the assertion that the Title V annual emission fee is a tax. Neither the Board nor the Department has the authority to establish taxes. The General Assembly retains the authority to propose and pass bills which establish taxes. Moreover, the Department is statutorily mandated under both the act and the CAA to establish fees to ensure the continued viability of the air quality program.

The Board first proposed a Title V fee amendment at 39 Pa.B. 6049 (October 17, 2009). While this proposal was not finalized, the regulated community has been on notice of the need for additional fees. This final-form rulemaking was published as proposed in the early part of 2013, which allowed companies to adequately plan for the increase based on 2013 emissions. Furthermore, the emission fees required by this final-form rulemaking are due on or before September 1 of each year for emissions from the previous calendar year. Consequently, emissions for 2013 do not need to be paid until September 1, 2014. This is not retroactive.

The commentator asserted that the reduction in emissions and the shutdown of sources will reduce the Department's workload and should reduce the need for additional fees.

The Board disagrees. The announced facility shutdowns will not reduce the Department's workload. Proposed shutdowns in coal-fired power plants are being offset by the proposed construction of additional natural gas-fired power plants. To date, there are nine plan approval applications in various stages of approval with the Department regarding the construction of new natural gas-fired power plants. Department air program staff continue to implement the air pollution laws and regulations, issue plan approvals and operating permits, including renewals and amendments, conduct facility inspections, respond to complaints, assess the risks of hazardous air pollutant emissions and monitor the ambient air in this Commonwealth. Air program staff operates and maintains a source testing program to ensure compliance with applicable requirements. Significant staff resources have been devoted to permitting and inspection of unconventional natural gas development activities. Further, the Department projects an increased workload due to the implementation of new or revised Federal regulations. Implementation of the new and revised Federal permitting rules will require increased numbers of inspections and permitting actions and outreach to and education of the impacted industry. These Federal rules may require promulgation of new or revision to existing State regulations.

The commentator thought that the Board failed to recognize the inordinate regulatory costs borne by the manufacturing industry.

The Board disagrees. The Board acknowledges the number of new or revised regulations that impact manufacturing facilities. However, the CAA and the act require that a Title V fee structure that is sufficient to cover the cost of the Title V permitting program be established.

The commentator noted that 40% of the Title V fees paid in Allegheny County would be paid by one company and that this is not commensurate with the resources needed to administer the Title V program.

The Board agrees that the commentator is correct that the owners or operators, or both, of a few major emitting facilities will pay a large portion of the Title V emission fees assessed by the air program. However, the commentator's facilities are also among the highest emitting facilities in Allegheny County. The Board agrees that the fee structure established by the act needs to be reviewed as part of the analysis of all air quality fees that will be conducted over the next 2 years. However, at this time, the most equitable and feasible approach to this issue is to ensure that the Title V annual emission fee revenues adequately cover the expense of the program.

A commentator supported the Board's decision to not establish a fee structure for carbon dioxide and GHG.

The Board thanks the commentator for the support of the decision. As stated in the proposed rulemaking, this final-form rulemaking does not establish a fee structure for carbon dioxide and other GHG, including hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons and sulfur hexafluoride. On June 3, 2010, the EPA finalized the Tailoring Rule. As the Tailoring Rule relates to the applicability of Title V annual emission fees for a "regulated pollutant" as defined in section 502 of the CAA, the EPA did not mandate revisions to state and local Title V programs to account for these emissions. The EPA reasoned that it would be difficult to apply the Title V fee to GHG gases, based on the large amount of GHG emissions relative to other pollutants and the need for better data to establish a GHG-specific fee amount. However, the EPA did commit to addressing this issue in a future rulemaking and to work with states to develop a workable fee approach. The EPA has not yet proposed a fee schedule under the CAA for GHG emissions. Consequently, the Board did not propose to impose Title V emission fees for GHG emissions from stationary sources in this Commonwealth.

The commentator urged the Board to make any Title V emission fee increase temporary, because the Title V fee revenue will return once the economy improves.

The Board disagrees. The reduction in Title V emission fee revenue is expected to continue to decline due mainly to the closure of certain large coal-fired electric generating units. As a result, Title V fee revenue is not expected to return to previous levels once the economy improves. Therefore, the Title V fee revision must be promulgated to cover the cost of administering the Title V program.

The commentator questioned why the same numbers of Department staff are needed for inspections when the number of Title V facilities is decreasing.

The Board agrees that there has been a reduction in the number of Title V facilities. However, this reduction in the number of Title V facilities does not have a direct impact on the number of inspectors needed. This is because the inspections have become more complex, tak-

ing longer to conduct and to document than inspections that occurred at the start of the program in the early 1990s.

The commentator requested that the Board consider delaying implementation of the fee by 1 year or implementing the increase over several years.

The Board analyzed the solvency of the Clean Air Fund Title V Major Emission Facilities Account and determined that there will not be sufficient funds to sustain the Title V permitting program beginning in FY 2015-2016. Failure to address the Title V revenue shortfall now will result in a program without sufficient funds to operate. This in turn will have significant impacts on regulated industry, including the delay in revising and addressing plan approvals and operating permits including renewals and amendments.

A commentator thought that the Board could impose a fee higher than $85 per ton and still remain below the level charged by several other states.

The Board agrees that a higher fee could have been proposed. The Title V fee of $85 per ton of emissions of up to 4,000 tons of regulated pollutant provides a bridge to allow additional time for the development of a comprehensive fee structure for the air quality program.

A commentator asked whether the regulation will result in the air quality program operating at a loss again in just 2 years.

The Board agrees that the increase to the Title V annual emission fee is not a permanent solution to funding the air quality program. The current Comparative Financial Statement for the Clean Air Fund shows that the Title V Major Emission Facilities Account will have a negative balance at the end of FY 2015-2016. As noted in the minutes of the November 20, 2012, Board meeting, the final-form rulemaking provides a "bridge" for the Department to address its imminent budget needs while allowing the Department and interested stakeholders sufficient time to examine the most appropriate means to support the Title V program in the future as new air pollution control technologies, the abundance of natural gas and the retirement of coal-fired power plants continue to reduce emissions of regulated pollutants.

The commentator wanted to know whether the Board explored offsetting all or a portion of the proposed increase through cost reductions.

The Board believes that the Department has made significant cost reductions in the Title V program. The Department has eliminated or postponed the purchase of fixed assets. The Department has reallocated program costs to the Mobile and Area Facilities Account of the Clean Air Fund when permissible to prolong the solvency of the Title V Major Emission Facilities Account. For example, the Department transferred $485,000 of expenditures from the Title V Major Emission Facilities Account to the Mobile and Area Facilities Account of the Clean Air Fund in FY 2012-2013. These expenditures included staff training, certain travel expenses, computer and computer software purchases, health certifications and certain utility charges. For FY 2013-2014, the Department will transfer $240,000 in operating expenses to the Mobile and Area Facilities Account of the Clean Air Fund and reduce computer systems support spending by $150,000. The Department will continue to look for cost reductions that can be implemented without negatively impacting the Title V permitting program.

The commentator asked how the fee increase will affect employment.

The Board considered whether an increase to the Title V annual emission fee would put businesses in this Commonwealth at a competitive disadvantage with comparable businesses in the surrounding states or draw business and employment opportunities away from this Commonwealth.

The Board finds that in some cases, this Commonwealth would be very competitive and may be able to draw new industry on the basis of having a lower Title V annual emission fee than nearby states.

The commentator wondered whether the Board considered a delay or phase-in of the increase to allow businesses time to accommodate the full impact and whether it is reasonable to impose the fee increase on emissions that already occurred in 2013.

The Board did consider a delay and different years for the implementation of the Title V fee increase. However, assessing the revised fee on emissions of regulated pollutants occurring in calendar year 2013, due and payable by September 1, 2014, was chosen due to the projected budget deficit and anticipated retirement or deactivation of electric generating units that will have a significant negative impact on the Title V permitting program. Because of declining Title V emission fee revenue due to the installation of air pollution control technology on stationary sources and the retirement or curtailment of operations by major sources including coal-fired power plants, deficits of $7.235 million and $19.406 million in FYs 2015-2016 and 2016-2017, respectively, are projected for the Title V Major Facilities Account.

The Board analyzed the solvency of the Clean Air Fund Title V Major Emission Facilities Account and determined that there will not be sufficient funds to sustain the Title V permitting program beginning in FY 2015-2016. Failure to address the Title V revenue shortfall now will result in a program without sufficient funds to operate. This will have significant impacts on industry, including the delay in revising and addressing plan approvals and operating permits including renewals and amendments since the Department will necessarily be forced to reduce staff in order to balance the budget. There will not be sufficient staff to conduct facility inspections, respond to complaints, assess the risks of hazardous air pollutant emissions, monitor the ambient air in this Commonwealth and operate and maintain a source testing program to ensure compliance with applicable requirements. These factors could contribute to a loss of employment opportunities and slow the economic recovery in this Commonwealth. The Board first proposed a Title V annual emission fee increase in 2009, thereby providing notice to the affected owners and operators of Title V facilities of the need to address the revenue shortfall. Further, payment of the emission fees for emissions occurring in calendar year 2013 will not be due until September 1, 2014, 19 months after publication of the proposed rulemaking at 43 Pa.B. 677 to increase to the Title V annual emission fee.

The commentator asked the Board to explain how the costs imposed by the fee increase are justifiable compared to the benefits the fees produce.

Retaining sufficient staff (including permitting, monitoring, enforcement, source testing and legal personnel) to support the Title V permitting program is a critical component of improving air quality and assuring compliance with the NAAQS. The benefits of attaining and

maintaining the NAAQS are significant. The EPA has estimated the monetized health benefits of attaining ambient air quality standards. For example, the EPA estimated that the monetized health benefits of attaining the 8-hour ozone standard of 0.075 ppm range from $8.3 billion to $18 billion on a National basis. See Regulatory Impact Analysis, Final National Ambient Air Quality Standard for Ozone, July 2011, http://www.epa.gov/glo/pdfs/201107_OMBdraft-OzoneRIA.pdf. Prorating that benefit to this Commonwealth, based on population, results in a public health benefit of $337 million to $732 million. The projected costs to the regulated industry Commonwealth-wide in increased fees ranging from $5,830,000 in FY 2014-2015 to $4,237,000 in FY 2018-2019 pale by comparison.

The Board is not stating that these estimated monetized health benefits would all be the result of implementing the increase to the Title V annual emission fee, but the EPA estimates are indicative of the benefits of attaining the NAAQS. Ensuring that there are sufficient staff and resources to implement the Title V permitting program is one part of the overall air quality program to attain and maintain the NAAQS in this Commonwealth. Adequate funding will assure the regulated industry that their plan approval applications and permits will be reviewed in a timely manner, sustaining their profitable business and maintaining jobs. Attaining and maintaining public health and welfare goals will attract and retain residents needed to fill the jobs created by the regulated industries and small businesses. Maintaining a healthy environment will benefit the agricultural and tourism industries, both of which provide many jobs. These situations will increase tax revenues to the Commonwealth.

Implementing the increase to the Title V annual emission fee will assure the residents of this Commonwealth that the Commonwealth's air pollution control program is adequately funded for the next few years. The anticipated increased revenues will allow the Department and approved local air pollution control agencies to continue providing adequate oversight of the air pollution sources in this Commonwealth and take action, when necessary, to reduce emissions to achieve healthful air quality and ensure continued protection of the environment and the public health and welfare of the residents of this Commonwealth.

G. *Benefits, Costs and Compliance*

Benefits

The increased Title V annual emission fee revenue will be used to adequately fund the Commonwealth's air quality Title V permit programs as authorized by the act. Without an increase in the annual emission fee, Clean Air Fund Title V Major Emission Facilities Account deficits of $7.235 million, $19.406 million, $32.001 million and $45.028 million are projected for the Department's Title V program for FYs 2015-2016, 2016-2017, 2017-2018 and 2018-2019, respectively. Revenue to the Department from the fee increase will be used solely to address the projected deficits in the Title V Major Emission Facilities Account in the Clean Air Fund.

The Title V annual emission fee of $85 per ton for emissions of up to 4,000 tons of each regulated pollutant will result in projected increased revenue to the Department of $5.1 million in the Title V Account for FYs 2014-2015 and 2015-2016 and $3.5 million for FYs 2016-2017, 2017-2018 and 2018-2019 if the fee is imposed beginning with emissions occurring in calendar year 2013 and payable by September 1, 2014. An increase in the Title V annual emission fee will provide projected increased emission fee revenue of approximately $570,000 and $167,000 for the approved local air pollution control agency Title V programs in Allegheny County and Philadelphia County, respectively. The increase in the Title V annual emission fee will result in a combined projected increase of revenue to the three agencies of $5.8 million in FY 2014-2015.

The increase to the Title V annual emission fee will assure the regulated industry that their plan approval applications and permits are reviewed in a timely manner, sustaining their business and maintaining jobs. Adoption of the revised Title V emission fee will ensure that the Commonwealth's Title V air pollution control permit program is adequately funded for the next few years. The anticipated increased revenue will allow the Department and approved local air pollution control agencies to continue providing adequate oversight of the air pollution sources in this Commonwealth and take action, when necessary, to further reduce emissions of regulated pollutants to achieve healthful air quality and ensure continued protection of the environment and the public health and welfare of the residents of this Commonwealth.

Compliance costs

The owners and operators of approximately 560 Title V facilities in this Commonwealth, including facilities in Allegheny and Philadelphia Counties, will be required to comply with the revised Title V annual emission fee on emissions of up to 4,000 tons of each regulated pollutant. The financial impact on the owners and operators of Title V facilities regulated by the Department, collectively, will be additional annual emission fee costs of approximately $5.1 million per year for FYs 2014-2015 and 2015-2016; additional annual emission fee costs in FYs 2016-2017, 2017-2018 and 2018-2019 for these owners and operators are expected to be about $3.5 million per year due to decreasing amounts of emissions of regulated pollutants as major sources install additional air pollution controls, convert to burning natural gas (a cleaner energy source) instead of coal or oil, or shut down certain facilities. Costs to the owners and operators of Title V facilities regulated by the approved local air pollution control agencies are expected to be about $570,000 and $167,000 in FY 2014-2015 in Allegheny County and Philadelphia County, respectively. The revised Title V annual emission fee will result in total projected increased costs of $5.8 million for the regulated community in Title V emission fee payments to the three agencies in FY 2014-2015.

New legal, accounting or consulting procedures would not be required.

Compliance Assistance Plan

The Department plans to educate and assist the public and regulated community in understanding the newly revised requirements and how to comply with them. This outreach initiative will be accomplished through the Department's ongoing compliance assistance program.

Paperwork requirements

There are not additional paperwork requirements associated with this final-form rulemaking with which the industry would need to comply.

H. *Pollution Prevention*

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. The anticipated increased revenues will allow the Department and approved local air pollution control agencies to continue providing adequate oversight of the air pollution sources in this Commonwealth, sustain the gains made in healthful air quality and ensure continued protection of the environment and the public health and welfare of the residents of this Commonwealth.

I. *Sunset Review*

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 22, 2013, the Department submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 677, to IRRC and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees 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 Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 6, 2013, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 7, 2013, and approved the final-form rulemaking.

K. *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 regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) At least a 60-day public comment period was provided as required by law and all comments were considered.

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 43 Pa.B. 677.

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this preamble.

(5) These regulations are reasonably necessary to cover the indirect and direct costs of administering the air pollution control program, operating permit program required under Title V of the CAA, other requirements of the CAA and the indirect and direct costs of administering the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, Small Business Compliance Advisory Committee and Office of Small Business Ombudsman.

L. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapter 127, are amended by amending §§ 127.701 and 127.705 to read as set forth in Annex A.

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

(c) The Chairperson of the Board shall submit this order and Annex A to IRRC and the Committees as required by the Regulatory Review Act.

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

(e) This final-form rulemaking will be submitted to the EPA as an amendment to the Pennsylvania SIP.

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

E. CHRISTOPHER ABRUZZO,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 43 Pa.B. 6988 (November 23, 2013).)

Fiscal Note: Fiscal Note 7-478 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE III. AIR RESOURCES

CHAPTER 127. CONSTRUCTION, MODIFICATION, REACTIVATION AND OPERATION OF SOURCES

Subchapter I. PLAN APPROVAL AND OPERATING PERMIT FEES

§ 127.701. General provisions.

(a) This subchapter establishes fees to cover the direct and indirect costs of administering the air pollution control planning process, operating permit program required by Title V of the Clean Air Act (42 U.S.C.A. §§ 7661—7661f), other requirements of the Clean Air Act, the indirect and direct costs of administering the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, Compliance Advisory Committee and the Office of Small Business Ombudsman and the costs to support the air pollution control program authorized by the act.

(b) The fees collected under this subchapter shall be made payable to the Pennsylvania Clean Air Fund and deposited into the Clean Air Fund established under section 9.2 of the act (35 P. S. § 4009.2).

(c) Fees collected under this subchapter to implement the requirements of Title V of the Clean Air Act and the Small Business Stationary Source Technical and Environmental Compliance Assistance, Compliance Advisory Committee and the Office of Small Business Ombudsman shall be made payable to the Pennsylvania Clean Air Fund and deposited into a restricted revenue account within the Clean Air Fund.

§ 127.705. Emission fees.

(a) The owner or operator of a Title V facility including a Title V facility located in Philadelphia County or Allegheny County, except a facility identified in subparagraph (iv) of the definition of a Title V facility in § 121.1 (relating to definitions), shall pay an annual Title V emission fee of $85 per ton for each ton of a regulated pollutant actually emitted from the facility. The owner or operator will not be required to pay an emission fee for emissions of more than 4,000 tons of each regulated pollutant from the facility. The owner or operator of a Title V facility located in Philadelphia County or Allegheny County shall pay the emission fee to the county Title V program approved by the Department under section 12 of the act (35 P. S. § 4012) and § 127.706 (relating to Philadelphia County and Allegheny County financial assistance).

(b) The emissions fees required by this section shall be due on or before September 1 of each year for emissions from the previous calendar year. The fees required by this section shall be paid for emissions occurring in calendar year 2013 and for each calendar year thereafter.

(c) As used in this section, the term "regulated pollutant" means a VOC, each pollutant regulated under sections 111 and 112 of the Clean Air Act (42 U.S.C.A. §§ 7411 and 7412) and each pollutant for which a National ambient air quality standard has been promulgated, except that carbon monoxide shall be excluded from this reference.

(d) The emission fee imposed under subsection (a) shall be increased in each calendar year after December 14, 2013, by the percentage, if any, by which the Consumer Price Index for the most recent calendar year exceeds the Consumer Price Index for the previous calendar year. For purposes of this subsection:

(1) The Consumer Price Index for a calendar year is the average of the Consumer Price Index for All-Urban Consumers, published by the United States Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year.

(2) The revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1989 shall be used.

[Pa.B. Doc. No. 13-2312. Filed for public inspection December 13, 2013, 9:00 a.m.]

BOARD OF COAL MINE SAFETY

[25 PA. CODE CH. 208]

Maintenance of Incombustible Content of Rock Dust

The Board of Coal Mine Safety (Board) adds § 208.71 (relating to maintenance of incombustible content of rock dust). The final-form rulemaking conforms Pennsylvania regulations to Federal regulations, thereby establishing that the incombustible content of coal dust, rock dust and other dust will not be less than 80% in bituminous coal mines.

This final-form rulemaking was given under Board order at its meeting of September 17, 2013.

A. *Effective Date*

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information, contact Joe Sbaffoni, Director, Bureau of Mine Safety, Fayette County Health Center, 100 New Salem Road, Room 167, Uniontown, PA 15401, (724) 439-7469, jsbaffoni@pa.gov; or Susana Cortina de Cárdenas, Assistant Counsel, Bureau of Regulatory Counsel, Office of Chief Counsel, Rachel Carson State Office Building, 9th Floor, P. O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060, scortina@pa.gov. Persons with a disability may use the Pennsylvania AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.state.pa.us.

C. *Statutory Authority*

This final-form rulemaking is authorized under sections 106 and 106.1 of the Bituminous Coal Mine Safety Act (BCMSA) (52 P. S. §§ 690-106 and 690-106.1), which grant the Board the authority to adopt regulations implementing the BCMSA, including additional safety standards. The Board is authorized to promulgate regulations that are necessary or appropriate to implement the BCMSA and to protect the health, safety and welfare of miners and other individuals in and about mines.

D. *Background and Purpose*

This final-form rulemaking requires that where rock dust is to be applied in bituminous underground coal mines in this Commonwealth, the incombustible content of the combined coal dust, rock dust and other dust that is present in a mine's intake and return airways may not be less than 80%.

On September 23, 2010, the United States Department of Labor and the Federal Mine Safety and Health Administration (MSHA) issued an emergency temporary standard (ETS) under section 101(b) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C.A. § 811(b)) in response to the grave danger that miners in underground bituminous coal mines throughout the country face when accumulations of coal dust are not made inert. See 75 FR 57849 (September 23, 2010). MSHA concluded, from investigations of mine explosions and other reports, that immediate action was necessary to protect miners.

The ETS served as an emergency temporary final rule with immediate effect and provided an opportunity for notice and comment, after which time a final rule would be issued. The National Institute for Occupational Safety and Health (NIOSH) conducted a series of large-scale dust explosion tests at the NIOSH Lake Lynn Experimental Mine using the dust survey results to determine the incombustible content necessary to prevent explosion propagation. Based on the results of this testing, NIOSH recommended an 80% total incombustible content in both intake and return airways of bituminous coal mines in the ETS. In addition, the incombustible content of the dust shall be increased to 0.4% for each 0.1% of methane present.

Based on NIOSH's data and recommendations and MSHA data and experience, the United States Secretary of Labor determined that miners were exposed to grave danger in areas of underground bituminous coal mines that were not properly and sufficiently rock dusted in accordance with the ETS and that the ETS was necessary to protect miners from this danger. The final MSHA rule retained the verbatim requirements of the ETS to ensure continuous protection for underground bituminous coal miners from grave danger due to hazards of coal dust explosions. See 76 FR 35968 (June 21, 2011).

In developing the final Federal rule, MSHA considered the following: its accident investigation reports of mine explosions in intake air courses that involved coal dust; the NIOSH Report of Investigations entitled "Recommendations for a New Rock Dusting Standard to Prevent Coal Dust Explosions in Intake Airways"; MSHA's experience and data; public comments on the ETS; and testimony provided at the public hearings. MSHA believes that the requirements of the final rule are necessary to continue to protect underground bituminous coal miners from grave danger. These regulations are codified at 30 CFR 75.403 and 75.403-1 (relating to maintenance of incombustible content of rock dust; and incombustible content).

The percentage of incombustible content of rock dust plays an important role in the probability and severity of explosions in bituminous coal mines. Rock dust has been used for 100 years as a precautionary measure to prevent explosions. The workings of these mines lead to the production of explosive coal dust and adding rock dust with an incombustible content of a certain percentage reduces the potential, as well as the severity, of explosions. This has been amply documented by the previously-referenced studies. Inert rock dust acts as a heat sink, that is, a source that absorbs and dissipates heat, so that a certain amount of inert rock dust with coal dust is likely to prevent or reduce the potential for coal dust explosions. For that reason, the Federal regulation mandates that the incombustible content of the combined coal, rock and any other type of dust used in bituminous coal mines may not be less than 80%.

The BCMSA is the first significant update of the Commonwealth's underground bituminous coal mine safety laws since 1961. See section 103(a) of the BCMSA (52 P. S. § 690-103(a)). One of the significant changes made by the BCMSA is the authority to promulgate regulations for mine safety. The General Assembly established the Board to promulgate the regulations. This seven-member board consists of the Department's Secretary as Chairperson, three members representing the viewpoint of mine workers and three members representing the viewpoint of underground bituminous coal mine operators. See section 106 of the BCMSA.

A significant problem with the pre-existing law was that its safety standards were becoming outdated. There was not an effective mechanism to modify existing standards or to adopt new safety standards to address changes in technology or other hazards. To rectify this problem, the BCMSA contains broad rulemaking authority to adopt regulations to either modernize safety standards in the BCMSA or adopt new safety standards not in the BCMSA. The Board was directed to consider whether to adopt Federal mine safety standards not in the BCMSA. See section 106.1 of the BCMSA.

After learning of the more stringent MSHA requirements under 30 CFR 75.403 and 75.403-1 for the maintenance of incombustible content of rock dust, the Board determined that the Commonwealth should incorporate the Federal standards into State regulation and provide the Department the necessary independent authority to enforce those standards. Accordingly, at 43 Pa.B. 2587 (May 11, 2013), the Board proposed these requirements for a 30-day public comment period. The Board received comments from the United Mine Workers of America, who fully supported the rulemaking. The Independent Regulatory Review Commission (IRRC) provided notice to the Board that it reviewed the proposed rulemaking and did not have objections, comments or recommendations to offer. IRRC noted that if the Board delivered the final-form rulemaking without revisions, and the standing committees did not take any action on the final rulemaking, the final-form rulemaking would be deemed approved by IRRC. Changes were not made between the proposed and final-form rulemakings. Therefore, this final-form rulemaking is adopted as proposed.

E. *Summary of Comments and Responses to the Proposed Rulemaking*

The United Mine Workers wholeheartedly supported the rulemaking. The commentator believed that this rulemaking, which is consistent with the Federal standards, will save lives.

The Board agrees and appreciates the commentator's support of the rulemaking. The Board believes that the final-form rulemaking will enhance the Department's ability to ensure the safety of miners by reducing the potential or severity of explosions in bituminous coal mines and by allowing the Department to have independent authority to enforce the Federal requirement. This final-form rulemaking conforms State regulations to Federal regulations that are already in place.

F. *Summary of Final Regulatory Requirements*

The Board adds § 208.71 to require the use of additional rock dust to reduce the possibility and severity of explosions that may cause bodily harm or loss of life while working underground, as well as prevent property loss. Changes were not made from proposed to final-form rulemaking.

Subsection (a) provides that, among other things, the incombustible content of the combined coal dust, rock dust and other dust may not be less than 80%.

Subsection (b) provides that where methane is present, the percent of incombustible content of combined dust shall be increased 0.4% for each 0.1% of methane.

Subsection (c) provides that moisture in the combined coal dust, rock dust and other dusts shall be considered a part of the incombustible content of the mixture.

G. *Benefits and Costs*

Benefits

The final-form rulemaking will reduce the possibility and severity of explosions that may cause bodily harm, loss of life or property. The final-form rulemaking incorporates Federal regulations into the Commonwealth's regulations, thus enhancing the Commonwealth's mine safety program and its reputation for excellence.

Compliance Costs

The final-form rulemaking will not add compliance costs to those already existing, as a Federal regulation is already in place in this regard. This final-form rulemaking imposes standards already imposed by MSHA.

Compliance Assistance Plan

The Department plans to educate and assist the public and regulated community in understanding the final-form

rulemaking and how to comply with it. This will be accomplished through the Department's ongoing compliance assistance program.

Paperwork Requirements

The final-form rulemaking will not increase the paperwork that is already generated because of the existing Federal regulation that is already in place.

H. *Sunset Review*

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether it effectively fulfills the goals for which it was intended.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 1, 2013, the Board submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 2587, to IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees 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 House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 6, 2013, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC effective November 6, 2013.

J. *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 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) These regulations do not enlarge the purpose of the proposed rulemaking published at 43 Pa.B. 2587.

(4) This regulation is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this preamble.

K. *Order*

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

(1) The regulations of the Department, 25 Pa. Code Chapter 208, are amended by adding § 208.71 to read as set forth at 43 Pa.B. 2587.

(2) The Chairperson of the Board shall submit this order and 43 Pa.B. 2587 to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form as required by law.

(3) The Chairperson of the Board shall submit this order and 43 Pa.B. 2587 to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(4) The Chairperson of the Board shall certify this order and 43 Pa.B. 2587 and deposit them with the Legislative Reference Bureau as required by law.

(5) This order shall take effect immediately.

E. CHRISTOPHER ABRUZZO,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 43 Pa.B. 6988 (November 23, 2013).)

Fiscal Note: Fiscal Note 7-481 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 13-2313. Filed for public inspection December 13, 2013, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF FUNERAL DIRECTORS

[49 PA. CODE CH. 13]

Fees

The State Board of Funeral Directors (Board) amends § 13.12 (relating to fees).

Effective Date

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*. It is anticipated that the increased biennial renewal fees will be implemented with the January 31, 2014, biennial renewal.

Statutory Authority

Section 18.1 of the Funeral Director Law (act) (63 P. S. § 479.18.1) requires the Board to increase fees by regulation to meet or exceed projected expenditures if the revenues raised by fees, fines and civil penalties are not sufficient to meet expenditures over a 2-year period.

Background and Need for Amendment

Under section 18.1 of the act, the Board is required by law to support its operations from the revenue it generates from fees, fines and civil penalties. In addition, the act provides that the Board must increase fees if the revenue raised by fees, fines and civil penalties is not sufficient to meet expenditures over a 2-year period. The Board raises the majority of its revenue through biennial renewal fees. A small percentage of its revenue comes from other fees, fines and civil penalties. In 2006, facing rising deficits for the foreseeable future, the Board undertook a proposed rulemaking to implement a fee increase in an attempt to avoid continued deficits and restore the Board's fiscal integrity. At the time, it was anticipated that the increase would be implemented in time for the 2008 biennial renewal. See 37 Pa.B. 1868 (April 21, 2007). Unfortunately, due to circumstances beyond the Board's control, the final-form rulemaking was not published until January 24, 2009, at 39 Pa.B. 414, and was not implemented until the 2010 biennial renewal. This delay caused additional deficits to accrue. For that reason, the Board recognized that it might have to look into the possibility of another fee increase to address the lingering deficits.

At the December 7, 2011, Board meeting, representatives from the Department of State's Bureau of Finance and Operations (BFO) presented a summary of the Board's revenue and expenses for Fiscal Years (FY) 2009-2010 and 2010-2011, and projected revenue and expenses through FY 2014-2015. By the beginning of FY 2009-2010, the Board accrued a deficit of over $1 million. At the end of FY 2010-2011, in spite of the implementation of the fee increase, the BFO reported that the Board continued to run a deficit of $790,540.68. At the current fee levels, the Board receives revenue of approximately $2,152,000 over a 2-year period (consisting of a renewal year and a nonrenewal year). Budgeted expenditures for the next 2 fiscal years (FYs 2013-2014 and 2014-2015) are approximately $2,322,000. Therefore, the Board determined that it was necessary to raise fees to meet or exceed projected expenditures in compliance with section 18.1 of the act and to eliminate the existing deficit. At the time, the Board determined to wait until the close of FY 2011-2012 and review revenue and expenditure projections at that time. In June 2012, the BFO returned with revised estimates and recommended a $75 increase to the biennial renewal fees as sufficient to eliminate the existing deficit, provide for the current level of operations and return the Board to firm financial ground. As a result, the Board voted at its July 5, 2012, meeting to increase biennial renewal fees from $325 to $400.

Summary of Comments and the Board's Response

The Board published a proposed rulemaking at 43 Pa.B. 2044 (April 13, 2013) with a 30-day public comment period. Public comments were not received. On May 24, 2013, the House Professional Licensure Committee (HPLC) sent a request for information pertaining to the major cost centers of the Board and any significant increases in its expenditures. On June 12, 2013, the Independent Regulatory Review Commission (IRRC) sent a letter to the Board indicating that it would would review the Board's response to the HPLC's comment as part of IRRC's determination of whether this final-form rulemaking is in the public interest.

The three major cost centers of the Board are Board administration, the legal office, and enforcement and investigation. These three areas comprise 90% of the Board's budget. Board administration expenses are relatively stable, averaging approximately $146,000 each year since FY 2006-2007 (higher in renewal years and less in nonrenewal years). Enforcement and investigation is by far the largest cost center. These costs include those associated with routine inspections of funeral homes as well as investigations regarding complaints filed against licensed funeral directors and funeral entities. Enforcement and investigation has averaged approximately $480,000 each year since FY 2006-2007 (from a low of $425,065.23 to a high of $521,510.76). Legal office costs have fluctuated from a low of $120,882.07 in FY 2011-2012 to a high of $252,994.35 in FY 2007-2008, averaging about $173,500 in most years.

Enforcement and investigation and legal costs are all dependent upon the number of inspections conducted, the number of complaints filed, the number of those complaints that merit investigation, and the number of inspections and investigations that result in prosecutions. Costs also depend to a degree on the number of matters that are resolved through consent agreements and those that require hearings to be conducted. The complexity and seriousness of the matters also affect the costs. The Board averages approximately 200 new cases opened against its licensees each year. Each complaint is reviewed or investigated to determine if a violation of the act or regulations has occurred. The legal office then prosecutes those matters when a violation is alleged. The Board incurs hearing expenses for each matter actually prosecuted and the Board incurs additional legal costs defending any appeals. Ultimately, the number of complaints and disciplinary actions drive the bulk of the Board's costs and the Board does not have control over the number of complaints filed against its licensees or the number of disciplinary actions brought by the Commonwealth.

Because it has been 1 year since the Board last considered the fee increase, and to fully inform its deliberations regarding the final-form rulemaking, the Board asked the BFO for an updated financial picture. The Board again reviewed its financial condition at its meeting on August 7, 2013, and the situation has not changed dramatically. One notable change is that the renewable license count has increased slightly from 6,248 last year to 6,425 this year, which affects the amount of revenue that will be generated from the fee increase, however, this increase is not significant enough to impact the proposed increase at this time. Still, without the increase, the Board anticipates that its deficits will continue to mount. Additionally, the Board has been engaged in protracted litigation regarding the constitutionality of the act that has resulted at the trial level in a judgment (liability) in excess of $1 million. While the payment of the judgment has been stayed pending appeal, the liability must be considered in calculating the fee. According to the BFO, the new fee will allow the Board to recoup the remaining deficits, produce adequate revenue to pay the judgment if necessary and help the Board return to firm financial footing. For that reason, the Board voted at its August 7, 2013, meeting to promulgate the final-form rulemaking as proposed. Specifically, the biennial renewal fee for all classes of licensee will increase from $325 to $400, an increase of $75 each biennium.

Fiscal Impact

The final-form rulemaking increases the biennial renewal fees for licensees of the Board. There are currently approximately 6,425 licensees that will be required to pay more to renew their licenses when they expire in 2014 and every 2 years thereafter. The final-form rulemaking should not have other fiscal impact on the private sector, the general public or political subdivisions of this Commonwealth.

Paperwork Requirements

The final-form rulemaking will require the Board to alter some of its forms to reflect the new fees. However, the final-form rulemaking will not create additional paperwork for the regulated community or for the private sector.

Sunset Date

The act requires the Board to monitor its revenue and costs on a fiscal year and biennial basis. 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 2, 2013, the Board submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 2044, to IRRC and the Chairpersons of the HPLC and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on October 9, 2013, 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 7, 2013, and approved the final-form rulemaking.

Contact Person

Further information may be obtained by contacting Heidy Weirich, Board Administrator, State Board of Funeral Directors, P. O. Box 2649, Harrisburg, PA 17105-2649.

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 no public comments were received.

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

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapter 13, are amended by amending § 13.12 to read as set forth at 43 Pa.B. 2044.

(b) The Board shall submit this order and 43 Pa.B. 2044 to the Office of General Counsel and the Office of Attorney General as required by law.

(c) The Board shall certify this order and 43 Pa.B. 2044 and deposit them with the Legislative Reference Bureau as required by law.

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

DONALD J. MURPHY,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 43 Pa.B. 6988 (November 23, 2013).)

Fiscal Note: Fiscal Note 16A-4822 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 13-2314. Filed for public inspection December 13, 2013, 9:00 a.m.]

BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

[49 PA. CODE CH. 43b]

Schedule of Civil Penalties—Social Workers, Marriage and Family Therapists and Professional Counselors

The Commissioner of Professional and Occupational Affairs (Commissioner) adds § 43b.24 (relating to schedule of civil penalties—social workers, marriage and family therapists and professional counselors) to read as set forth in Annex A.

Effective Date

The civil penalty schedule will be effective upon publication in the *Pennsylvania Bulletin* and will apply to violations that occur on or after the effective date.

Statutory Authority

Section 5(a) of the act of July 2, 1993 (P. L. 345, No. 48) (Act 48) (63 P. S. § 2205(a)) authorizes the Commissioner, after consultation with licensing boards and commissions in the Bureau of Professional and Occupational Affairs (Bureau), to promulgate regulations setting forth a schedule of civil penalties, guidelines for their imposition and procedures for appeal for: (1) operating without a current and valid license, registration, certificate or permit; and (2) violating an act or regulation of a licensing board or commission regarding the conduct or operation of a business or facility licensed by a board or commission.

Background and Purpose

Act 48 authorizes agents of the Bureau to issue citations and impose civil penalties under schedules adopted by the Commissioner in consultation with the Bureau's boards and commissions. Act 48 citations streamline the disciplinary process by eliminating the need for formal orders to show cause, answers, adjudications and orders, and consent agreements. At the same time, licensees who receive Act 48 citations retain their due process right of appeal prior to the imposition of discipline. The use of Act 48 citations has increased steadily since 1996, when the program was first implemented. Act 48 citations have become an important part of the Bureau's enforcement efforts.

Upon consultation with a representative of the Commissioner, the State Board of Social Workers, Marriage and Family Therapists and Professional Counselors (Board) determined that it should utilize the Act 48 citation process to decrease costs to its licensees and more efficiently conduct its duties. To that end, the final-form rulemaking adds § 43b.24 to establish a schedule of civil penalties for three general categories of matters that routinely arise before the Board: cases involving unlicensed individuals holding out as licensed; lapsed license cases; and cases involving violations of the continuing education requirements.

Summary of Comments and the Commissioner's Response

The Commissioner published the proposed rulemaking at 42 Pa.B. 5742 (September 8, 2012) with a 30-day public comment period. On October 8, 2012, the Commissioner received a comment from the Pennsylvania Association for Marriage and Family Therapists (PAMFT). Generally, PAMFT agreed with the schedule of civil

penalties and asked that the Commissioner consider additional language restricting the use of the term "family therapist" to individuals with appropriate training and education, similar to the protection accorded to the term "social worker" in section 20(a.1) of the Social Workers, Marriage and Family Therapists and Professional Counselors Act (act) (63 P. S. § 1920(a.1)). Unfortunately, neither the Commissioner nor the Board has the statutory authority to restrict the use of the term "family therapist" or to impose civil penalties for the use of that term. It would take an act of the General Assembly to provide title protection to the use of the term "family therapist." For this reason, a change has not been made to the final-form rulemaking based on this comment.

On October 22, 2012, the House Professional Licensure Committee (HPLC) submitted comments to the Commissioner on the proposed rulemaking. The HPLC suggested deleting a duplicate word. The Legislative Reference Bureau deleted the duplicate word when the proposed rulemaking was published and the Commissioner has likewise removed the word from the final-form rulemaking. In addition, the HPLC suggested describing the violation under section 20(a.1) of the act as holding oneself out as a social worker without meeting "the criteria set forth in" the definition of "social worker" in section 3 of the act (63 P. S. § 1903). The Commissioner found this suggestion reasonable and made the amendment to the final-form rulemaking.

On November 8, 2013, the Independent Regulatory Review Commission (IRRC) sent a letter to the Commissioner indicating that it did not have objections, comments or recommendations to offer on the proposed rulemaking.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will not have an adverse fiscal impact on the Commonwealth or its political subdivisions and will reduce the paperwork requirements of both the Commonwealth and the regulated community by eliminating the need for orders to show cause, answers, consent agreements and adjudications/orders for those violations subject to the Act 48 citation process.

Sunset Date

The Commissioner continuously monitors the effectiveness of Bureau regulations on a fiscal year and biennial basis. 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 August 28, 2012, the Commissioner submitted a copy of the proposed rulemaking, published at 42 Pa.B. 5742, to IRRC and the Chairpersons of the HPLC and the Senate Consumer Protection and Professional Licensure Committee (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 Commissioner has considered all comments from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 6, 2013, 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 7, 2013, and approved the final-form rulemaking.

Contact Person

Further information may be obtained by contacting Beth Michlovitz, Counsel, State Board of Social Workers, Marriage and Family Therapists and Professional Counselors, P. O. Box 2649, Harrisburg, PA 17105-2649.

Findings

The Commissioner 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 to the final-form rulemaking do not enlarge the purpose of the proposed rulemaking published at 42 Pa.B. 5742.

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

Order

The Commissioner, acting under the authority of Act 48, orders that:

(a) The regulations of the Commissioner, 49 Pa. Code Chapter 43b, are amended by adding § 43b.24 to read as set forth in Annex A.

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

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

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

KATIE TRUE,
Commissioner

(*Editor's Note*: See 43 Pa.B. 7282 (December 14, 2013) for a final-form rulemaking by the Board relating to this final-form rulemaking.)

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 43 Pa.B. 6988 (November 23, 2013).)

Fiscal Note: Fiscal Note 16A-6917 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 43b. COMMISSIONER OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

SCHEDULE OF CIVIL PENALTIES, GUIDELINES FOR IMPOSITION OF CIVIL PENALTIES AND PROCEDURES FOR APPEAL

§ 43b.24. Schedule of civil penalties—social workers, marriage and family therapists and professional counselors.

STATE BOARD OF SOCIAL WORKERS, MARRIAGE AND FAMILY THERAPISTS AND PROFESSIONAL COUNSELORS

Violation under 63 P. S.	*Title/Description*	*Penalties*
Sections 1904 and 1916	Holding oneself out as a licensed social worker, using the letters L.S.W. in connection with one's name or using words or symbols indicating or tending to indicate that one is a licensed social worker without first having obtained a license from the Board	1st offense—$500 2nd and subsequent offenses—formal action
Sections 1904 and 1916.1	Holding oneself out as a licensed clinical social worker, using the letters L.C.S.W. in connection with one's name or using words or symbols indicating or tending to indicate that one is a licensed clinical social worker without first having obtained a license from the Board	1st offense—$500 2nd and subsequent offenses—formal action
Sections 1904 and 1916.2	Holding oneself out as a licensed marriage and family therapist, using the letters L.M.F.T. in connection with one's name or using words or symbols indicating or tending to indicate that one is a licensed marriage and family therapist without first having obtained a license from the Board	1st offense—$500 2nd and subsequent offenses—formal action
Sections 1904 and 1916.3	Holding oneself out as a licensed professional counselor, using the letters L.P.C. in connection with one's name or using words or symbols indicating or tending to indicate that one is a licensed professional counselor without first having obtained a license from the Board	1st offense—$500 2nd and subsequent offenses—formal action
Section 1920(a)	Holding oneself out as a licensed social worker, licensed clinical social worker, licensed marriage and family therapist or licensed professional counselor on a lapsed or expired license	1st offense—0 to 12 months—$100 per month up to $1,000; over 12 months—formal action 2nd and subsequent offense—formal action
Section 1920(a.1)	Holding oneself out as a social worker, using the title of "social worker" or using the abbreviation "S.W." without meeting the criteria in the definition of "social worker" in 63 P. S. § 1903	1st offense—$500 2nd and subsequent offenses—formal action
Violation under 49 Pa. Code	*Title/Description*	*Penalties*
Section 47.32(a)	Failure of a licensed social worker to complete 30 clock hours of continuing education in acceptable courses and programs in social work offered by approved providers during the preceding biennium as a condition of renewal, including at least 3 clock hours in ethical issues	1st offense—less than 3 hours deficient—warning; 3 to 10 hours deficient—$100 per hour; over 10 hours deficient—formal action 2nd and subsequent offenses—formal action
Section 47.32(b)	Failure of a licensed clinical social worker to complete 30 clock hours of continuing education in acceptable courses and programs in social work offered by approved providers during the preceding biennium as a condition of renewal, including at least 3 clock hours in ethical issues	1st offense—less than 3 hours deficient—warning; 3 to 10 hours deficient—$100 per hour; over 10 hours deficient—formal action 2nd and subsequent offenses—formal action
Section 48.32	Failure of a licensed marriage and family therapist to complete 30 clock hours of continuing education in acceptable courses and programs offered by approved providers during the preceding biennium as a condition of renewal, including at least 3 clock hours in ethical issues	1st offense—less than 3 hours deficient—warning; 3 to 10 hours deficient—$100 per hour; over 10 hours deficient—formal action 2nd and subsequent offenses—formal action

Violation under 49 Pa. Code	*Title/Description*	*Penalties*
Section 49.32	Failure of a licensed professional counselor to complete 30 clock hours of continuing education in acceptable courses and programs offered by approved providers during the preceding biennium as a condition of renewal, including at least 3 clock hours in ethical issues	1st offense—less than 3 hours deficient—warning; 3 to 10 hours deficient—$100 per hour; over 10 hours deficient—formal action 2nd and subsequent offenses—formal action

[Pa.B. Doc. No. 13-2315. Filed for public inspection December 13, 2013, 9:00 a.m.]

STATE BOARD OF SOCIAL WORKERS, MARRIAGE AND FAMILY THERAPISTS AND PROFESSIONAL COUNSELORS

[49 PA. CODE CHS. 47—49]

Continuing Education Audit and Enforcement

The State Board of Social Workers, Marriage and Family Therapists and Professional Counselors (Board) amends §§ 47.37, 48.38 and 49.38 (relating to reporting by licensee of hours spent in continuing education; continuing education audit and enforcement) to read as set forth in Annex A.

Statutory Authority

Section 18(a) of the Social Workers, Marriage and Family Therapists and Professional Counselors Act (act) (63 P. S. § 1918(a)) authorizes the Board to promulgate regulations regarding continuing education.

Background and Purpose

The Board has determined that to be more efficient and cost-effective in handling certain classes of disciplinary matters, including those regarding some continuing education violations, the Board should make use of the citation process provided by section 5(a) of the act of July 2, 1993 (P. L. 345, No. 48) (Act 48) (63 P. S. § 2205(a)). A companion final-form rulemaking promulgated by the Commissioner of Professional and Occupational Affairs sets forth a schedule of civil penalties to allow agents of the Bureau of Professional and Occupational Affairs (Bureau) to issue citations imposing monetary civil penalties for continuing education violations involving deficiencies of 10 hours or less. Violations of more than 10 hours will still be handled through formal disciplinary proceedings. Historically, when the Board determined a continuing education violation had occurred, the Board would issue an order imposing discipline and directing that the deficiency be made up within 6 months. The Board has now determined that it is necessary to codify this practice to be able to make use of the more streamlined citation process and still ensure that continuing education deficiencies are remedied in a timely manner.

Summary of Comments and the Board's Response

The Board published a proposed rulemaking at 42 Pa.B. 5744 (September 8, 2012) with a 30-day public comment period. The Board did not receive comments from the public. On October 23, 2012, the Board received comments from the House Professional Licensure Committee (HPLC). On November 8, 2012, the Board received comments from the Independent Regulatory Review Commission (IRRC). The HPLC and IRRC both commented on the continuing education audit process. The HPLC asked for an explanation regarding at what point in the biennial period the continuing education audits are expected to be conducted. IRRC asked the Board to provide a more detailed explanation for how the Board conducts these random audits, including an average time frame necessary to complete an audit, and the impact an audit will have on a licensee's ability to practice.

Generally, continuing education audits are expected to begin approximately 90 days after the end of the biennial period. The licensure database contains a program that generates a list of licensees selected randomly for audit. An audit letter is generated and sent by first class mail to each licensee selected for audit to the licensee's last address on file with the Board. The letter directs the licensee to provide documentation evidencing completion of the required continuing education for the prior biennial period within 30 days. If a licensee fails to respond to the first notice, a second notice is sent by certified mail, with return receipt requested, again requesting the required documentation. The documentation received is reviewed by Bureau staff to determine if it appears to comply with the continuing education regulations. Bureau staff may correspond with a licensee to resolve any issues. This process can take another 60 to 90 days. Ultimately, if a suspected deficiency is identified and remains unresolved, the audit file is referred to the Bureau's Professional Compliance Office to be reviewed for possible disciplinary action. The audit process does not impact the licensee's ability to practice.

Possible continuing education deficiencies are then reviewed by the paralegals and attorneys in the Professional Compliance Office/Prosecution Division to determine if there has been a violation of the continuing education regulations. If a violation is identified, one of three possible actions will be taken: 1) a warning letter may be issued; 2) a citation may be issued imposing a monetary civil penalty; or 3) formal disciplinary action may be started by the filing of an order to show cause. IRRC asked under what circumstances a warning letter would be sent. Under the schedule of civil penalties promulgated by the Commissioner of Professional and Occupational Affairs, a warning letter may be appropriate if the deficiency amounts to 1 or 2 credit hours. This often occurs when a licensee documents 30 hours of continuing education, however a particular course may not have been given by an approved provider, or a licensee may exceed the cap on the number of hours that are permitted to be taken in home study courses. It can also occur when a licensee submits documentation of a course completed outside of the applicable biennial renewal period. The warning letter will direct the licensee to make up the deficiency within 6 months as required under § 47.37(d), § 48.38(d) or § 49.38(d), as applicable.

A citation may be issued under the civil penalty schedule for deficiencies of 3 to 10 credit hours. Under the civil penalty schedule in § 43b.24 (relating to schedule of civil penalties—social workers, marriage and family

therapists and professional counselors), a citation of $100 per credit hour would be issued to the licensee along with a notice to make up the deficiency, as required. Upon receipt of the citation, the licensee could simply pay the civil penalty and make up the deficiency within 6 months or dispute the violation and request a hearing. Hearings on citations are conducted on the first Tuesday of each month before a hearing examiner. If a licensee is aggrieved by a decision of the hearing examiner, the licensee may appeal it to the Board. The Board members will then review the record made before the hearing examiner and determine whether to uphold or dismiss the citation, and a final order would be issued.

Finally, if the identified deficiency is between 11 and 30 credit hours, formal disciplinary action could be initiated by the filing of an order to show cause. Under the General Rules of Administrative Practice and Procedure (GRAPP), the licensee has 30 days to file an answer to the order to show cause and may request a hearing. The Board may hear the matter or delegate it to be heard by a hearing examiner. A formal hearing is conducted and ultimately a final adjudication and order is issued either finding a violation and imposing discipline, or dismissing the matter. If discipline is imposed, it will include an order to make up the deficient continuing education hours within 6 months. It should be noted, however, that the vast majority of formal disciplinary proceedings for continuing education violations are resolved by consent agreement and order.

The HPLC asked whether 1 year or more of the licensure period passes before an audit is completed and a citation or other sanctions are imposed. It is possible that an audit and the resulting action by the legal office could take 1 year or more to complete. The audit is not started until at least 90 days after the close of the biennial renewal period. The audit itself can take up to 6 months to complete. Review and action by the legal office staff adds additional time to the overall process. Formal disciplinary action takes much longer than the citation process which, in turn, takes longer than the warning letter process.

IRRC recommended, to aid clarity, that the Board add a cross reference to the schedule of civil penalties promulgated by the Commissioner to §§ 47.37(c), 48.38(c) and 49.38(c). The Board agrees that a cross-reference to § 43b.24 would aid clarity and has made that amendment to the final-form rulemaking. IRRC also recommended that §§ 47.37(c), 48.38(c) and 49.38(c) specifically reference the subsections of section 11 of the act (63 P. S. § 1911) that apply to authorize formal disciplinary action. Section 11(a) of the act authorizes the Board to discipline a licensee for a variety of reasons including those that may be applicable to a continuing education deficiency. The discretion as to which grounds to charge in the order to show cause lies exclusively with the prosecuting attorney. The Board cannot be involved in the decision to prosecute or otherwise direct the prosecution of continuing education violations. Section 11(b) of the act sets forth the panoply of sanctions available to the Board and section 11(c) of the act provides the requirement that the actions of the Board be taken subject to the right of notice, hearing, adjudication and appeal in accordance with GRAPP. Section 11(d) and (e) of the act, regarding temporary suspension and automatic suspension, does not apply to continuing education violations. Therefore, to aid clarity, the Board amended the final-form rulemaking to refer to section 11(a)—(c) only.

The HPLC asked how the 6-month deficiency correction period will be monitored. Once the warning letter, citation or final order imposing formal discipline is issued advising the licensee of the need to make up the deficiency, Board staff will receive the documentation required under subsection (d) and it will be reviewed. If a licensee fails to submit documentation within 6 months as directed, the matter will be referred again to the Professional Compliance Office for consideration as to whether additional disciplinary action should be initiated. With reference to subsection (e) which pertains to "additional disciplinary action under section 11 of the act," IRRC asked the Board to include specific cross references to the relevant provisions in the act. The Board's reference to "additional disciplinary action" was meant to refer to the possibility of a second disciplinary action being brought for violating a regulation promulgated by the Board or for violating an order of the Board previously entered in a disciplinary proceeding. Again, the specific provisions of section 11 that would apply to a disciplinary proceeding are in section 11(a)—(c) of the act. Therefore, the Board amended the final-form rulemaking to refer only to these subsections.

Description of Amendments

Based on the comments received, §§ 47.37(c) and (e), 48.38(c) and (e) and 49.38(c) and (e) have been amended to clarify the relevant provisions of section 11 of the act that authorize disciplinary action for continuing education violations and to provide a cross reference to the applicable civil penalty schedule for social workers, marriage and family therapists and professional counselors.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking should not result in additional legal, accounting or reporting requirements for the Commonwealth or the regulated community.

Sunset Date

The Board continuously monitors the effectiveness of its regulations on a fiscal year and biennial basis. 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 August 28, 2012, the Board submitted a copy of the proposed rulemaking, published at 42 Pa.B. 5744, to IRRC and the Chairpersons of the HPLC and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 6, 2013, 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 7, 2013, and approved the final-form rulemaking.

Contact Person

Further information may be obtained by contacting Beth Michlovitz, Counsel, State Board of Social Workers, Marriage and Family Therapists and Professional Counselors, P. O. Box 2649, Harrisburg, PA 17105-2649.

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 to the final-form rulemaking do not enlarge the purpose of the proposed rulemaking published at 42 Pa.B. 5744.

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

Order

The Board, acting under the authority of its authorizing statute, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapters 47—49, are amended by amending §§ 47.37, 48.38 and 49.38 to read as set forth in Annex A.

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

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

LAURA L. HINDS, LSW,
Chairperson

(*Editor's Note*: See 43 Pa.B. 7279 (December 14, 2013) for a final-form rulemaking by the Bureau relating to this final-form rulemaking.)

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 43 Pa.B. 6988 (November 23, 2013).)

Fiscal Note: Fiscal Note 16A-6918 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 47. STATE BOARD OF SOCIAL WORKERS, MARRIAGE AND FAMILY THERAPISTS AND PROFESSIONAL COUNSELORS

CONTINUING EDUCATION

§ 47.37. Reporting by licensee of hours spent in continuing education; continuing education audit and enforcement.

(a) Applicants for license renewal shall provide a signed statement certifying that the continuing education requirements have been met. The certification statement will be included on the application form for renewal of licensure.

(b) The Board will randomly audit licensees to ensure compliance with the continuing education requirements. A licensee selected for audit shall provide information to document the licensee's completion of required continuing education. The information must include the following:

(1) The date attended.

(2) The clock hours claimed.

(3) The title of course or program and description of content.

(4) The school, hospital, medical center or organization which sponsored the course or program.

(5) The instructor.

(6) The location of course or program.

(7) The Board approval number assigned to the course or program unless the provider is preapproved under § 47.36(a) (relating to preapproved providers of continuing education courses and programs for social workers and clinical social workers).

(c) A licensee who, as a result of an audit, is determined to be deficient in continuing education hours is subject to formal disciplinary action under section 11(a)—(c) of the act (63 P. S. § 1911(a)—(c)) or the issuance of a citation under section 5(a) of the act of July 2, 1993 (P. L. 345, No. 48) (63 P. S. § 2205(a)) as provided in § 43b.24 (relating to schedule of civil penalties—social workers, marriage and family therapists and professional counselors).

(d) Notwithstanding other action taken as set forth in subsection (c), a licensee who is determined to be deficient in continuing education hours is required to make up deficient hours of continuing education and submit documentation containing the information in subsection (b) to the Board within 6 months from the issuance of a warning letter, the issuance of a citation or the imposition of discipline. Hours of continuing education submitted to the Board to make up for a deficiency may not be used by the licensee to satisfy the continuing education requirement for the current biennium.

(e) Failure to make up the deficiencies in subsection (d) will subject the licensee to additional disciplinary action under section 11(a)—(c) of the act.

CHAPTER 48. STATE BOARD OF SOCIAL WORKERS, MARRIAGE AND FAMILY THERAPISTS AND PROFESSIONAL COUNSELORS—LICENSURE OF MARRIAGE AND FAMILY THERAPISTS

CONTINUING EDUCATION

§ 48.38. Reporting by licensee of hours spent in continuing education; continuing education audit and enforcement.

(a) Applicants for license renewal shall provide a signed statement certifying that the continuing education requirements have been met. The certification statement will be included on the application form for renewal of licensure.

(b) The Board will randomly audit licensees to ensure compliance with the continuing education requirements. A licensee selected for audit shall provide information to document the licensee's completion of required continuing education. The information must include the following:

(1) The date attended.

(2) The clock hours claimed.

(3) The title of course or program and description of content.

(4) The school, hospital, medical center or organization which sponsored the course or program.

(5) The instructor.

(6) The location of course or program.

(7) The Board approval number assigned to the course or program unless the provider is preapproved under § 48.36(a) (relating to preapproved providers of continuing education courses and programs for marriage and family therapists).

(c) A licensee who, as a result of an audit, is determined to be deficient in continuing education hours is subject to formal disciplinary action under section 11(a)—(c) of the act (63 P. S. § 1911(a)—(c)) or the issuance of a citation under section 5(a) of the act of July 2, 1993 (P. L. 345, No. 48) (63 P. S. § 2205(a)) as provided in § 43b.24 (relating to schedule of civil penalties—social workers, marriage and family therapists and professional counselors).

(d) Notwithstanding other action taken as set forth in subsection (c), a licensee who is determined to be deficient in continuing education hours is required to make up deficient hours of continuing education and submit documentation containing the information in subsection (b) to the Board within 6 months from the issuance of a warning letter, the issuance of a citation or the imposition of discipline. Hours of continuing education submitted to the Board to make up for a deficiency may not be used by the licensee to satisfy the continuing education requirement for the current biennium.

(e) Failure to make up the deficiencies in subsection (d) will subject the licensee to further disciplinary action under section 11(a)—(c) of the act.

CHAPTER 49. STATE BOARD OF SOCIAL WORKERS, MARRIAGE AND FAMILY THERAPISTS AND PROFESSIONAL COUNSELORS—LICENSURE OF PROFESSIONAL COUNSELORS

CONTINUING EDUCATION

§ 49.38. Reporting by licensee of hours spent in continuing education; continuing education audit and enforcement.

(a) Applicants for license renewal shall provide a signed statement certifying that the continuing education requirements have been met. The certification statement will be included on the application form for renewal of licensure.

(b) The Board will randomly audit licensees to ensure compliance with the continuing education requirements. A licensee selected for audit shall provide information to document the licensee's completion of required continuing education. The information must include the following:

(1) The date attended.

(2) The clock hours claimed.

(3) The title of course or program and description of content.

(4) The school, hospital, medical center or organization which sponsored the course or program.

(5) The instructor.

(6) The location of course or program.

(7) The Board approval number assigned to the course or program unless the provider is preapproved under § 49.36(a) (relating to preapproved providers of continuing education courses and programs for professional counselors).

(c) A licensee who, as a result of an audit, is determined to be deficient in continuing education hours is subject to formal disciplinary action under section 11(a)—(c) of the act (63 P. S. § 1911(a)—(c)) or the issuance of a citation under section 5(a) of the act of July 2, 1993 (P. L. 345, No. 48) (63 P. S. § 2205(a)) as provided in § 43b.24 (relating to schedule of civil penalties—social workers, marriage and family therapists and professional counselors).

(d) Notwithstanding other action taken as set forth in subsection (c), a licensee who is determined to be deficient in continuing education hours is required to make up deficient hours of continuing education and submit documentation containing the information in subsection (b) to the Board within 6 months from the issuance of a warning letter, the issuance of a citation or the imposition of discipline. Hours of continuing education submitted to the Board to make up for a deficiency may not be used by the licensee to satisfy the continuing education requirement for the current biennium.

(e) Failure to make up the deficiencies in subsection (d) will subject the licensee to further disciplinary action under section 11(a)—(c) of the act.

[Pa.B. Doc. No. 13-2316. Filed for public inspection December 13, 2013, 9:00 a.m.]