RULES AND REGULATIONS

Title 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CHS. 46 AND 76]

Food Code; Food Employee Certification

The Department of Agriculture (Department) amends Chapter 46 (relating to Food Code) and rescinds Chapter 76 to read as set forth in Annex A.

Statutory Authority

Sections 5701—5714 of 3 Pa.C.S. (relating to Retail Food Facility Safety Act), 3 Pa.C.S. §§ 5721—5737 (relating to Food Safety Act), the act of July 2, 1935 (P. L. 589, No. 210) (31 P. S. §§ 645—660g), known as the Milk Sanitation Law, section 1705(d) of The Administrative Code of 1929 (71 P. S. § 445(d)) and 3 Pa.C.S. §§ 6501—6510 (relating to Food Employee Certification Act) provide the legal authority for this final-form rulemaking.

The Retail Food Facility Safety Act charges the Department with responsibilities regarding the licensure, inspection, cleanliness and sanitation of "retail food facilities" (such as restaurants) in this Commonwealth. This includes the responsibility to promulgate regulations necessary to implement the Retail Food Facility Safety Act and requires that, in promulgating this final-form rulemaking, the Department "be guided by the most current edition of the Food Code, published by the United States Department of Health, Food and Drug Administration" (Model Food Code). See section 5707(a) of the Retail Food Facility Safety Act (relating to powers of department). The Retail Food Facility Safety Act also affords the Department the discretion to establish retail food facility license intervals of more than 1 year, but requires that these license intervals be established by regulation and that the regulation use risk-based factors identified in the Model Food Code as a basis for determining the appropriate license interval.

The Food Safety Act charges the Department with the responsibility to: (1) regulate, register and inspect "food establishments" in this Commonwealth (see section 5734(a) of the Food Safety Act (relating to registration of food establishments)); (2) promulgate regulations and food safety standards necessary to the proper enforcement of the food safety requirements in the Food Safety Act (see section 5733(a) of the Food Safety Act (relating to rules and regulations)); and (3) construe the Food Safety Act and its attendant regulations in a manner that is as consistent with Federal statutory and regulatory authority as practicable (see section 5736 of the Food Safety Act (relating to construction of subchapter)).

The Milk Sanitation Law requires that a person selling milk, milk products or manufactured dairy products have a Department-issued permit. It also charges the Department with responsibility to promulgate regulations necessary for the proper enforcement of the Milk Sanitation Law. See section 19 of the Milk Sanitation Law (31 P. S. § 660c).

Section 1705(d) of The Administrative Code of 1929 requires the Department to establish regulatory standards necessary to enforce food safety laws.

The Food Employee Certification Act requires that a retail food facility have at least one employee who holds a valid certificate evidencing successful completion of a Department-approved food safety training course (see section 6504(a) of the Food Employee Certification Act (relating to certification of employees)) and authorizes the Department to promulgate regulations necessary for the proper enforcement of the Food Employee Certification Act (see section 6505 of the Food Employee Certification Act (relating to rules and regulations)).

Purpose of the Final-Form Rulemaking

The act of November 23, 2010 (P. L. 1039, No. 106) (Act 106) accomplished a significant overhaul of the food-related statutes administered and enforced by the Department. It repealed the Public Eating or Drinking Places Law and the Food Act, and supplanted these with the Retail Food Facility Safety Act and the Food Safety Act, respectively. It also made substantive changes to the Food Employee Certification Act. Although many of the provisions of these new or revised food-related statutes are similar to provisions of the statutes they replaced, there are also a number of changes that necessitate the regulatory revisions described in this document.

The final-form rulemaking: (1) adopts the terminology and implements the changes necessitated or authorized by Act 106; (2) incorporates, to the extent practicable, the standards and requirements of the Model Food Code as the food safety standards and requirements for this Commonwealth; (3) establishes retail food facility license intervals of more than 1 year, using risk-based factors identified in the Model Food Code as a basis for determining the appropriate license interval; and (4) streamlines the substance of the food employee certification regulations formerly in Chapter 76 and incorporates them into Chapter 46.

The Model Food Code is the product of a collaborative effort among the Department, the United States Food and Drug Administration (FDA), the Food Safety Inspection Service, the Centers for Disease Control, various state and local public health and food control agencies, food industry representatives, academia and consumers. It represents the state-of-the-science with respect to food handling and food safety. It is adopted by reference in portions of Chapter 46. The format, layout, section headings and subject matter of much of Chapter 46 track the Model Food Code. The Model Food Code is also a basis for food safety training courses Nationwide. In addition, the Retail Food Facility Safety Act specifically requires that the Department be guided by the Model Food Code in promulgating regulations (see section 5707(a) of the Retail Food Facility Safety Act). Against this backdrop, the Department is satisfied that the regulated community is familiar with the Model Food Code and that the expansive adoption of Model Food Code standards and requirements in the regulations will not have an adverse impact on that regulated community.

The final-form rulemaking is driven by the substantial changes to underlying food-safety-related statutes accomplished by Act 106.

The final-form rulemaking is also needed to reduce foodborne illness to the fullest extent possible. This public health and safety objective is the primary reason for the final-form rulemaking.

The food safety standards in the final-form rulemaking should also serve the regulated community by helping to lower the number of claims and lawsuits related to foodborne illness.

The provisions of the regulations that prescribe the appropriate license intervals for various types of retail food facilities (based on risk-based factors identified in the Model Food Code) are needed for the Department and other licensors of these facilities to make better use of limited manpower resources involved in accomplishing inspections and processing license paperwork.

Act 106 also made significant revisions to the Food Employee Certification Act and the final-form rulemaking is needed to implement these changes.

The Department is satisfied there are no reasonable alternatives to proceeding with the regulations. The Department is also satisfied the regulations meet the requirements of Executive Order No. 1996-1, "Regulatory Review and Promulgation."

Comments and Responses

Notice of proposed rulemaking was published at 42 Pa.B. 5218 (August 11, 2012) affording the public, the General Assembly and the Independent Regulatory Review Commission (IRRC) the opportunity to offer comments.

Comments were received from IRRC, the Pennsylvania Catholic Conference (PCC) and the Pennsylvania Association for Sustainable Agriculture (PASA). These comments and the Department's responses follow.

Comment 1

PASA reviewed proposed § 46.3 (relating to definitions) and raised a question regarding the definition of "commingle." PASA observed that the definition refers to the commingling of shellstock (raw, in-shell oyster, clams, mussels and scallops) and not the commingling of other foods.

Response

The proposed rulemaking reflected that the definition of "commingle" was proposed for deletion. The final-form rulemaking deletes the defined term and the term is not used elsewhere in the regulations.

Section 1-201.10 of the Model Food Code, regarding statement of application and listing of terms, defines "commingle" only with respect to the commingling of shellstock and shucked shellfish. In the context of the Model Food Code, the term is only used with respect to these foods. The Department does not believe there is a need to adopt a definition of this term that varies from the definition in the Model Food Code.

Comment 2

PASA reviewed proposed § 46.3 and offered a revision to the definition of "foodborne disease outbreak." PASA suggested "case" be replaced with "occurrence" in that definition, but acknowledged that the use of the "occurrence" is not the typical language of epidemiological discipline.

Response

The proposed rulemaking reflected that "foodborne disease outbreak" was proposed for deletion. The final-form rulemaking deletes the defined term and the single use of the phrase in the definition of term "confirmed disease outbreak" in § 46.3.

Section 1-201.10 of the Model Food Code defines "foodborne disease outbreak" and includes the same "occurrence of two or more cases" language the commentator referenced. The Department declines to vary from the Model Food Code on this definition given that the language is clear and has not been the source of known confusion in the many years it has been in effect.

Comment 3

PASA reviewed proposed § 46.3 and noted that the definition of "food facility" exempts certain food establishments that do not ". . . provide food to the consumer either directly or indirectly (such as through the home delivery of groceries)." The commentator asked "how the Department might view a CSA (community shared agriculture) making deliveries to homes, markets or collective drop off points."

Response

The proposed rulemaking reflected that "food facility" was proposed for deletion. The final-form rulemaking deletes the defined term. The only reference to home delivery of groceries in the final-form rulemaking is in the definition of a "retail food establishment." That definition is verbatim from section 5702 of the Retail Food Facility Safety Act (relating to definitions).

The Retail Food Facility Safety Act provides for the licensure of retail food facilities. The determination of whether a particular facility is a retail food facility is a fact-driven determination. In the examples provided by the commentator, if a community-shared agriculture business has a market or collective drop-off point, that market or drop-off point would fit within the definition of a retail food facility. If the market or drop-off point provides only raw agricultural commodities, it would be exempt under section 5703(b)(2)(i) of the Retail Food Facility Safety Act (relating to license required) from having to acquire a retail food facility license and pay the attendant license fee, but would remain subject to inspection and would have to comply with all other applicable provisions of the Retail Food Facility Safety Act.

If a community-shared agriculture business has a home delivery service, that service would not fit within the definition of "retail food facility."

If a community-shared agriculture business consists of a farm that makes deliveries to its customers or shareholders, those direct deliveries would not make the farm a retail food facility. If the farm has a retail storefront from which food for human consumption is sold, it would be a retail food facility. In addition, if a farm conducted on-farm food processing, it would likely be a "food establishment" subject to the registration requirements of the Food Safety Act.

Comment 4

PASA asked that the final-form rulemaking clarify that rabbits (whether captive bred or wild) are considered game in this Commonwealth. PASA also asked that the Department "offer some clarity about the requirements for slaughter and market of such animals."

Response

Although the final-form rulemaking does not specifically reference game animals or rabbits, § 1-201.10 of the Model Food Code defines "game animal" as including rabbits and, at § 3-201.17, regarding game animals, presents the legal requirements for the slaughter and legal sale of these animals. These include a requirement that game animals that are commercially raised for food be slaughtered and processed under a United States Department of Agriculture (USDA)-administered or state-administered regulatory inspection program.

Rabbit processors may choose to operate under a voluntary USDA-administered inspection program or be registered and inspected by the Department in accordance with the Food Safety Act.

Comment 5

PASA reviewed the proposed definition of "licensor" in § 46.3 and asked whether the regulations will supersede "those of the county (and other) departments of health."

Response

Section 5703(e)(2) of the Retail Food Facility Safety Act requires that rules and regulations adopted by a licensor other than the Department meet and not exceed the requirements of Retail Food Facility Safety Act and its attendant regulations. This means that although a licensor other than the Department may enforce its own standards, they may not exceed standards in the Retail Food Facility Safety Act or the final-form rulemaking.

Comment 6

PASA noted the definition of "mobile food facility" in § 46.3 and asked:

> Where does the definition of a mobile food facility—particularly that part that states cart, basket, box or similar structure—leave a CSA and that "basket, box or similar structure" in which the CSA person might deliver the food directly to the buyer and/or to a drop off location?

Response

The proposed rulemaking reflected that the definition of "mobile food facility" was proposed for deletion. The final-form rulemaking deletes the defined term.

A delivery truck or other conveyance or container used for delivering food from a farm, retail food facility or food establishment is not, itself, a mobile retail food facility. These vehicles or containers would be subject to the standards that are applicable to the retail food facility or food establishment from which the food originates.

In general, a vehicle that is being used for food preparation and sale of food directly to consumers (such as a lunch truck) would be considered a retail food facility or a food establishment and would be subject to the applicable legal licensure/registration requirements.

A basket, box or similar structure that is used by a community-shared agriculture business to deliver food to its customers or shareholders is not, itself, a mobile food facility.

Comment 7

PASA reviewed the definition of "person in charge" in § 46.3 and asked:

> What if there is an unannounced inspection? Is the most "senior" "responsible" person on site at that moment deemed the person in charge? Can the employee/owner ask that the inspector return at another time?

Response

Section 2-101.11 of the Model Food Code, regarding assignment, requires that the retail food facility operator be the person in charge or that he designates a person in charge and ensures that a person in charge is present at all hours of operation.

Inspections of retail food facilities and food establishments are (with few exceptions) unannounced. The inspecting entity does not designate who the person in charge is. It is the affirmative obligation of the licensee or operator of the facility to make this designation and to have a person in charge present at the establishment at all hours of operation.

The regulation requires that the person in charge allow access to the retail food facility and provide information and records to facilitate the inspection. This is tempered by § 46.1101 (relating to access to retail food facilities), which requires that this cooperation be provided ". . . during the retail food facility's hours of operation and other reasonable times if the facility is not open during normal business hours."

In general, a refusal to allow an inspection would constitute a violation of § 46.1101 and would subject the facility to enforcement action such as a civil penalty, a criminal prosecution, an action for injunctive relief or some other action. There might be specific circumstances (such as a medical emergency or death) that might justify a licensor in refraining from enforcement actions.

Comment 8

PASA offered comments with respect to the definition of "public water system" in § 46.3. The commentator sought ". . . clarification around such situations in which individuals or families might need to have water hauled in situations, be they temporary or permanent, where, for example, their water is not good because of other actions (contaminated wells come to mind)."

Response

The proposed rulemaking reflected that "public water system" was proposed for deletion, as were the provisions that made use of that term. Former § 46.801 required that water be from: (1) a public water system; or (2) a nonpublic water system that meets the Department of Environmental Protection's (DEP) regulatory standards for safe drinking water. Although the final-form regulation deletes this provision, it supplants it with § 5-101.11 of the Model Food Code, regarding approved system, which imposes an identical requirement. In practice, the Department works with DEP on issues regarding the adequacy of water at retail food facilities and, in particular, defers to DEP on questions regarding whether a nonpublic water source is in compliance with applicable DEP regulatory safe water drinking standards.

Comment 9

IRRC noted that the proposed definition of "raw agricultural commodity" in § 46.3 repeats the definition of that term in section 5722 of the Food Safety Act (relating to definitions) but adds "or as otherwise defined in section 5722 of the Food Safety Act." IRRC asked the Department to either explain the reason why this phrase was included or delete it from the final-form rulemaking.

Response

The Department deleted the referenced phrase from the final-form rulemaking.

Comment 10

PASA reviewed the definition of "ready-to-eat food" in § 46.3 and noted:

> . . . there is so much potential for odd interpretations here. One could read this with greens and such in mind—and, in some peoples' minds, the . . . (*definition of "ready-to-eat food"*) . . . could make washed veggies ready to eat as opposed to having undergone the basics of field dressing. That potentially opens up a whole bunch of interpretive options (like the difference between field processing including washing and

those greens {and other products, be they vegetable or meat/raw animal foods} that are actually sold as ready to eat. . . . . .). (Clarification added).

Response

The proposed rulemaking reflected that the definition of "ready-to-eat food" was proposed for deletion. The only use of that term in the final-form rulemaking is in § 46.1141(c)(3)(ii) (relating to license requirement). In context, the provision references a retail food facility that includes "ready-to-eat foods from a café, salad bar or hot food bar." The Department believes that the context in which the term is used adds sufficient clarity.

In addition, § 1-201.10 of the Model Food Code provides a more detailed definition of the term.

The Department is satisfied it can differentiate among raw agricultural commodities, ready-to-eat foods and other types of foods. In general, if a raw fruit or vegetable is washed so that no further washing is needed before it is eaten by the consumer, it is a ready-to-eat food. An example of this type of food is bagged lettuce or bagged greens.

A raw fruit or vegetable is not a ready-to-eat food if it is field-washed and the consumer must wash the fruit or vegetable before eating it. An example of this type of food is a head of iceberg lettuce.

If a raw fruit or vegetable is processed by chopping, cutting or some similar treatment it is no longer a raw agricultural commodity. If a processed food is not to be washed by the consumer before eating, it is a ready-to-eat food.

Comment 11

PASA reviewed proposed § 46.3 and offered several questions and comments regarding the definition of "sanitization."

Please clarify the need for the different types of operations to actually do this testing in said operation. Consider in the response the situation in which individuals actually need to test surfaces before and after cleaning (as opposed to using the recommended cleaning and sanitizing procedures provided by, for example, the product label or another professional).

Is the five log reduction in bacterial load predicated on the type (genus, species or serotype, for example) of organism? Is there any leeway in the log reduction based on the relative risk of the particular/specific organism?

Is the department prepared to be more specific with respect to identifying those organisms which are defined below as "representative" disease microorganisms of public health importance?

Response

The proposed rulemaking reflected that the definition of "sanitization" was proposed for deletion. The final-form rulemaking deletes that definition and use of the term throughout the regulations.

Section 1-201.10 of the Model Food Code defines "sanitization" as it was defined in § 46.3. That definition has long been the standard in the food industry and is well known and widely accepted. Manufacturers of commercially-available sanitizers are aware of this long-standing sanitization definition, and sanitizing agents that are formulated for food safety applications are, when used in accordance with manufacturer's instructions, capable of cleaning food contact surfaces to meet the standard of sanitization. Chemical sanitizers are evaluated and approved by the United States Environmental Protection Agency for efficacy and, when so approved, meet the referenced standard of sanitization.

The Department declines to prescribe different sanitization standards for different types of food production operations. Sanitized food contact surfaces help lower the risk of foodborne illness.

The Department's answer to each of the questions posed in the last two paragraphs of the comment is "no."

Comment 12

PASA reviewed proposed § 46.3 and asked for clarification with respect to the definition of "sewage." Specifically, the commentator asked whether substances that are not currently considered "sewage," such as spray wash off, wash water from floors and milk houses, are deemed "sewage."

Response

The proposed rulemaking reflected that the definition of "sewage" was proposed for deletion. The final-form rulemaking references the term in §§ 46.1121(b)(5) and 46.1144(5) (relating to facility and operating plans; and conditions of retention: responsibilities of the retail food facility operator). In context, these provisions require that a facility's operating plan describe how it will dispose of sewage and that a facility report a sewage backup or other unsanitary condition.

Section 1-201.10 of the Model Food Code defines "sewage" in rather broad terms as consisting of "liquid waste containing animal or vegetable matter in suspension or solution" and as including "liquids containing chemicals in solution." The substances referenced by the commentator are, under this broad definition, "sewage."

Comment 13

PASA noted that the proposed rulemaking would rescind Chapter 46, Subchapter B and asked "What will be put in the place of this material, in the sections labeled reserved? Once those blanks have been filled, will there be a second comment period?"

Response

Regulations will not be adopted to replace this subchapter. There will not be a second comment period as that is not required under the Regulatory Review Act (71 P. S. §§ 745.1—745.12).

Chapter 46, Subchapter B addressed topics regarding supervision, employee health, personal cleanliness and hygienic practices. These same subjects are addressed in Chapter 2 of the Model Food Code, regarding management and personnel, which also addresses supervision, employee health, personal cleanliness and hygienic practices. Section 46.4 (relating to adoption of Model Food Code) effectively makes these Model Food Code standards those of the Department. As related in more detail in the response to comment 30, the Department revised the final-form rulemaking by incorporating the substance of proposed § 76.21 into final-form § 46.1201 (relating to Food Employee Certification Act compliance).

Comment 14

IRRC reviewed proposed § 46.212(a) (relating to food prepared in a private home) and noted that it establishes general requirements for food prepared in private homes that is used or offered for human consumption in a retail food facility. IRRC also noted that proposed subsection (a)(3) required an organization that uses this home-

prepared food to inform the consumer that the food was prepared in an unlicensed and uninspected private home. IRRC recommended the Department specify what kind of notice is necessary to properly inform consumers that the food was prepared in an unlicensed and uninspected private home.

Response

The Department implemented IRRC's recommendation in the final-form rulemaking.

The proposed language in § 46.212(a) essentially restated language from section 5712 of the Retail Food Facility Safety Act (relating to applicability). The Department added language to the final-form regulation to require that consumers be informed through written means at the point of sale. This can be accomplished by a menu, a menu board, a separate sign or through labeling of individual products. In addition, the final-form regulation provides examples of language that is adequate to meet the referenced statutory requirement.

Comment 15

IRRC and the PCC expressed concern that proposed § 46.212(b) might cause confusion among individuals who prepare food in their homes and seek to donate it to the various charitable organizations identified in proposed subsection (a). Both commentators offered essentially the same solution, recommending that the final-form regulation include language to clarify that subsection (b) relates to foods prepared in private homes "except as otherwise permitted under subsection (a)," or explain why clarification is not necessary.

Response

The Department agrees with the commentators and added the recommended clarifying language in the final-form regulation.

Comment 16

PASA noted that §§ 46.218—46.461 and Chapter 46, Subchapters D—G are proposed to be rescinded. PASA asked "What will be put in the place of this material, in the sections labeled reserved? Once those blanks have been filled, will there be a second comment period?"

Response

Regulations will not be adopted to replace these sections and subchapters. There will not be a second comment period as that is not required under the Regulatory Review Act. In summary, the subject matter of the rescinded provisions is addressed in the Model Food Code.

The rescinded provisions include portions of Chapter 46, Subchapter C. This subchapter addressed topics that are essentially the same as are addressed in Chapter 3 of the Model Food Code, regarding food. Section 46.4 effectively makes these Model Food Code standards those of the Department.

The rescinded provisions include Chapter 46, Subchapter D. This subchapter addressed topics that are essentially the same as are addressed in Chapter 4 of the Model Food Code, regarding equipment, utensils and linens. Section 46.4 effectively makes these Model Food Code standards those of the Department.

The rescinded provisions include Chapter 46, Subchapter E. This subchapter addressed topics that are essentially the same as are addressed in Chapter 5 of the Model Food Code, regarding water, plumbing and waste. Section 46.4 effectively makes these Model Food Code standards those of the Department.

The rescinded provisions include Chapter 46, Subchapter F. This subchapter addressed topics that are essentially the same as are addressed in Chapter 6 of the Model Food Code, regarding physical facilities. Section 46.4 effectively makes these Model Food Code standards those of the Department.

The rescinded provisions include Chapter 46, Subchapter G. This subchapter addressed topics that are essentially the same as are addressed in Chapter 7 of the Model Food Code, regarding poisonous or toxic materials. Section 46.4 effectively makes these Model Food Code standards those of the Department.

Comment 17

PASA reviewed proposed § 46.1101 and asked what the rights of a farm owner, business owner or employee are in the event a licensor conducts an unannounced inspection of a retail food facility.

Response

If a business entity applies for and obtains a retail food facility license under the Retail Food Facility Safety Act, it has consented to the provisions of the Retail Food Facility Safety Act that require and allow inspection, sampling and analysis by the licensor. Section 5703(e)(1) of the Retail Food Facility Safety Act requires an inspection before a license is issued and section 5703(g)(1) requires an inspection as a condition of license renewal. Section 5704(a) of the Food Facility Safety Act (relating to inspection, sampling and analysis) also requires that an inspector present credentials and inspect "at reasonable times, within reasonable limits and in a reasonable manner."

Section 46.1101 essentially restates the inspection language of the Retail Food Facility Safety Act and suggests that a retail food facility's normal hours of operation are generally a reasonable time for inspections to be conducted.

Section 46.1101 has been in place for many years and the amendments are not substantive. The Department has applied this provision consistently with respect to those retail food facilities it licenses. The Department believes licensees understand their obligation to allow inspections, and that the Department's inspection staff makes an effort to inspect at reasonable times.

Comment 18

PASA reviewed proposed § 46.1103 (relating to variances), noted that certain portions of that section were not included in the proposed rulemaking and asked that the Department "clarify and enhance the continuity" of that provision.

Response

The referenced portions of the section were not published because the Department did not propose changes to this text. The material that was not included from § 46.1103(b) reads as follows:

(1) A statement of the proposed variance of the chapter requirement citing relevant chapter section numbers.

(2) An analysis of the rationale for how the potential public health hazards addressed by the relevant chapter sections will be alternatively addressed by the proposal.

(3) An HACCP plan—if required as specified in § 46.1122(a)(1) (relating to HACCP plans)—that in-

cludes the information specified in § 46.1122(b) as it is relevant to the variance requested.

The material that was not included in § 46.1103(c) reads as follows:

(1) Comply with the HACCP plans and procedures that are submitted as specified in § 46.1122(b) and approved as a basis for the modification or waiver.

Comment 19

PASA asked several questions with respect to proposed § 46.1121:

What are the implications and responsibilities for review of plans if the ownership is changing, for example, within a family unit? What are the implications and responsibilities if the type/structure of ownership changes, for example, from a private holding to an LLC or other business model?

Response

Retail food facility licenses are location-specific and proprietor-specific. If either of these changes, a new license is required. Licenses are not transferrable.

If the location of a licensed retail food facility changes, the licensee, or license applicant, may file a new retail food facility license application with the Department.

If the ownership of a licensed retail food facility changes and there are not substantial changes to the physical layout of the facility, itself, a license application is required but the application review process is generally faster since the Department does not need to conduct the same plan review it would conduct with respect to licensing a new or remodeled retail food facility.

In practice, it is not uncommon for a licensee who is a sole proprietor to incorporate his business, to establish a partnership and bring in business partners, transfer ownership to a family member or sell the facility to a third party. Each of these events would trigger the need for a new license.

Comment 20

PASA asked the Department to clarify proposed § 46.1121(b)(2)—(6).

Response

The referenced portions of the section were not published because the Department did not propose changes to this text. The referenced material reads as follows:

(2) Anticipated volume of food to be stored, prepared and sold or served.

(3) Proposed layout, mechanical schematics, construction materials and finish schedules.

(4) Proposed equipment types, manufacturers, model numbers, locations, dimensions, performance capacities and installation specifications.

(5) Source of water supply, means of sewage disposal and refuse disposal.

(6) An HACCP plan, if required under § 46.1122 (relating to HACCP plans).

Comment 21

PASA offered several comments with respect to proposed § 46.1122 (relating to HACCP plans). Initially, it presented the following:

There are large sections quoted below in which the material is proposed rescinded. What will be put in the place of this material, in the sections labeled reserved? Once those blanks have been filled, will there be a second comment period?

Response

The Department believes the commentator is referring to the proposed replacement of several references to sections of the proposed rulemaking that the Department proposed to delete with references to the Model Food Code. To that extent, the blanks in this provision are filled with references to the Model Food Code.

The Department's response to comment 16 sets forth some general references to the subject matter addressed in the Model Food Code.

There will not be a second comment period with respect to the proposed rulemaking as that is not required under the Regulatory Review Act.

Comment 22

With respect to proposed § 46.1122, PASA also asked whether "any and all situations require HACCP plans."

Response

Hazard Analysis Critical Control Point (HACCP) plans are not required in any and all situations. HACCP plans are required if they are also required under Federal or State law or to obtain a variance as described in § 3-502.11 of the Model Food Code, regarding variance requirement. That provision of the Model Food Code requires a variance for a food establishment to conduct any of a number of specialized processing methods. These specialized processing methods include smoking food, curing food, using food additives for certain purposes, packaging food using reduced oxygen packaging, operating a life-support tank to display molluscan shellfish, certain custom processing practices, sprouting seeds or beans, and more.

Comment 23

With respect to proposed § 46.1122, PASA also offered that ". . . for some educators, consultants and providers, the language of the discipline has changed/is changing from HACCP to Hazard Analysis Preventive Controls" and asked "What is the longer term (and short term) implication/s of this change in nomenclature?"

Response

"HACCP" is defined in § 1-201.10 of the Model Food Code and is used throughout that document. If there is ever a movement to change that terminology in the Model Food Code the Department would have ample notice and a chance to participate in the amendment process, and can consider whether the change to the Model Food Code warrants a change to the Department's regulation.

The phrase "Hazard Analysis Preventive Controls" used by the commentator suggests that the phrase may have originated from separate FDA rules or proposed rules on "Hazard Analysis and Risk-Based Preventive Controls for Human Food." These rules would apply to food manufacturing plants and distributing establishments and would not be applicable to retail food facilities.

Comment 24

PASA reviewed proposed § 46.1124 (relating to preoperational inspection of construction) and asked whether the preoperational inspections described in that provision are "in addition to the building permit/local inspections." The commentator also asked whether there are fees associated with these inspections.

Response

The referenced preoperational inspections are separate and distinct from any inspection that a local government unit might require as a condition of the issuance of a building permit or conduct under some other local authority.

When the licensor is the Department, there will not be a fee for this type of inspection because the Retail Food Facility Safety Act does not authorize a fee. Section 5703(j) of the Retail Food Facility Safety Act addresses the Department's authority to impose fees.

When the licensor is an entity other than the Department, that type of licensor has the authority to establish its own fee schedule and might establish a fee schedule that imposes a fee for the type of preoperational inspection of construction.

Comment 25

IRRC raised several concerns regarding the clarity of proposed § 46.1141(c). It noted that proposed § 46.1141 establishes the license requirements necessary to operate as a retail food facility and that subsection (c) establishes the intervals for license expiration for various types of retail food facilities.

With respect to subsection (c), IRRC noted the 24-month, 18-month, 12-month and 6-month license intervals and asked the Department to explain how it determined that each of these time frames represent the appropriate license expiration date for a retail food facility that meets these criteria.

IRRC noted that subsection (c)(1)(iii) provides that the intervals between license expirations can increase should a retail food facility demonstrate that it has achieved "active managerial control of foodborne illness risk factors. . . ." IRRC asked that the final-form regulation clarify what the Department considers appropriate "historical documentation" to validate that a retail food facility has achieved this level of control. IRRC noted that this same terminology is used in subsection (c)(2)(iii), (3)(iii) and (4)(iii).

Response

With respect to IRRC's inquiry as to the origin of the various license intervals and categories in proposed § 46.1141(c), the Department notes that section 5703(g)(1) of the Retail Food Facility Safety Act allows the Department to establish retail food facility license intervals using risk-based factors identified in the Model Food Code.

The Department consulted Annex 5 of the Model Food Code, regarding conducting risk-based inspections, in developing the risk-based license intervals presented in proposed § 46.1141. Annex 5 contains a table identified as Annex 5, Table 1, regarding risk categorization of food establishments. That table establishes four separate risk categories for retail food facilities. The proposed regulation essentially incorporated each of these four risk categories and established a different (and risk-based) license interval for each. The referenced table also recommends inspection frequency intervals of from one to four inspections each year, based upon the risk category involved. Although the Department does not have the resources to inspect on this frequent an inspection schedule, the proposed regulation used the same inspection interval ratios presented in that table: namely, that those retail food facilities that present the highest risk of spreading foodborne illness should be inspected four times as often as those retail food facilities that present the lowest risk of spreading foodborne illness.

Annex 5 of the Model Food Code also recommends the Voluntary National Retail Food Regulatory Program (VNRFRP) Standards established by the FDA as a source of additional recommendations with respect to establishing risk-based inspection programs for retail food facilities. The VNRFRP Standards are part of a National initiative to promote application of effective food safety strategies that are based on risk factors and to promote uniformity among retail food facility regulatory programs. The VNRFRP Standards were developed with input from Federal, state and local regulatory officials, the food industry, food-related trade associations, academia and consumers, and provide common standards by which participating retail food facility regulatory programs can assess their programs. The Department has been a participating jurisdiction with respect to the VNRFRP Standards since 2004 and, as part of that participation, has completed a self-assessment of its retail food facility regulatory program.

The VNRFRP Standards consist of nine separate standards. Of these, Standard No. 3, inspection based on HACCP principles, recommends that inspection frequency be based on the relative risk posed by a retail food facility and recommends the establishment of at least three categories of retail food facilities based on potential and inherent food safety risks. This allows inspection staff to spend more time in those higher-risk establishments that pose the greatest potential of causing foodborne illness. Standard No. 3 also allows regulatory jurisdictions to consider available resources (such as personnel and funding) in establishing inspection frequencies.

The Department considered its existing staffing levels and its experience in allocating manpower to meet the current annual inspection requirement for retail food facilities. Under the proposed regulation, most retail food facilities will continue to be subject to this yearly inspection requirement, but the Department's inspection resources can be better-focused on those retail food facilities that present the greatest risk of spreading foodborne illness.

In summary, the categories of retail food facilities described in proposed § 46.1141(c)(1)—(4) were essentially as recommended in Annex 5 of the Model Food Code and are consistent with the VNRFRP Standards. The license intervals establish an inspection timetable that can be met with current Department or local licensor inspection staff, or both, and that directs inspection resources toward those retail food facilities that present the greatest risk of causing foodborne illness.

With respect to the second portion of IRRC's comment, the Department revised the referenced provisions to make clear that the "historical documentation" that is necessary to demonstrate the active managerial control of foodborne illness risk factors justifying a longer license interval shall consist of: (1) at least three regular inspections at the established risk-based interval that reflect the retail food facility is "in compliance" overall; (2) an absence of consumer complaints that prove valid; and (3) an absence of reported foodborne illnesses associated with the facility.

Comment 26

With respect to proposed § 46.1141, PASA asked for clarification of whether a farmers' market and all individual farmers selling from that market must be licensed. PASA also adds:

Here—as well as in other portions of this (and other documents)—it seems appropriate and clear to substitute the phrase "compliant at a scale and risk appropriate level" rather than using the word "exemption." Please comment.

Response

Proposed § 46.1141(b) repeated the full range of circumstances under which a retail food facility might be exempt from licensure under section 5703(b) of the Retail Food Facility Safety Act.

A typical farmers' market is not a single "retail food facility" in that it does not have a single proprietor that owns and operates all of the retail food facilities located in the market. It is usually a centralized gathering of multiple retail food facilities, each with its own proprietor (similar to a gathering of food vendors at a fair or other event). In this case, each farmers' market stand is a discrete retail food facility. Depending on the type of food operation conducted in the facility, the facility may or may not be exempt from the licensure requirement imposed by the Retail Food Facility Safety Act. This type of determination will be fact driven.

With respect to the commentator's suggestion that the regulation should reference that a facility is compliant "at a scale and risk appropriate level," the Department maintains it is appropriate to continue to use "exempt" and "exemptions" in § 46.1141. The Retail Food Facility Safety Act describes the circumstances under which a retail food facility is "exempt" from the license requirements (but not the inspection requirements) of that statute. These are in 5703(b) of the Retail Food Facility Safety Act, which describes them as exemptions. Although the Retail Food Facility Safety Act affords a licensor some leeway to determine appropriate maximum license intervals based upon certain risk-based factors (see section 5703(g)(1)), it does not allow the scale of a retail food facility's operation or the risk level posed by that facility to determine whether a facility is exempt from licensure.

Comment 27

PASA reviewed proposed § 46.1143 (relating to issuance) and noted that certain portions of that section were not included in the proposed rulemaking and asked that the Department "clarify and enhance the continuity" of this section.

PASA also asked for clarification of the need for a new license when there is a change in ownership of the license retail food facility. PASA specifically asked that the response include consideration of events such as "changes within the family, changes in business structure and category."

Response

The referenced portions of the section were not published because the Department did not propose changes to this text. The material that was not included under § 46.1143(a) reads as follows:

(1) The required plans, specifications and information are reviewed and approved.

(2) A preoperational inspection, as described in § 46.1124 (relating to preoperational inspection of construction) shows that the facility is built or remodeled in accordance with the approved plans and specifications and that the facility is in compliance with this chapter.

(3) A properly completed application is submitted.

(4) The required fee is submitted.

With respect to the commentator's request for clarification of the circumstances under which a new license would be required, the Department's response to comment 19 is responsive.

Comment 28

IRRC noted that proposed § 46.1144(4) references a specific subpart of the Model Food Code but that other provisions in the proposed rulemaking contain more general references to the Model Food Code. IRRC referenced proposed §§ 46.3, 46.1121(b)(1), 46.1122, 46.1122(a)(2), 46.1141(c) and 46.1141(c)(iii) as examples. IRRC recommends that the final-form rulemaking include specific cross-references to the Model Food Code or that the Department explain why references are not appropriate.

Response

IRRC's recommendation has been implemented in the final-form rulemaking.

Throughout the final-form rulemaking the Department has, where appropriate, changed general references to the Model Food Code to specific references to the applicable subpart of the Model Food Code. Specifically, the sections of the final-form rulemaking that have been revised and the references to the appropriate subparts of the Model Food Code, are as follows:

Section	*New Model Food Code Reference*
46.3	Subpart 1-201, regarding applicability and terms defined
46.1121(b)(1)	Subpart 3-603, regarding consumer advisory
46.1122(a)(1)(ii)	Subpart 8-201, regarding facility and operating plans
46.1122(a)(2)	Subpart 3-502, regarding specialized processing methods
46.1122(c)(1)(iii)	Subpart 8-401, regarding frequency
46.1141(c)	Subpart 8-401, regarding frequency, and Annex 5, regarding conducting risk-based inspections

Although the basic subject matter of a subpart of the Model Food Code does not change, individual sections are occasionally revised by the FDA. For this reason the final-form rulemaking does not reference exact sections of the Model Food Code but, instead, the subpart in which that section is located.

Comment 29

With respect to proposed § 76.20, IRRC recommended that: (1) the phrase "unless otherwise defined in Chapter 46 (relating to food code)" be deleted; and (2) the definition of the term "Department" in that section "include the same language pertaining to the Model Food Code as that contained in Section 46.3."

Response

The Department agrees with the commentator and revised the final-form rulemaking to effectively accomplish IRRC's recommendations. As explained in response to comment 30, these changes appear in § 46.1201 as proposed § 76.20 was not adopted by the Department.

Comment 30

PASA noted that §§ 76.1—76.19 were proposed to be rescinded and asked:

> What will be put in the place of this material, in the sections labeled reserved? Once those blanks have been filled, will there be a second comment period? Please explain why the collection of these "odd definitions" are presented in this portion of the document rather than in the prodromal section with the remainder of the definitions.

Response

Regulations will not be adopted to replace these sections. There will not be a second comment period as that is not required under the Regulatory Review Act.

The Food Employee Certification Act is the underlying statutory authority for Chapter 76. Act 106 accomplished a significant and substantive revision of the Food Employee Certification Act, and had the effect of simplifying and streamlining the process by which a retail food facility shall have at least one employee who holds a current certificate evidencing successful completion of an accredited food safety training course. Much of the Food Employee Certification Act is self-executing, without the need for detailed supporting regulations. The final-form rulemaking does nothing more than implement the changes to the Food Employee Certification Act wrought by Act 106.

With respect to the comment regarding the placement of proposed § 76.20 as a separate section, the Department agrees that the requirements of the Food Employee Certification Act are so intertwined with the subject matter of Chapter 46 that the regulations will be more user-friendly if the substance of proposed Chapter 76 is incorporated into Chapter 46. The Department revised the final-form rulemaking by: (1) incorporating the relevant definitions that appeared in proposed § 76.20 into § 46.3; and (2) incorporating the substance of proposed § 76.21 into § 46.1201.

Affected Individuals and Organizations

The final-form rulemaking will impact the public by reducing the number of foodborne illness outbreaks originating from retail food facilities and food establishments.

Retail food facilities and food establishments will also be affected by the final-form rulemaking. Fewer foodborne illness incidents will benefit owners, operators and employees of these businesses who will be spared some costs associated with lawsuits, compensation or business disruption regarding foodborne illness. Also, since the final-form rulemaking brings the Commonwealth's food safety standards into greater alignment with the Model Food Code, and the Model Food Code is the basis for food safety standards in all of the continental United States, there may be some savings associated with operating in a regulatory environment where there is a greater degree of consistency and uniformity in regulatory food safety standards.

Fiscal Impact

Commonwealth

Aside from an initial expected outlay of approximately $5,000 to revise literature, web sites, forms and its electronic licensing system, the final-form rulemaking will not impose costs and will not have fiscal impact on the Commonwealth. The Department currently registers and inspects food establishments under the Food Safety Act and licenses and inspects retail food facilities under the Retail Food Facility Safety Act. The final-form rulemaking will not appreciable expand or alter the Department's role in administering and enforcing these underlying statutes.

Political subdivisions

The final-form rulemaking will not impose costs and will not have fiscal impact upon political subdivisions. Although a local government unit may act as the "licensor" of retail food facilities within its borders, the final-form rulemaking will not impose any requirement on a local government unit licensor that is not imposed by one or more of the underlying statutes.

Private sector

The final-form rulemaking is not expected to impose costs on the private sector. Owners of restaurants, food processing operations, other retail food facilities and other food establishments are already familiar with the food safety standards and procedures prescribed under the Model Food Code. Chapter 46 embodies many of the provisions of the Model Food Code; the Model Food Code is the basis for much of the food-safety-related training that is available to these persons and that has been obtained for purposes of compliance with the Food Employee Certification Act.

General public

The final-form rulemaking will enhance public health and safety. It is expected to reduce the number of cases of foodborne illness attributable to food originating from food facilities in this Commonwealth. This should result in some indeterminate cost savings to the general public.

Paperwork Requirements

The final-form rulemaking is not likely to appreciably impact upon the paperwork generated by the Department or other retail food facility licensors, or upon retail food facilities or food establishments.

Effective Date

The final-form rulemaking will be effective on May 12, 2014.

Contact Person

Individuals who need information about the final-form rulemaking should contact the Department of Agriculture, Bureau of Food Safety and Laboratory Services, 2301 North Cameron Street, Harrisburg, PA 17110-9408, Attention: Sheri Morris.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 1, 2012, the Department submitted a copy of the notice of proposed rulemaking, published at 42 Pa.B. 5218, to IRRC and the Chairpersons of the House and Senate Standing Committees on Agriculture and Rural Affairs 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 February 26, 2014, 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 February 27, 2014, and approved the final-form rulemaking.

Findings

The Department finds that:

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

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

(3) The revisions that were made to this final-form rulemaking in response to comments received do not enlarge the purpose of the proposed rulemaking published at 42 Pa.B. 5218.

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

Order

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

(1) The regulations of the Department, 7 Pa. Code Chapters 46 and 76, are amended by adding §§ 46.4 and 46.1201; deleting §§ 46.101, 46.102, 46.111—46.115, 46.131—46.137, 46.151—46.153, 46.201, 46.211, 46.213—46.216, 46.218—46.222, 46.241—46.251, 46.261, 46.262, 46.281—46.286, 46.301—46.307, 46.321—46.323, 46.341—46.344, 46.361—46.366, 46.381—46.385, 46.401, 46.402, 46.421—46.423, 46.441, 46.461, 46.501, 46.521—46.523, 46.541—46.544, 46.561—46.563, 46.581—46.595, 46.611—46.615, 46.631—46.634, 46.651, 46.652, 46.671—46.676, 46.691—46.693, 46.711—46.719, 46.731, 46.751—46.753, 46.771—46.775, 46.801—46.806, 46.821—46.825, 46.841—46.844, 46.861—46.863, 46.881—46.886, 46.901, 46.902, 46.921, 46.922, 46.941—46.946, 46.961—46.965, 46.981, 46.982, 46.1001, 46.1002, 46.1021—46.1029, 46.1041, 76.1—76.17 and 76.19; and amending §§ 46.2, 46.3, 46.212, 46.217, 46.1101—46.1103, 46.1121—46.1124 and 46.1141—46.1144 to read as set forth in Annex A.

(*Editor's Note*: Section 46.1201 was not included in the proposed rulemaking published at 42 Pa.B. 5218. Proposed §§ 76.20 and 76.21 have been withdrawn by the Department.)

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

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

(4) This order will take effect on May 12, 2014.

GEORGE D. GREIG,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 1534 (March 15, 2014).)

Fiscal Note: Fiscal Note 2-174 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 7. AGRICULTURE.

PART III. BUREAU OF FOOD SAFETY AND LABORATORY SERVICES

Subpart A. SOLID FOODS

CHAPTER 46. FOOD CODE

Subchapter A. PURPOSE; DEFINITIONS; ADOPTION OF MODEL FOOD CODE

§ 46.2. Scope.

This chapter establishes definitions; sets standards for management and personnel, food operations and equipment and facilities; and provides for retail food facility plan review, licensing, inspection and employee restriction.

§ 46.3. Definitions.

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

Bed and breakfast homestead or inn—A private residence which contains ten or fewer bedrooms used for providing overnight accommodations to the public, and in which breakfast is the only meal served and is included in the charge for the room.

Conference for Food Protection—An independent National voluntary nonprofit organization to promote food safety and consumer protection. Participants in this organization include Federal, state and local regulatory agencies, universities, test providers, certifying organizations, consumer groups, food service and retail store trade associations, and retail food facility operators. The objectives of the organization include identifying and addressing food safety problems and promoting uniformity of regulations in food protection.

Department—The Department of Agriculture of the Commonwealth. The term is synonymous with the term "regulatory authority" in Subpart 1-201 of the Model Food Code, regarding applicability and terms defined.

Drinking water, *potable water* or *water*—Safe drinking water as defined in the Pennsylvania Safe Drinking Water Act (35 P. S. §§ 721.1—721.17). The term does not include water such as boiler water, mop water, rainwater, wastewater and "nondrinking" water.

Employee—The license holder, person in charge, person having supervisory or management duties, person on the payroll, family member, volunteer, person performing work under contractual agreement or other person working in a retail food facility.

Food—An article used for food or drink by humans, including chewing gum and articles used for components of any article. The term does not include medicines and drugs.

Food Employee Certification Act—3 Pa.C.S. §§ 6501—6510 (relating to Food Employee Certification Act).

Food establishment—

(i) A room, building or place or portion thereof or vehicle maintained, used or operated for the purpose of commercially storing, packaging, making, cooking, mixing, processing, bottling, baking, canning, freezing, packing or otherwise preparing, transporting or handling food.

(ii) The term excludes retail food facilities, retail food establishments, public eating and drinking places, and

those portions of establishments operating exclusively under milk or milk products permits.

(iii) The term is synonymous with the term "food processing plant" in Subpart 1-201 of the Model Food Code.

Food Safety Act—3 Pa.C.S. §§ 5721—5737 (relating to Food Safety Act).

HACCP—Hazard Analysis Critical Control Point—A system developed by the National Advisory Committee on Microbiological Criteria for Foods that identifies and monitors specific foodborne hazards that can adversely affect the safety of the food products.

License—A grant to a proprietor to operate a retail food facility. The term is synonymous with the term "permit" in Subpart 1-201 of the Model Food Code.

Licensee—The person, (such as a retail food facility operator), who is directly responsible for the operation of a retail food facility and holds a current license. The term is synonymous with the term "permit holder" in Subpart 1-201 of the Model Food Code.

Licensor—The term includes the following:

(i) The county department of health or joint-county department of health, whenever the retail food facility is located in a political subdivision which is under the jurisdiction of a county department of health or joint-county department of health.

(ii) The health authorities of cities, boroughs, incorporated towns and first-class townships, whenever the retail food facility is located in a city, borough, incorporated town or first-class township not under the jurisdiction of a county department of health or joint-county department of health.

(iii) The health authorities of second class townships and second class townships which have adopted a home rule charter which elect to issue licenses under the Retail Food Facility Safety Act whenever a retail food facility is located in a second class township or second class township which has adopted a home rule charter not under the jurisdiction of a county department of health or joint-county department of health.

(iv) The Department, whenever the retail food facility is located in any other area of this Commonwealth.

Milk Sanitation Law—The act of July 2, 1935 (P. L. 589, No. 210) (31 P. S. §§ 645—660g).

Model Food Code—The most current edition of the Food Code published by the Department of Health and Human Services, Food and Drug Administration.

Organized camp—A combination of programs and facilities established for the primary purpose of providing an outdoor group living experience for children, youth and adults with social, recreational and educational objectives that is operated and used for 5 consecutive days or more during one or more seasons of the year.

Person in charge—A person designated by a retail food facility operator to be present at a retail food facility and responsible for the operation of the retail food facility at the time of inspection.

Proprietor—A person, partnership, association or corporation conducting or operating a retail food facility in this Commonwealth. The term is synonymous with the term "person" in Subpart 1-201 of the Model Food Code.

Public eating or drinking place—A place within this Commonwealth where food or drink is served to or provided for the public, with or without charge. The term does not include dining cars operated by a railroad company in interstate commerce or a bed and breakfast homestead or inn.

Raw agricultural commodity—A food in its raw or natural state, including fruits which are washed, colored or otherwise treated in their unpeeled, natural form prior to marketing.

Retail food establishment—

(i) An establishment which stores, prepares, packages, vends, offers for sale or otherwise provides food for human consumption and which relinquishes possession of food to a consumer directly, or indirectly, through a delivery service such as home delivery of grocery orders or delivery service provided by common carriers.

(ii) The term does not include dining cars operated by a railroad company in interstate commerce or a bed and breakfast homestead or inn.

Retail food facility—A public eating or drinking place or a retail food establishment. The term is synonymous with the term "food establishment" in Subpart 1-201 of the Model Food Code.

Retail food facility operator—The entity that is legally responsible for the operation of the retail food facility, such as the owner, owner's agent or other person.

Retail Food Facility Safety Act—3 Pa.C.S. §§ 5701—5714 (relating to Retail Food Facility Safety Act).

Secretary—The Secretary of the Department or an authorized representative, employee or agent of the Department.

§ 46.4. Adoption of Model Food Code.

The provisions, terms, procedures, appendices and standards in the current edition of the Model Food Code are adopted to the extent they do not conflict with one or more of the following:

(1) The Retail Food Facility Safety Act.

(2) The Food Safety Act.

(3) This chapter.

Subchapter B. (Reserved)

§ 46.101. (Reserved).

§ 46.102. (Reserved).

§§ 46.111—46.115. (Reserved).

§§ 46.131—46.137. (Reserved).

§§ 46.151—46.153. (Reserved).

Subchapter C. FOOD

§ 46.201. (Reserved).

FOOD SOURCES

§ 46.211. (Reserved).

§ 46.212. Food prepared in a private home.

(a) *General.* Food prepared in a private home may not be used or offered for human consumption in a retail food facility unless the private home meets the requirements of subsection (b) or (c).

(b) *Private home that is a registered food establishment.* Food prepared in a private home may be used or offered for human consumption in a retail food facility if the private home from which the food originates is registered with the Department as a food establishment under the Food Safety Act.

(c) *Private home that is exempt from licensure or inspection under the Retail Food Facility Safety Act.* Food prepared in a private home may be used or offered for human consumption in a retail food facility if the following apply:

(1) The food is not potentially hazardous food.

(2) The food is used or offered for human consumption by any of the following organizations:

(i) A tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C.A. § 501(c)(3)).

(ii) A volunteer fire company or ambulance, religious, charitable, fraternal, veterans, civic, sportsmen, agricultural fair or agricultural association, or a separately chartered auxiliary of an association on a nonprofit basis.

(iii) An organization that is established to promote and encourage participation and support for extracurricular recreational activities for youth of primary and secondary public, private and parochial school systems on a nonprofit basis.

(3) The organization that uses or offers the food for human consumption informs consumers that the organization uses or offers food that has been prepared in private homes that are not licensed or inspected.

(i) Acceptable means of providing written notice include providing that notice on a menu, a menu board, separate signage posted in a location that is conspicuous for consumers to view or on individual food product labels.

(ii) The written notice must clearly communicate that the food has been prepared in a private home that is not licensed or inspected. Phrases such as "These baked goods originate from private homes that are not government-licensed or government-inspected," "The food offered on this table comes from private homes that are not licensed or inspected" and "Food offered in this bake sale has been prepared in private homes that are not licensed or inspected" meet this requirement. Persons may submit proposed written notice language to the Department or other licensor, as applicable, for review.

(4) The food is donated to an organization described under paragraph (2).

§§ 46.213—46.216. (Reserved).

§ 46.217. Milk and milk products.

Milk and milk products may be offered for human consumption in a retail food facility if the facility complies with section 2 of the Milk Sanitation Law (31 P. S. § 646).

§§ 46.218—46.222. (Reserved).

§§ 46.241—46.251. (Reserved).

§ 46.261. (Reserved).

§ 46.262. (Reserved).

§§ 46.281—46.286. (Reserved).

§§ 46.301—46.307. (Reserved).

§§ 46.321—46.323. (Reserved).

§§ 46.341—46.344. (Reserved).

§§ 46.361—46.366. (Reserved).

§§ 46.381—46.385. (Reserved).

§ 46.401. (Reserved).

§ 46.402. (Reserved).

§§ 46.421—46.423. (Reserved).

§ 46.441. (Reserved).

§ 46.461. (Reserved).

Subchapter D. (Reserved)

§ 46.501. (Reserved).

§§ 46.521—46.523. (Reserved).

§§ 46.541—46.544. (Reserved).

§§ 46.561—46.563. (Reserved).

§§ 46.581—46.595. (Reserved).

§§ 46.611—46.615. (Reserved).

§§ 46.631—46.634. (Reserved).

§ 46.651. (Reserved).

§ 46.652. (Reserved).

§§ 46.671—46.676. (Reserved).

§§ 46.691—46.693. (Reserved).

§§ 46.711—46.719. (Reserved).

§ 46.731. (Reserved).

§§ 46.751—46.753. (Reserved).

§§ 46.771—46.775. (Reserved).

Subchapter E. (Reserved)

§§ 46.801—46.806. (Reserved).

§§ 46.821—46.825. (Reserved).

§§ 46.841—46.844. (Reserved).

§§ 46.861—46.863. (Reserved).

§§ 46.881—46.886. (Reserved).

Subchapter F. (Reserved)

§ 46.901. (Reserved).

§ 46.902. (Reserved).

§ 46.921. (Reserved).

§ 46.922. (Reserved).

§§ 46.941—46.946. (Reserved).

§§ 46.961—46.965. (Reserved).

§ 46.981. (Reserved).

§ 46.982. (Reserved).

Subchapter G. (Reserved)

§ 46.1001. (Reserved).

§ 46.1002. (Reserved).

§§ 46.1021—46.1029. (Reserved).

§ 46.1041. (Reserved).

Subchapter H. ADMINISTRATIVE PROCEDURES ACCESS, APPROVALS AND VARIANCES

§ 46.1101. Access to retail food facilities.

After the Department or licensor presents identification, the person in charge shall allow the Department or licensor to determine if the retail food facility is in compliance with this chapter by allowing access to the facility, allowing inspection and providing information and records specified in this chapter and to which the Department or licensor is entitled under the Retail Food Facility Safety Act and any other relevant statutory or food regulatory authority during the retail food facility's

hours of operation and other reasonable times if the facility is not open during normal business hours.

§ 46.1102. Obtaining Department or licensor approval.

(a) *General.* This section describes the process by which a person may obtain an approval from the Department or a licensor required by another provision of this chapter.

(b) *Written request.* A person seeking an approval from the Department or a licensor under this chapter shall submit a written request for approval to the entity from which approval is sought. If approval is sought from the Department, the written request shall be mailed or delivered to the following address:

Pennsylvania Department of Agriculture
Bureau of Food Safety and Laboratory Services
2301 North Cameron Street
Harrisburg, Pennsylvania 17110-9408

(c) *Contents of request.* The written request for approval described in subsection (b) must specify the provision of this chapter under which approval is sought, the reason approval is sought and relevant documentation in support of the request.

(d) *Processing a request.* The Department or licensor will, within 30 days of receipt of a written request for approval under this section, mail or otherwise provide the requester with a written grant or denial of the request, or a specific request for additional information. If a written request for additional information is made, the Department or licensor will have an additional 30 days from the date it receives the additional information within which to mail or otherwise provide the requester with a written grant or denial of the request.

(e) *Standard for approval.* The Department or licensor will grant approval if it determines the approval would not constitute or cause a violation of the Retail Food Facility Safety Act or this chapter, and that no health hazard would result from the approval.

§ 46.1103. Variances.

(a) *Modifications and waivers.* The Department may grant a variance by modifying or waiving the requirements of this chapter if—in the opinion of the Department—a health hazard will not result from the variance. If a variance is granted, the Department will retain the information specified in subsection (b) in its records for the retail food facility and provide a copy of the approved variance to the licensor if the licensor is an entity other than the Department.

(b) *Documentation of proposed variance and justification.* Before a variance from a requirement of this chapter is approved, the information provided by the person requesting the variance and retained in the Department's file on the retail food facility includes the following:

(1) A statement of the proposed variance of the chapter requirement citing relevant chapter section numbers.

(2) An analysis of the rationale for how the potential public health hazards addressed by the relevant chapter sections will be alternatively addressed by the proposal.

(3) An HACCP plan—if required as specified in § 46.1122(a)(1) (relating to HACCP plans)—that includes the information specified in § 46.1122(b) as it is relevant to the variance requested.

(c) *Conformance with approved procedures.* If the Department grants a variance as specified in subsection (a), or an HACCP plan is otherwise required as specified in § 46.1122(a), the retail food facility operator shall do the following:

(1) Comply with the HACCP plans and procedures that are submitted as specified in § 46.1122(b) and approved as a basis for the modification or waiver.

(2) Maintain and provide to the Department or licensor, upon request, records specified in § 46.1122(b)(4) and (5) that demonstrate that the following are routinely employed:

(i) Procedures for monitoring critical control points.

(ii) Monitoring of the critical control points.

(iii) Verification of the effectiveness of an operation or process.

(iv) Necessary corrective actions if there is failure at a critical control point.

PLAN SUBMISSION AND APPROVAL

§ 46.1121. Facility and operating plans.

(a) *When plans are required.* A retail food facility licensing applicant or retail food facility operator shall have plans and specifications reviewed by the Department or licensor and shall submit these properly prepared plans and specifications (as described in subsection (b)) to the Department or licensor for review and approval using the procedure described in § 46.1142 (relating to application procedure for appropriate license) before any of the following:

(1) The construction of a retail food facility.

(2) The conversion of an existing structure for use as a retail food facility.

(3) The remodeling of a retail food facility (including installation and use of any new major food equipment for heating, cooling, and hot and cold holding food) or a change of type of retail food facility or food operation if the Department or licensor determines that plans and specifications are necessary to ensure compliance with this chapter.

(4) A change of ownership of a retail food facility.

(b) *Contents of the plans and specifications.* The plans and specifications for a retail food facility shall include (as required by the Department or licensor based on the type of operation, type of food preparation and foods prepared) the following information to demonstrate conformance with this chapter:

(1) Intended menu and consumer advisory intentions, if a consumer advisory is required under Subpart 3-603 of the Model Food Code, regarding consumer advisory, for animal foods that are raw, undercooked or not otherwise processed to eliminate pathogens.

(2) Anticipated volume of food to be stored, prepared and sold or served.

(3) Proposed layout, mechanical schematics, construction materials and finish schedules.

(4) Proposed equipment types, manufacturers, model numbers, locations, dimensions, performance capacities and installation specifications.

(5) Source of water supply, means of sewage disposal and refuse disposal.

(6) An HACCP plan, if required under § 46.1122 (relating to HACCP plans).

(7) Other information that may be required by the Department or licensor for the proper review of the proposed construction, conversion or modification of a retail food facility, and requested by the Department or licensor in writing.

§ 46.1122. HACCP plans.

(a) *When an HACCP plan is required.*

(1) Before engaging in an activity that requires an HACCP plan, a retail food facility applicant or retail food facility operator shall submit to the Department or licensor for approval a properly prepared HACCP plan as specified in subsection (b) and the relevant provisions of this chapter if any of the following occurs:

(i) Submission of an HACCP plan is required according to applicable Federal or State laws.

(ii) A variance is required as specified in Subpart 8-201 of the Model Food Code, regarding facility and operating plans.

(iii) The Department or licensor determines that a food preparation or processing method requires a variance based on a plan submittal specified in § 46.1121(b) (relating to facility and operating plans), an inspectional finding or a variance request.

(2) A retail food facility applicant or retail food facility operator shall have a properly prepared HACCP plan as specified in Subpart 3-502 of the Model Food Code, regarding specialized processing methods, for reduced oxygen packaging.

(b) *Contents of an HACCP plan.* For a retail food facility that is required under subsection (a) to have an HACCP plan, the plan and specifications must indicate the following:

(1) A categorization of the types of potentially hazardous foods that are specified in the menu such as soups and sauces, salads, and bulk, solid foods such as meat roasts, or of other foods that are specified by the Department or licensor.

(2) A flow diagram by specific food or category type identifying critical control points and providing information on the following:

(i) Ingredients, materials and equipment used in the preparation of that food.

(ii) Formulations or recipes that delineate methods and procedural control measures that address the food safety concerns involved.

(3) Food employee and supervisory training plan that addresses the food safety issues of concern.

(4) A statement of standard operating procedures for the plan under consideration including clearly identifying the following:

(i) Each critical control point.

(ii) The critical limits for each critical control point.

(iii) The method and frequency for monitoring and controlling each critical control point by the food employee designated by the person in charge.

(iv) The method and frequency for the person in charge to routinely verify that the food employee is following standard operating procedures and monitoring critical control points.

(v) Action to be taken by the person in charge if the critical limits for each critical control point are not met.

(vi) Records to be maintained by the person in charge to demonstrate that the HACCP plan is properly operated and managed.

(5) Additional scientific data or other information, as required by the Department or licensor, supporting the determination that food safety is not compromised by the proposal.

§ 46.1123. Confidentiality of trade secrets.

The Department or licensor will treat as confidential information that meets the criteria specified in law for a trade secret and is contained on inspection report forms and in the plans and specifications submitted as specified in §§ 46.1121(b) and 46.1122(b) (relating to facility and operating plans; and HACCP plans).

§ 46.1124. Preoperational inspection of construction.

The Department or licensor will conduct one or more preoperational inspections to verify that the retail food facility is constructed and equipped in accordance with the approved plans and approved modifications of those plans, and variances granted under § 46.1103 (relating to variances). The Department or licensor will also verify the retail food facility is otherwise in compliance with this chapter and the Retail Food Facility Safety Act.

REQUIREMENTS FOR OPERATION

§ 46.1141. License requirement.

(a) *General requirement.* A person may not operate a retail food facility without a valid license issued by the Department or licensor, unless otherwise provided in subsection (b).

(b) *Exemptions.* The following retail food facilities are exempt from licensure requirements under the Retail Food Facility Safety Act but remain subject to the inspection provisions and all other provisions of the Retail Food Facility Safety Act:

(1) A retail food facility in which only prepackaged, nonpotentially hazardous food or beverages are sold.

(2) A retail food facility that sells only raw agricultural commodities.

(3) A retail food facility that is exempt from licensure by an order of the Secretary that has been published in the *Pennsylvania Bulletin* in accordance with section 5703(b)(1) of the Retail Food Facility Safety Act (relating to license required) if the licensor is the Department.

(4) A retail food facility that is exempt from licensure by an order of the local government unit or units having licensing authority in accordance with section 5703(b)(1) of the Retail Food Facility Safety Act if the licensor is an entity other than the Department.

(c) *License interval.* A license certificate issued by the Department under this chapter sets forth the license expiration date. The license interval varies, in accordance with the risk-based factors identified in Subpart 8-401 of the Model Food Code, regarding frequency, and Annex 5 of the Model Food Code, regarding conducting risk-based inspections, as follows:

(1) *24-month license interval.*

(i) The license interval is 24 months with a respect to a retail food facility that:

(A) Serves or sells only prepackaged, nonpotentially hazardous foods (nontime/temperature control for safety foods).

(B) Prepares only nonpotentially hazardous foods (nontime/temperature control for safety foods).

(C) Heats only commercially processed, potentially hazardous foods (time/temperature Control for Safety Food (TCS foods)) for hot holding.

(D) Does not cool potentially hazardous foods (TCS foods) for hot holding.

(ii) Examples of the type of retail food facility that would typically be subject to the 24-month license interval in subparagraph (i) are convenience store operations, hot dog carts and coffee shops.

(iii) The license interval for a retail food facility is 24 months if the retail food facility would otherwise be subject to the 18-month license interval in paragraph (2) but demonstrates to the Department, through historical documentation, that it has achieved and documented active managerial control of foodborne illness risk factors identified in Subpart 8-401 of the Model Food Code. These risk factors include:

(A) A history of noncompliance with provisions regarding foodborne illness risk factors or critical items.

(B) Specialized processes conducted.

(C) Food preparation a day in advance of service.

(D) Large numbers of people served.

(E) A history of foodborne illnesses or complaints, or both.

(F) Highly susceptible population served.

(iv) Active managerial control is achieved and documented when the conditions in subsection (d) are achieved by the licensee.

(2) *18-month license interval.*

(i) The license interval is 18 months with respect to a retail food facility that:

(A) Has a limited menu.

(B) Prepares/cooks and serves most products immediately.

(C) May involve hot and cold holding of potentially hazardous foods (TCS foods) after preparation or cooking.

(D) Limits complex preparation of potentially hazardous foods (TCS foods) requiring cooking, cooling and reheating for hot holding to only a few potentially hazardous foods (TCS foods).

(ii) Examples of the type of retail food facility that would typically be subject to the 18-month license interval in subparagraph (i) are retail food store operations that have only a limited number of separate departments (such as deli, bakery, produce, seafood or meat areas), institutional facilities that do not serve a highly susceptible population and quick food service operations.

(iii) The license interval for a retail food facility is 18 months if the retail food facility would otherwise be subject to the 12-month license interval in paragraph (3) but demonstrates to the Department, through historical documentation, that it has achieved and documented active managerial control of the foodborne illness risk factors in paragraph (1).

(iv) The license interval for a retail food facility is 18 months if the retail food facility would otherwise be subject to the 24-month license interval in paragraph (1), but the retail food facility is newly-licensed or has not yet demonstrated to the Department, through historical documentation, that it has achieved and documented active managerial control of the foodborne illness risk factors in paragraph (1). Active managerial control is achieved and documented when the conditions in subsection (d) are achieved by the licensee.

(3) *12-month license interval.*

(i) The license interval is 12 months with respect to a retail food facility that:

(A) Has an extensive menu that entails handling of raw ingredients.

(B) Has complex preparation including cooking, cooling and reheating for hot holding that involves many potentially hazardous foods (TCS foods).

(C) Uses a variety of processes that require hot and cold holding of potentially hazardous food (TCS food).

(ii) Examples of the type of retail food facility that would typically be subject to the 12-month license interval in subparagraph (i) are full service restaurants or retail food stores with a full range of separate departments (such as deli, bakery, produce, seafood or meat areas) that include ready-to-eat foods from a café, salad bar or hot food bar.

(iii) The license interval for a retail food facility is 12 months if the retail food facility would otherwise be subject to the 6-month license interval in paragraph (4) but demonstrates to the Department, through historical documentation, that it has achieved and documented active managerial control of the foodborne illness risk factors in paragraph (1).

(iv) The license interval for a retail food facility is 12 months if the retail food facility would otherwise be subject to the 18-month license interval in paragraph (2), but the retail food facility is newly-licensed or has not yet demonstrated to the Department, through historical documentation, that it has achieved and documented active managerial control of the foodborne illness risk factors in paragraph (1). Active managerial control is achieved and documented when the conditions in subsection (d) are achieved by the licensee.

(4) *6-month license interval.*

(i) The license interval is 6 months with respect to a retail food facility that serves a highly susceptible population or that conducts specialized processes such as smoking, curing or reduced oxygen packaging to extend shelf life.

(ii) Examples of the type of retail food facility that would typically be subject to the 6-month license interval in subparagraph (i) are preschools, hospitals, nursing homes and establishments conducting processing at retail.

(iii) The license interval for a retail food facility is 6 months if the retail food facility would otherwise be subject to the 12-month license interval in paragraph (3) but the retail food facility is newly-licensed or has not yet demonstrated to the Department, through historical documentation, that it has achieved and documented active managerial control of the foodborne illness risk factors in paragraph (1). Active managerial control is achieved and documented when the conditions in subsection (d) are achieved by the licensee.

(d) *Achieving and documenting active managerial control.* Active managerial control is achieved and documented when all of the following conditions are met:

(1) The previous three inspections of the retail food facility, conducted at the appropriate risk-based licensing

inspection interval as described in subsection (c), document through the licensee's inspection reports that:

(i) The retail food facility was in overall compliance.

(ii) There have not been repeats of previously-identified risk-factor violations among those three inspection reports.

(iii) If an HACCP plan is required under § 46.1122 (relating to HACCP plans), there have not been violations of that HACCP plan.

(2) Within the previous three inspections of the retail food facility, conducted at the appropriate risk-based licensing inspection interval as described in subsection (c), there have been no founded consumer complaints regarding food safety.

(3) Within the previous three inspections of the retail food facility, conducted at the appropriate risk-based licensing inspection interval as described in subsection (c), there have been no reported and confirmed incidents of foodborne illness associated with the facility.

(4) The retail food facility is in compliance with the Food Employee Certification Act.

(5) The retail food facility has written procedures that, at a minimum, address all risk factors if the facility does one or more of the following:

(i) Serves large numbers of people or prepares food a day in advance, or both, such as a retail food facility at a sports stadium, entertainment complex, conference center, banquet hall or offsite catering facility.

(ii) Serves transient groups of people such as a mobile retail food facility or temporary food facility at a fair or event.

(iii) Serves consumers which are a highly susceptible population, such as a preschool, nursing home or hospital.

§ 46.1142. Application procedure for appropriate license.

Prior to the opening of a retail food facility, the operator shall contact the Department or licensor to obtain the appropriate application form for the required license. The Department or licensor will supply the applicant with the appropriate form, based upon the type of retail food facility involved.

§ 46.1143. Issuance.

(a) *New, converted or remodeled retail food facilities.* For retail food facilities that are required to submit plans as specified in § 46.1121(a) (relating to facility and operating plans), the Department or licensor will issue a license to the applicant after the following occur:

(1) The required plans, specifications and information are reviewed and approved.

(2) A preoperational inspection, as described in § 46.1124 (relating to preoperational inspection of construction), shows that the facility is built or remodeled in accordance with the approved plans and specifications and that the facility is in compliance with this chapter.

(3) A properly completed application is submitted.

(4) The required fee is submitted.

(b) *License renewal.* The retail food facility operator of an existing retail food facility shall submit an application, the required fee and be in compliance with this chapter prior to issuance of a renewed license by the Department or a licensor.

(c) *Change of ownership.* Licenses are nontransferable. New owners shall apply to the Department or licensor in accordance with § 46.1142 (relating to application procedure for appropriate license).

§ 46.1144. Conditions of retention: responsibilities of the retail food facility operator.

To retain a license issued by the Department or licensor under this chapter, a retail food facility operator shall do the following:

(1) Post the license in a location in the retail food facility that is conspicuous to consumers and the Department or licensor.

(2) Comply with this chapter—including the conditions of a granted variance as specified in § 46.1103(c) (relating to variances)—and approved plans as specified in § 46.1121(b) (relating to facility and operating plans).

(3) If a retail food facility is required in § 46.1122(a) (relating to HACCP plans) to operate under an HACCP plan, comply with the plan as specified in § 46.1103(c).

(4) Immediately contact the Department or licensor to report an illness of a food employee as specified in Subpart 2-201 of the Model Food Code, regarding responsibilities of permit holder, person in charge, food employees, and conditional employees.

(5) Immediately discontinue operations and notify the Department or licensor if an imminent health hazard may exist because of an emergency such as a fire, flood, extended interruption of electrical or water service, sewage backup, misuse of poisonous or toxic materials, onset of an apparent foodborne illness outbreak, gross unsanitary occurrence or condition, or other circumstance that may endanger public health. A retail food facility operator does not need to discontinue operations in an area of a facility that is unaffected by the imminent health hazard.

(6) Not resume operations discontinued in accordance with paragraph (5) or otherwise according to the Retail Food Facility Safety Act until approval is obtained from the Department or licensor.

(7) Allow representatives of the Department or licensor access to the retail food facility as specified in § 46.1101 (relating to access to retail food facilities).

(8) Except as specified in paragraph (9), replace existing facilities and equipment with facilities and equipment that comply with this chapter if either of the following occurs:

(i) The Department or licensor directs the replacement because the facilities and equipment constitute a public health hazard or no longer comply with the criteria upon which the facilities and equipment were accepted.

(ii) The facilities and equipment are replaced in the normal course of operation.

(9) Comply with directives of the Department or licensor including time frames for corrective actions specified in inspection reports, notices, orders, warnings and other directives issued by the Department or licensor in regard to the operator's retail food facility or in response to community emergencies.

(10) Accept notices issued and served by the Department or licensor according to the Retail Food Facility Safety Act.

(11) Remit a fee owed the Department under section 5703(j) of the Retail Food Facility Safety Act (relating to license required) within the time prescribed by the Department.

(12) Remit a civil penalty assessed against the retail food facility operator under the Retail Food Facility Safety Act or this chapter within 30 days of the later of either of the following:

(i) The effective date of the final adjudication assessing the civil penalty.

(ii) The expiration of the applicable deadline by which the final adjudication could be appealed to an appellate court of the Commonwealth.

Subchapter I. FOOD EMPLOYEE CERTIFICATION ACT COMPLIANCE

Sec.
46.1201. Food Employee Certification Act compliance.

§ 46.1201. Food Employee Certification Act compliance.

(a) *Statutory requirement.* The Food Employee Certification Act requires that a retail food facility have at least one employee who holds a valid certificate present at the retail food facility or immediately accessible at all hours of operation and who is the person in charge of the retail food facility when physically present and on duty.

(b) *General recognition of certification programs.* For purposes of compliance with the Food Employee Certification Act, the Department recognizes certification programs, including examinations developed under those programs, that are evaluated and listed by an accrediting agency that has been recognized by the Conference for Food Protection as conforming to the Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Program. A certificate of completion of a program is a "certificate" for purposes of the requirement in subsection (a) and is adequate proof of compliance.

(c) *Posting of certificate.* A retail food facility shall post the original certificate of its certified employee in public view at its business location.

(d) *List of acceptable certification programs.* The Department will maintain a current list of Department-recognized certification programs. The Department will:

(1) Publish the current list in the *Pennsylvania Bulletin* annually and when the list is revised.

(2) Post the current list on the Department's web site at www.agriculture.state.pa.us.

(3) Provide a copy of the current list upon request directed to the Department's Bureau of Food Safety and Laboratory Services at (717) 787-4315 or the following mailing address:

Pennsylvania Department of Agriculture
Bureau of Food Safety and Laboratory Services
ATTN: Food Employee Certification
2301 North Cameron Street
Harrisburg, Pennsylvania 17110-9408

Subpart C. MISCELLANEOUS PROVISIONS

CHAPTER 76. (Reserved)

§§ 76.1—76.17. (Reserved).

§ 76.19. (Reserved).

[Pa.B. Doc. No. 14-762. Filed for public inspection April 11, 2014, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA CODE CHS. 121 AND 139]

Measurement and Reporting of Condensable Particulate Matter Emissions

The Environmental Quality Board (Board) amends Chapters 121 and 139 (relating to general provisions; and sampling and testing) to read as set forth in Annex A.

This final-form rulemaking amends Chapter 139 to update and clarify what sampling and testing methods are used to demonstrate compliance with certain particulate matter (PM) emission limitations. The amendment to § 139.12(a) (relating to emissions of particulate matter) explains the process used for determining compliance with filterable PM emission standards in §§ 123.11—123.13 (relating to combustion units; incinerators; and processes). The amendments to § 139.12(b) and (c) explain the process used for determining compliance with filterable and condensable PM emission limitations. The amendment to § 139.12(d) explains the compliance demonstration process and clarifies that use of test methods and procedures that are not specified in the Source Testing Manual must be approved in writing by the Department. Subsection (e) adds a cross-reference to § 139.5 (relating to revisions to the source testing manual and the continuous source monitoring manual). The amendment to § 139.53 (relating to filing monitoring reports) specifies where monitoring reports must be filed.

In addition to these substantive changes, the final-form rulemaking amends Chapter 121 to add two terms and definitions in § 121.1 (relating to definitions)—"condensable particulate matter" and "filterable particulate matter."

This order was adopted by the Board at its meeting of November 19, 2013.

A. *Effective Date*

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

B. *Contact Persons*

For further information, contact Kirit Dalal, Chief, Division of Air Resource Management, P. O. Box 8468, Rachel Carson State Office Building, Harrisburg, PA 17105-8468, (717) 772-3436; 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 5(a)(1) of the Air Pollution Control Act (act) (35 P. S. § 4005(a)(1)), which grants the Board the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth, and section 5(a)(8) of the act, which grants the Board the authority to adopt rules and regulations designed to implement the Clean Air Act (CAA) (42 U.S.C.A. §§ 7401—7671q).

D. *Background and Purpose*

PM is the term for a mixture of solid particles and liquid droplets found in the air. Some particles, such as dust, dirt, soot and smoke, are large or dark enough to be seen with the naked eye. Other particles are so small they can only be detected using an electron microscope. PM includes "inhalable coarse particles," with diameters larger than 2.5 micrometers and smaller than 10 micrometers (PM-10), and "fine particles," with diameters that are 2.5 micrometers and smaller ($PM_{2.5}$). Epidemiological studies have shown a significant correlation between elevated levels of $PM_{2.5}$ and a number of serious health effects, including premature mortality, aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and restricted activity days), lung disease, decreased lung function, asthma attacks and certain cardiovascular problems such as heart attacks and cardiac arrhythmia. See 70 FR 944 (January 5, 2005) and 72 FR 20586 (April 25, 2007).

The United States Environmental Protection Agency (EPA) established the PM National Ambient Air Quality Standard (NAAQS) at 36 FR 8186 (April 30, 1971). The test method specified for determining attainment of the original standards was the high volume sampler, which collects filterable PM up to a nominal size of 25 to 45 micrograms (referred to as total suspended particulate). See 75 FR 80118, 80120 (December 21, 2010).

The Department of Environmental Resources, the predecessor agency to the Department, initially promulgated PM emission standards for combustion units, incinerators and processes under §§ 123.11—123.13 at 1 Pa.B. 1804 (September 11, 1971). Test methods for determining emissions of PM were promulgated under § 139.12 at 2 Pa.B. 383 (March 4, 1972). These methods included the use of both dry filters and wet impingers to test for filterable and condensable PM.

The Department deleted the requirement to use wet impingers to test for PM at 27 Pa.B. 6804 (December 27, 1997) because that provision was more stringent than the applicable Federal requirement and provided little environmental benefit. Under this change, the owners and operators of existing stationary sources subject to §§ 123.11—123.13 are only required to test for compliance with filterable PM emission standards.

The EPA revised the PM NAAQS to add a new standard for fine particles, using $PM_{2.5}$ as the indicator, at 62 FR 38652 (July 18, 1997). The EPA set the health-based (primary) and welfare-based (secondary) $PM_{2.5}$ annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$) and the 24-hour standard at a level of 65 $\mu g/m^3$. The health-based primary standard is designed to protect human health from elevated levels of $PM_{2.5}$. The secondary standard is designed to protect against major environmental effects of $PM_{2.5}$ such as visibility impairment, soiling and materials damage.

The EPA lowered the primary and secondary 24-hour NAAQS for $PM_{2.5}$ to 35 $\mu g/m^3$ from 65 $\mu g/m^3$ at 71 FR 61236 (October 17, 2006). The following counties or portions thereof have been designated by the EPA as nonattainment for the 2006 fine PM 24-hour NAAQS: Allegheny (partial), Armstrong (partial), Beaver, Bucks, Butler, Cambria, Chester, Cumberland, Dauphin, Delaware, Greene (partial), Indiana (partial), Lancaster, Lawrence (partial), Lebanon, Lehigh, Montgomery, Northampton, Philadelphia, Pittsburgh/Liberty-Clairton (partial), Washington, Westmoreland and York. See 74 FR 58688, 58758 (November 13, 2009).

Section 110 of the CAA (42 U.S.C.A. § 7410) requires state and local air pollution control agencies to develop, and submit to the EPA for approval, State Implementation Plans (SIP) that provide for the attainment, maintenance and enforcement of the NAAQS in each air quality control region (or portion thereof) within each state. The emissions inventories and analyses used in the state's attainment demonstrations must consider PM-10 and $PM_{2.5}$ emissions from stationary sources that are significant contributors of primary PM-10 and $PM_{2.5}$ emissions.

Section 51.50 of 40 CFR (relating to what definitions apply to this subpart) defines primary PM-10 and $PM_{2.5}$ as including both the filterable and condensable fractions of PM. Filterable PM consists of those particles that are directly emitted by a source as a solid or liquid at the stack (or similar release conditions) and captured on the filter of a stack test train. Condensable PM is the material that is in vapor phase at stack conditions but condenses or reacts, or both, upon cooling and dilution in the ambient air to form solid or liquid PM immediately after discharge from the stack. The Commonwealth defines primary PM-10 and $PM_{2.5}$ in a similar manner as measured by the applicable reference method or equivalent method. See § 121.1.

The EPA promulgated revisions to its test methods for measuring filterable PM-10 and $PM_{2.5}$ and for measuring condensable PM emissions from stationary sources at 75 FR 80118, which became effective on January 1, 2011. The final amendments to Method 201A add a particle-sizing device to allow for sampling of PM with mean aerodynamic diameters less than or equal to 2.5 micrometers ($PM_{2.5}$ or fine PM). The final amendments to Method 202 revise the sample collection and recovery procedures of the method to reduce the formation of reaction artifacts that could lead to inaccurate measurements of condensable PM. The Department incorporates Methods 201A and 202, and revisions to these methods, by reference in the Department's Source Testing Manual under § 139.4(5) (relating to references).

Final-form § 139.12(a) clarifies that the owner and operator subject to the PM emission standards under §§ 123.11—123.13 are only required to test for filterable PM as provided in paragraphs (1)—(5). These owners and operators are not subject to the condensable PM test requirements under final-form subsections (b)—(d).

Final-form § 139.12(b) clarifies that the owner or operator of a stationary source subject to PM-10 and $PM_{2.5}$ emission limitations shall demonstrate compliance with those limitations by including both filterable and condensable PM. This subsection also clarifies that the owner or operator of a stationary source subject to applicability determinations under Chapter 127, Subchapters D and E (relating to prevention of significant deterioration of air quality; and new source review) shall demonstrate compliance for filterable and condensable PM-10 and $PM_{2.5}$ emissions.

Final-form § 139.12(c) clarifies when compliance with a PM, PM-10 or $PM_{2.5}$ emission limitation must include condensable PM.

Final-form § 139.12(d) explains the compliance demonstration process for the measurement and reporting of filterable and condensable PM. Subsection (d) also clarifies that use of test methods and procedures that are not specified in the Source Testing Manual requires the Department's prior written approval.

Final-form § 139.12(e) adds a cross-reference to § 139.5.

Final-form § 139.53 amends where monitoring reports are filed.

The Department consulted with the Air Quality Technical Advisory Committee (AQTAC) on the final-form rulemaking on February 14, 2013. The AQTAC did not have comments and concurred with the Department's recommendation to present the final-form rulemaking to the Board for consideration. The Department also consulted with the Citizens Advisory Council (CAC) Policy and Regulatory Oversight Committee (Committee) on February 6, 2013. On the recommendation of the Committee, on February 19, 2013, the CAC concurred with the Department's recommendation to present the final-form rulemaking to the Board.

The final-form rulemaking only updates and clarifies the applicability of certain requirements to which the owners and operators of certain stationary sources are already subject. The final-form rulemaking does not impose new or additional requirements or compliance costs on these owners and operators.

The final-form rulemaking is reasonably necessary to attain and maintain the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS and to satisfy related CAA requirements.

The final-form rulemaking will be submitted to the EPA upon final-form publication as a revision to the Commonwealth's SIP codified in 40 CFR 52.2020 (relating to identification of plan).

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

§ 121.1. Definitions

Final-form § 121.1 is amended to add definitions for the terms "condensable particulate matter" and "filterable particulate matter" to support the final-form amendments to Chapter 139. These definitions are consistent with the Federal definitions. The Board deleted "primary" from the final-form definition of "condensable particulate matter" in response to public comments received. Changes were not made to the definition of "filterable particulate matter.

§ 139.12. Emissions of particulate matter

The final-form rulemaking designates the existing language in § 139.12 as subsection (a) and adds subsections (b)—(d) to clarify filterable and condensable PM testing applicability requirements. Subsection (a) clarifies that the listed test procedures are to determine emissions of filterable PM only and not condensable PM from affected stationary sources for compliance with the PM emission standards in §§ 123.11—123.13.

Subsection (b) provides that the owner or operator of a stationary source subject to emission limitations for PM-10 and $PM_{2.5}$ or to applicability determinations required under Chapter 127, Subchapters D and E shall demonstrate compliance for both filterable and condensable PM-10 and $PM_{2.5}$ emissions.

Subsection (c) provides that compliance with a PM, PM-10 or $PM_{2.5}$ emission limitation issued by the Department prior to January 1, 2011, may not be based on condensable PM unless required by the terms and conditions of a plan approval, operating permit or the SIP in 40 CFR 52.2020.

Subsection (d) provides that a compliance demonstration required under subsection (b) or (c) must include the measurement and reporting of filterable and condensable PM. Test methods and procedures must be equivalent to those specified in § 139.4(5).

Subsection (e) provides a cross reference to § 139.5 to clarify how the Department revises the Source Testing Manual.

§ 139.53. Filing monitoring reports

The final-form rulemaking amends § 139.53 to specify that the periodic emissions monitoring test reports shall be submitted to the applicable Regional Air Program Manager instead of the Regional Air Pollution Control Engineer and a copy of the report shall be submitted to the Chief of the Division of Source Testing and Monitoring. This amendment makes the filing of monitoring reports more efficient and timely.

F. *Summary of Major Comments and Responses*

Three commentators requested changes to the first sentence of § 139.12(c) to include PM-10 and $PM_{2.5}$ in addition to PM. The commentators explained this would clarify that condensable PM is not included in determining compliance with emission limits for PM-10 and $PM_{2.5}$ that were established prior to January 1, 2011, unless required by a plan approval, operating permit or the SIP codified in 40 CFR 52.2020. The Independent Regulatory Review Commission (IRRC) recommended that the Board either add this clarification or explain why it is unnecessary. The Board agrees. Final-form § 139.12(c) states that compliance with a PM, PM-10 or $PM_{2.5}$ emission limitation issued by the Department prior to January 1, 2011, will not be based on condensable PM unless required under the terms and conditions of a plan approval, operating permit or the SIP.

A commentator requested that the phrase "or an applicability determination made" be added to § 139.12(c) because the EPA intended for condensable emissions to be considered prospectively for both emission limitation compliance demonstrations and major New Source Review program applicability determinations. The Board disagrees that the additional language is necessary. The final-form rulemaking clarifies the filterable and condensable PM testing applicability requirements adequately. Limitations regarding review of applicability determinations made before January 1, 2011, remain as established in the EPA's final rule for Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$), published at 73 FR 28321 (May 16, 2008), and the EPA's final rule for Methods for Measurement of Filterable PM-10 and $PM_{2.5}$ and Measurement of Condensable PM Emissions From Stationary Sources, published at 75 FR 80118.

A commentator requested that § 139.12(c) be revised to expressly indicate that the Department will specify when an emission limitation for PM, PM_{10} or $PM_{2.5}$ is based on condensable emissions in addition to filterable emissions. The commentator asserted the regulated community understands a generic "particulate matter" emission limitation to mean filterable only, and that limitations expressed without specific reference to condensable emissions should be interpreted as filterable only. The Board revised final-form § 139.12(c) as previously explained. The Board disagrees with adding the commentator's other requested language because final-form § 139.13(c) clearly states that compliance with a PM emission limitation issued by the Department prior to January 1, 2011, will not be based on condensable PM unless required under the terms and conditions of a plan approval, operating permit or the SIP. Compliance with a PM emission limitation issued by the Department on and after January 1, 2011, will include condensable PM as specified in § 139.12(b) and (d).

A commentator recommended revising § 139.12(b) to clarify that the applicability of the substantive requirements in subsection (b) is limited by subsections (a) and (c), by adding the phrase "except as provided in (a) and (c)" at the end of the last sentence in § 139.12(b). The Board's response is that the requirements of subsection (b) are not limited by subsection (a) or (c). The owner and operator of a regulated stationary source are required to meet the Federal requirements for PM standards. The changes to the language and exceptions requested by the commentator would result in a regulation that does not comply with Federal requirements.

A commentator recommended deleting the first sentence of § 139.12(d), contending that this sentence is redundant with § 139.12(b) and inconsistent with § 139.12(c). The Board disagrees that § 139.12(d) is redundant with § 139.12(b). Section 139.12(b) requires that the owner or operator of a unit subject to emission limitations for PM-10 and $PM_{2.5}$ demonstrate compliance for filterable and condensable PM-10 and $PM_{2.5}$ emissions. The first sentence in § 139.12(d) requires the demonstration of compliance specified in § 139.12(b) to be made by measurement and reporting. The second sentence in § 139.12(d) follows by requiring that the measurement and reporting methods used are equivalent to the test methods and procedures specified in § 139.4(5). Further, the Board disagrees that § 139.12(d) conflicts with § 139.12(b). Testing of filterable and condensable emissions is required regardless of whether the condensable portion will be used in the compliance demonstration. A compliance demonstration under § 139.12(c) shall include the measurement and reporting of both filterable and condensable PM, regardless of whether the condensable portion is subject to compliance demonstration under subsection (c).

A commentator requested that the Board adopt EPA Conditional Test Method 039 as an equivalent alternative to EPA Test Methods 201A and 202. IRRC asked whether EPA Conditional Test Method 039 is equivalent to the methods specified in the Source Testing Manual. The Board's response is that the inclusion of a Federal Conditional Test Method in the final-form rulemaking, that may be subject to change or may never be finalized, would be improper. The owner or operator of an affected source may request the Department's approval to use Federal Conditional Test Method 039 as an alternative method on a case-by-case basis in accordance with § 139.12(d) and the Source Testing Manual referenced in § 139.4(5). Condensable PM is defined in § 1.3.1.3 of the Source Testing Manual, regarding definitions, as "The sum of the condensable organic particulate and the condensable inorganic particulate as determined by EPA Method 202 or an equivalent method."

A commentator recommended that the Board confirm that this rulemaking action will not affect the annual inventory required under § 135.3 (relating to reporting). The commentator asserted that operators are not currently required to include condensable emissions in the emission inventory. The Board agrees that this final-form rulemaking does not affect annual emission statement reporting requirements under § 135.21 (relating to emission statements) or annual emission inventory reporting requirements under § 135.3. Owners and operators of air contamination sources subject to those reporting requirements are presently required to report emissions of PM-10 and $PM_{2.5}$ in accordance with the Department's Instructions for Completing the Annual Emission Statement Reporting Forms. The Board disagrees with the commentator's assertion that operators are not currently required to include condensable emissions in the emission inventory. Condensable particulate emissions are a component of $PM_{2.5}$ and PM-10.

A commentator recommended that the Board clarify and address whether condensable emissions will be considered a regulated pollutant for purposes of calculating the Title V annual emission fees required under § 127.705 (relating to emission fees). IRRC noted it would review the Board's response to this comment as part of its determination of whether the final-form regulation is in the public interest. The Board responds that condensable PM emissions are already regulated pollutants and required to be included in the accounting of a facility's emissions of PM and reported for the purposes of calculating the Title V annual emission fees required under § 127.705. The final-form rulemaking does not add a separate fee for condensable PM emissions.

IRRC commented that § 139.12(d) is not clear regarding who makes the determination that a test method or procedure is equivalent to those specified in the Source Testing Manual. IRRC recommended that the subsection be revised to clarify who makes the determination. The Board agrees and clarifies that an owner or operator of a facility who wishes to use an alternative test method or procedure in place of a Commonwealth-specific test method or procedure specified in the Source Testing Manual must obtain the Department's prior written approval. In these cases, the Department would review the documentation provided by the owner or operator that demonstrates that the alternative test method or procedure provides results that are equivalent and would issue a written determination to the owner or operator. However, the EPA would review the documentation and make the determination of whether an alternative test method or procedure is equivalent to a test requirement required under a Federal law or regulation.

IRRC requested that the Board consider cross-referencing § 139.5 to clarify how the Department revises the Source Testing Manual. In response to IRRC's request, the Board added final-form § 139.12(e) to cross-reference § 139.5 as follows: The Source Testing Manual referenced in § 139.4(5) is subject to revision in accordance with the procedures in § 139.5 (relating to revisions to the source testing manual and continuous monitoring manual).

G. *Benefits, Costs and Compliance*

Benefits

The final-form rulemaking accounts for emissions of condensable PM, which contribute to the formation of $PM_{2.5}$ in the atmosphere. Because condensable emissions exist almost entirely in the 2.5 micrometer range and smaller, and epidemiological studies have shown a significant correlation between elevated $PM_{2.5}$ levels and premature death, aggravation of heart and lung disease and asthma attacks, attaining and maintaining the $PM_{2.5}$ NAAQS is inherently more significant to the management of public health and welfare effects than attaining and maintaining prior PM NAAQS addressing larger particles. Therefore, it is important that the Commonwealth's air quality management of $PM_{2.5}$ promote a comprehensive and inclusive approach to measuring condensable PM emissions. Improved data will support development of better control strategies to reduce emissions of condensable PM and improve public health and welfare in areas that are designated as nonattainment for $PM_{2.5}$.

Compliance Costs

Because this final-form rulemaking updates and clarifies the applicability of certain requirements to which owners and operators of certain stationary sources are already subject, the final-form rulemaking does not impose new or additional requirements or compliance costs on the owners and operators of these existing stationary sources.

Compliance Assistance Plan

The regulated community is comprised of companies with sophisticated and experienced environmental staff. The owners and operators of these facilities have prior experience with regulatory programs and are technically capable of implementing the amended EPA test methods. The Department will post information on its web site to assist the public in understanding the requirements placed on the owners and operators of subject facilities.

Paperwork Requirements

Because this final-form rulemaking updates and clarifies the applicability of certain requirements to which the owners and operators of certain stationary sources are already subject, the final-form rulemaking does not impose additional paperwork requirements on the owners and operators of these existing stationary sources.

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 major pollution prevention mechanism in the final-form rulemaking is to ensure a comprehensive, inclusive and accurate approach to measuring condensable PM emissions. Improved data will support the development of better control strategies to reduce emissions of condensable PM and improve public health and welfare in areas that are designated as nonattainment for $PM_{2.5}$.

I. *Sunset Review*

This final-form rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether 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 June 22, 2012, the Department submitted a copy of the notice of proposed rulemaking, published at 42 Pa.B. 4363 (July 7, 2012), 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 February 26, 2014, 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 February 27, 2014, 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 the comments were considered.

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 42 Pa.B. 4363.

(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 necessary and appropriate to implement provisions of the CAA.

L. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapters 121 and 139, are amended by amending §§ 121.1, 139.12 and 139.53 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(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 the Independent Regulatory Review Commission 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 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 44 Pa.B. 1534 (March 15, 2014).)

Fiscal Note: Fiscal Note 7-477 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 121. GENERAL PROVISIONS

§ 121.1. Definitions.

The definitions in section 3 of the act (35 P. S. § 4003) apply to this article. In addition, the following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Computer diskette jacket manufacturing adhesive—An adhesive intended by the manufacturer to glue the fold-over flaps to the body of a vinyl computer diskette jacket.

Condensable particulate matter—Material that is vapor phase at stack conditions but which condenses or reacts, or both, upon cooling and dilution in the ambient air to form solid or liquid particulate matter immediately after discharge from the stack. All condensable particulate matter, if present from a source, is typically in the $PM_{2.5}$ size fraction and therefore all of it is a component of both $PM_{2.5}$ and PM-10.

Confined space—A space that is the following:

(i) Large enough and so configured that an employee can enter and perform assigned work.

(ii) Has limited or restricted means for entry or exit—for example, fuel tanks, fuel vessels and other spaces that have limited means of entry.

(iii) Not suitable for continuous employee occupancy.

* * * * *

Fiberglass—

(i) For purposes of §§ 129.301—129.310 (relating to control of NO_x emissions from glass melting furnaces), material consisting of fine filaments of glass that are combined into yarn and woven or spun into fabrics, or that are used as reinforcement in other materials or in masses as thermal or as acoustical insulating product.

(ii) For purposes of §§ 129.77 and 130.702 (relating to control of emissions from the use or application of adhesives, sealants, primers and solvents; and emission standards), a material consisting of extremely fine glass fibers.

Filterable particulate matter—Particles directly emitted by a source as a solid or liquid at the stack, or similar release conditions, and captured on the filter of a stack test train.

Final repair coat—Liquids applied to correct imperfections or damage to the topcoat.

* * * * *

CHAPTER 139. SAMPLING AND TESTING

Subchapter A. SAMPLING AND TESTING METHODS AND PROCEDURES

STATIONARY SOURCES

§ 139.12. Emissions of particulate matter.

(a) Tests for determining emissions of filterable particulate matter from stationary sources to demonstrate compliance with the particulate matter emission standards in §§ 123.11—123.13 (relating to combustion units; incinerators; and processes) shall conform with the following:

(1) Test methods for particulate matter emissions shall include dry filters and provide for at least a 95% collection efficiency of particulate matter.

(2) Isokinetic sampling procedures shall be used in sampling for particulate matter emissions and the weight determined gravimetrically after the removal of uncombined water.

(3) Test methods and procedures shall be equivalent to those specified in § 139.4(5) (relating to references). The equipment shall be inert where appropriate and similar to that specified in § 139.4(1).

(4) The minimum sampling time shall be 1 hour or as specified in an applicable standard or by the Department and the minimum sample volume shall be 50 cubic feet or as specified in an applicable standard or by the Department, corrected to standard conditions (dry basis).

(5) Results shall be calculated based upon sample train component weights specified in § 139.4(5). Results shall be reported as pounds of particulate matter per hour and in accordance with the units specified in §§ 123.11—123.13.

(b) The owner or operator of a stationary source subject to emission limitations for PM-10 and $PM_{2.5}$ or to applicability determinations required under Chapter 127, Subchapters D and E (relating to prevention of significant deterioration of air quality; and new source review) shall demonstrate compliance for filterable and condensable PM-10 and $PM_{2.5}$ emissions.

(c) Compliance with a particulate matter, PM-10 or $PM_{2.5}$ emission limitation issued by the Department prior to January 1, 2011, will not be based on condensable particulate matter unless required under the terms and conditions of a plan approval, operating permit or the State Implementation Plan codified in 40 CFR 52.2020 (relating to identification of plan).

(d) A compliance demonstration required under subsection (b) or (c) must include the measurement and reporting of filterable and condensable particulate matter. Test methods and procedures used to determine compliance must be equivalent to those specified in § 139.4(5). An owner or operator must obtain the Department's prior written approval for the use of methods and procedures that are not prescribed in the Source Testing Manual.

(e) The Source Test Manual referenced in § 139.4(5) is subject to revision in accordance with the procedures in § 139.5 (relating to revisions to the source testing manual and continuous source monitoring manual).

Subchapter B. MONITORING DUTIES OF CERTAIN SOURCES

GENERAL

§ 139.53. Filing monitoring reports.

(a) Persons responsible for the operation of sources subject to monitoring requirements established by order, by condition of plan approval or permit or under this subchapter, shall submit periodic reports of the results of tests, samples or observations conducted, obtained or made in accordance with the methods or techniques referenced in § 139.52 (relating to monitoring methods and techniques). The reports shall be:

(1) Submitted on forms supplied or in a format specified by the Department.

(2) Sworn by the person exercising managerial responsibility over the operation of the source for which monitoring is required.

(3) Submitted on the schedule established by order, condition of plan approval or permit or this subchapter.

(4) Submitted to the Regional Air Program Manager for the region of the Department in which the source is located and a copy to the Chief of the Division of Source Testing and Monitoring.

(b) In addition to the information required by subsection (a) the Department may, by use of a standard form or by written notice, require information regarding test methods, test conditions, operating conditions of the source or other information which may be necessary to properly evaluate the results of emissions monitoring performed at a source.

[Pa.B. Doc. No. 14-763. Filed for public inspection April 11, 2014, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF BARBER EXAMINERS

[49 PA. CODE CH. 3]

Fees

The State Board of Barber Examiners (Board) amends § 3.103 (relating to fees) to read as set forth in Annex A. The final-form rulemaking increases the biennial license renewal fees for all licensees of the Board and adjusts certain application fees to cover the costs of processing those applications.

Effective Date

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*. The new application fees will be implemented immediately upon publication of the final-form rulemaking. The new biennial renewal fees will take effect for the biennial renewal period beginning May 1, 2014.

Statutory Authority

Section 14(b) of the act of June 19, 1931 (P. L. 589, No. 202) (63 P. S. § 564(b)), known as the Barbers' License Law (act), 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 14 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 vast majority of its revenue through biennial renewal fees. A small percentage of its revenue comes from application fees and civil penalties.

The biennial renewal fees have not been increased since the final-form rulemaking published at 18 Pa.B. 2106 (May 7, 1988). Biennial renewal fees support the general operations of the Board. Licensees are charged the biennial renewal fees when they renew their licenses which expire on April 30 of even-numbered years. Application fees, on the other hand, are intended to offset the costs associated with the processing of the various applications and related inspections. The last time application fees were adjusted was in 2001. See 31 Pa.B. 1225 (March 3, 2001).

At the June 25, 2012, 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 Year (FY) 2009-2010 and FY 2010-2011 and projected revenue and expenses through FY 2014-2015. The BFO pointed out that as of June 2012, in spite of it being a renewal year, the Board incurred a deficit of $46,816.71. Projected revenues for FY 2012-2013, a nonrenewal year, were estimated at approximately $85,000. However, the Board's projected expenditures for the current fiscal year are in the area of $640,000, resulting in a projected deficit as of June 2013 of $601,816.71. The BFO projected that, without an increase to the biennial renewal fees, the Board will incur additional deficits totaling approximately $686,816.71 in FY 2013-2014 and $1,281,816.71 in FY 2014-2015. At that time, the BFO recommended that the Board consider increasing the biennial renewal fees by 205% to recoup the existing deficits and provide adequate revenues to meet the Board's operational needs. The Board voted to table the matter until the August 2012 meeting and asked the BFO to provide them with some options.

Thereafter, representatives from the BFO returned to the August 20, 2012, Board meeting. At that time, they presented the Board with various options. The Board selected an option that would raise biennial renewal fees by 200% which would eliminate all deficits by the end of FY 2017-2018 and provide a positive, albeit declining, balance in the Board's account through FY 2023-2024. The Board previously voted to adjust certain application fees to more appropriately reflect the current costs of processing the applications. These adjustments were also included in the proposed rulemaking.

Summary of Comments

The Board published the proposed rulemaking at 43 Pa.B. 1854 (April 6, 2013) with a 30-day public comment period. The Board did not receive comments from the public. On May 24, 2013, the Board received comments from the House Professional Licensure Committee (HPLC). On June 5, 2013, the Independent Regulatory Review Commission (IRRC) submitted comments to the Board.

The HPLC requested additional information pertaining to the major cost centers of the Board and explaining any significant increases in its expenditures. IRRC indicated that it would review the Board's response to the HPLC's comment as part of its determination of whether the rulemaking is in the public interest.

Response by the Board

In response, the Board first notes that it has been over 1 year since the BFO first met with the Board suggesting that a fee increase was necessary. Therefore, the Board asked the BFO to provide an updated analysis of the Board's fiscal situation based on current data. The BFO provided updated information to the Board which was discussed at the Board's regularly scheduled meeting on August 19, 2013. Two changes in the Board's current

financial condition were noted at that meeting. First, the number of active licensees has increased since the proposed increase 1 year ago. Second, the Board has been able to reduce expenditures below the projections of 1 year ago so that the projected deficits have been reduced slightly. For example, when the Board approved the increase in August 2012, the BFO projected a negative fund balance at the end of FY 2012-2013 (a nonrenewal year) of approximately $601,816.71. However, the actual balance at the end of FY 2012-2013 came in at $546,230.78. The combination of the increase in renewable licenses and the small decrease in the existing deficit led the BFO to conclude that the proposed 200% increase could be lowered to a 160% increase and still be sufficient to recoup existing deficits, cover anticipated operational costs and allow the Board to return to firm financial ground.

As for the major cost centers of the Board, the largest cost center for the Board is "enforcement and investigation" which has averaged approximately $264,263 annually since FY 2006-2007. All costs incurred by the regulatory enforcement inspectors and professional conduct investigators associated with inspections of barber shops and schools and investigations of complaints involving barbers, barber shops and barber schools are included in this cost center. Enforcement and investigation costs account for over 40% of the Board's expenditures each year. Board administration costs and costs associated with the legal office combined account for another 35% of the Board's expenditures. Board administration costs include all costs associated with receiving and reviewing applications and issuing licenses. These costs have averaged $121,735 since FY 2006-2007. "Legal office" costs are those costs associated with the prosecution of disciplinary actions involving licensees of the Board and defending those actions on appeal. This cost center also includes the costs associated with the promulgating regulations pertaining to the practice of the profession. Legal office costs have averaged approximately $90,670 per year since FY 2006-2007. Finally, the costs associated with the Professional Compliance Office and hearing expenses average $41,937 and $25,797 per year, respectively. Together these five cost centers make up 90% of the Board's expenditures. The remaining 10% consists of costs associated with the Commissioner's office, revenue office, departmental services and Board member expenses.

The major driving force behind the fee increase is not significant increases in expenditures, but rather the fact that the Board has not raised fees since 1988. Historically, the Board enjoyed a healthy balance in its "account" and elected not to increase its fees because the Board preferred to reduce the significant surplus of available funds. When it became apparent that a fee increase was necessary in 2008, for reasons beyond the Board's control, it was not promulgated in time to go into effect for the 2010 renewal. In 2010, a renewed effort was made to promulgate a fee increase for the 2012 renewal. With the change in administration in 2011, the Board's efforts were refocused as the Board worked with the BFO to explore options to reduce expenditures to mitigate any necessary fee increase. As a result, projected expenditures have been reduced from a high of $675,812.92 in FY 2010-2011 to $573,770.82 in FY 2011-2012 and $550,000 (projected) in FY 2012-2013. However, because there was not a fee increase in 2010 or 2012, the Board began incurring deficits, which now amount to $546,230.76 as of the end of FY 2012-2013. Without a fee increase at this time, even with the decreases in expenditure, these deficits will continue to mount because the Board currently produces approximately $671,000 in biennial revenues at the current fee levels, while incurring biennial expenditures of approximate $1.151 million, a difference of $480,000.

Description of Amendments

Based upon the current expense and revenue estimates provided to the Board, the Board is amending § 3.103 to increase the biennial renewal fees for all classes of licensees. The biennial renewal fees will increase in 2014 by 160%: $42 to $109 for barbers; $62 to $161 for barber shop managers; $67 to $174 for barber teachers; $72 to $187 for barber shops; and $112 to $291 for barber schools. A change has not been made to the proposed application fees, as these fees were designed to cover the costs associated with processing each application. Therefore, the fee for initial licensure by reciprocity will increase from $20 to $55 and the application fee for initial licensure of a barber shop will increase from $55 to $110. Conversely, the fee for initial licensure of a barber school will be reduced from $280 to $140. There are two fees the Board charges when a barber shop proposes a change depending on whether the proposed change requires an inspection. The Board is increasing the fee when an inspection is required from $55 to $90 and when no inspection is required from $15 to $40. Similarly, the fee to reinspect a shop or school after a failed inspection is being increased from $40 to $90.

Fiscal Impact

The final-form rulemaking will increase the biennial renewal fees for licensees of the Board. There are currently approximately 9,731 licensees that will be required to pay more to renew their licenses when they expire on April 30, 2014. In addition, applicants for various licenses will incur greater costs associated with processing applications and conducting inspections. 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 March 25, 2013, the Board submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 1854, 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 February 26, 2014, 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 February 27, 2014, and approved the final-form rulemaking.

Contact Person

Further information may be obtained by contacting Kelly Diller, Board Administrator, State Board of Barber Examiners, P.O. Box 2649, Harrisburg, PA 17105-2649, RA-BARBER@pa.gov.

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 comments were received.

(3) The amendments to the final-form rulemaking do not enlarge the purpose of the proposed rulemaking published at 43 Pa.B. 1854.

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

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapter 3, are amended by amending § 3.103 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*.

JOHN E. PAYNE, Jr.,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 1534 (March 15, 2014).)

Fiscal Note: Fiscal Note 16A-428 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 3. STATE BOARD OF BARBER EXAMINERS

SCHOOLS OF BARBERING

§ 3.103. Fees.

The schedule of fees charged by the Board is as follows:

Licensure of barber, barber shop manager or barber teacher $10

Licensure of barber by reciprocity $55

Licensure of barber shop $110

Licensure of barber school $140

Biennial renewal of barber license $109

Biennial renewal of barber shop manager license . $161

Biennial renewal of barber teacher license $174

Biennial renewal of barber shop license $187

Biennial renewal of barber school license $291

Change in barber shop—inspection required $90

Change in barber shop—no inspection required $40

Reinspection after first fail—new or change (shop or school) $90

Verify license/permit/registration $15

Certification of student status or student training hours $30

[Pa.B. Doc. No. 14-764. Filed for public inspection April 11, 2014, 9:00 a.m.]

STATE BOARD OF COSMETOLOGY

[49 PA. CODE CH. 7]

Fees—Cosmetology

The State Board of Cosmetology (Board) amends § 7.2 (relating to fees) to read as set forth in Annex A. The final-form rulemaking provides for an increase to the biennial license renewal fees for all licensees and increases certain application fees to cover the costs of processing those applications.

Effective Date

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*. The new application fees will be implemented immediately upon publication of the final-form rulemaking. The new biennial renewal fees will be implemented with the license renewals that are due by January 31, 2015.

Statutory Authority

Section 16(c) and (d) of the act of May 3, 1933 (P. L. 242, No. 36) (63 P. S. § 522(c) and (d)), known as the Cosmetology Law (act), 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 16(d) 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 vast majority of its revenue through biennial renewal fees. A small percentage of its revenue comes from application fees.

At the present fee level, the Board produces approximately $6.287 million in revenue over a 2-year period. Conversely, the Board is budgeted to spend $4.1 million in the current fiscal year and an estimated $4.223 million in Fiscal Year (FY) 2014-2015, or a deficit of over $2.036 million during the biennial cycle. The disparity in the amount of revenue capable of being produced over a 2-year period and the amount that is being expended requires the Board to now implement a 90% fee increase to sustain the required level of operations and eliminate mounting deficits. As of the end of FY 2012-2013, the Board has incurred deficits totaling nearly $3 million.

The Department of State's Bureau of Finance and Operations (BFO) anticipates that the fees will enable the Board to recoup the existing deficits by the end of FY 2017-2018, avoid future deficits and place the Board back on solid financial ground. Without the increases to these fees, deficits will threaten the continuing viability of the Board.

Summary of Comments

The Board published the proposed rulemaking at 43 Pa.B. 1855 (April 6, 2013) with a 30-day public comment period. The Board did not receive public comments. On May 24, 2013, the Board received comments from the House Professional Licensure Committee (HPLC). On June 5, 2013, the Independent Regulatory Review Commission (IRRC) submitted comments to the Board.

The HPLC requested additional information pertaining to the major cost centers of the Board and explaining any significant increases in its expenditures. IRRC indicated that it would review the Board's response to the HPLC's comment as part of its determination of whether the rulemaking is in the public interest.

Response by the Board

In response, the Board first notes that it has been over 1 year since the BFO last met with the Board suggesting that the fee increase was necessary. Therefore, the Board asked the BFO to provide an updated analysis of the Board's fiscal situation based on current data. The BFO provided updated information to the Board which was discussed at the Board's regularly scheduled meeting on September 16, 2013. Although the renewable licensee count has increased slightly, there has not been appreciable improvement in the Board's financial condition since 1 year ago. At that time, the BFO projected that the total deficit balance in the Board's "account" at the end of FY 2012-2013 would be approximately $2,958,500; the actual balance as of June 30, 2013, is now projected to be in the area of $2,902,400. The Board attributes this $50,000 difference in part to the increase in renewable licenses from 131,335 to 134,035 over the past year. However, the increase is not statistically significant enough to warrant a change in the proposed fee increases. Based on the Board's current financial status, even with the increased fees, the Board will not have a positive balance in its account until FY 2017-2018.

As for the major cost centers of the Board, the largest cost center for the Board is "enforcement and investigation" which has averaged approximately $1.2 million annually since FY 2006-2007. All costs incurred by the regulatory enforcement inspectors and professional conduct investigators associated with inspections of salons and schools and investigations of complaints involving licensees of the Board, licensed salons and schools are included in this cost center. Enforcement and investigation costs account for about 1/3 of the Board's expenditures each year. Board administration costs and costs associated with the legal office combined account for another 35% of the Board's expenditures. Board administration costs include all costs associated with receiving and reviewing applications and issuing licenses. These costs have averaged slightly more than $1 million annually since FY 2006-2007. "Legal office" costs are those costs associated with the prosecution of disciplinary actions involving licensees of the Board and defending those actions on appeal. This cost center also includes the costs associated with the promulgating regulations pertaining to the practice of the profession. Legal office costs have averaged approximately $500,000 per year since FY 2006-2007. Finally, the costs associated with the Professional Compliance Office and hearing expenses average $200,000 and $135,000 per year, respectively. Together these five cost centers make up 80% of the Board's expenditures. The remaining 20% consists of costs associated with the Commissioner's office, revenue office, departmental services and Board member expenses.

The major driving force behind the fee increase is not significant increases in expenditures. In fact, expenditures have not increased appreciably since FY 2006-2007. Total expenditures follow: FY 2007-2008—$3,659,505.80; FY 2008-2009—$3,840,825.42; FY 2009-2010—$3,816,867.37; FY 2010-2011—$3,877,457.59; FY 2011-2012—$3,475,451.32; and FY 2012-2013—$3,868,533.90. The Board has held the line on expenditures over these years. The need for a fee increase became apparent in FY 2007-2008 when expenditures significantly outpaced revenues for the first time (by approximately $500,000). As a result, the Board began regulatory efforts to increase its fees in 2009 (anticipating that the new fees would be in place for the 2011 renewals). However, due to circumstances beyond the Board's control, that fee increase was not implemented. With the change in administration in 2011, the Board's efforts were refocused as the Board worked with the BFO to explore options to reduce expenditures to mitigate any necessary fee increase. As a result, in FY 2011-2012, expenditures dropped from the prior year by approximately $400,000. However, in FY 2012-2013, expenditures rebounded back to the prior level. Unfortunately, starting in FY 2007-2008, the Board began incurring annual deficits, where annual expenditures outpaced annual revenues by amounts averaging approximately $665,000 each year. As a result, the balance in the Board's account has been depleted, to the degree that the Board now has a negative "balance" of nearly $3 million. Because the increased biennial renewal fees are not expected to be implemented until the renewals in January 2015, the BFO projects the total deficit will reach nearly $4 million before the situation begins to turn around.

Description of Amendments

Based upon the previous expense and revenue estimates provided to the Board, the Board is amending § 7.2 to increase the biennial renewal fees for all classes of licensees. The biennial renewal fee for cosmetologists, nail technicians, estheticians and natural hair braiders will increase from $35 to $67. The biennial renewal fee for cosmetology and limited practice teachers will increase from $55 to $105. The biennial renewal fee for cosmetology and limited practice salons will increase from $60 to $114. Finally, biennial renewal of cosmetology school licenses will increase from $150 to $285.

In addition, as a result of the review of the application fees conducted by the BFO, the Board is increasing the fees for the processing of applications for initial licensure of cosmetology and limited practice salons from the current level of $55 to $100. The fee schedule would increase the fee for cosmetology schools from $160 to $180. In addition, the Board is increasing the fees required to process a change in a salon license when an inspection is required from $55 to $85 and for reinspection of a salon or school from $40 to $85. In addition, the fee for processing a change to a salon license when an inspection is not required is increasing from $15 to $30. Finally, the Board is increasing the fees for processing an application for licensure by reciprocity from $20 to $60.

Fiscal Impact

The final-form rulemaking will increase the biennial renewal fees for all licensee classifications. There are

currently about 134,035 licensees expected to renew their licenses during the 2015 and 2016 renewal cycles. In addition, applicants for various licenses will incur greater costs associated with processing applications and conducting inspections. The final-form rulemaking should not have other fiscal impact on the private sector, the general public or political subdivisions.

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 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 March 25, 2013, the Board submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 1855, 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 February 26, 2014, 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 February 27, 2014, and approved the final-form rulemaking.

Contact Person

Further information may be obtained by contacting Kelly Diller, Board Administrator, State Board of Cosmetology, P.O. Box 2649, Harrisburg, PA 17105-2649, ra-cosmetology@pa.gov.

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 comments were received.

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

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapter 7, are amended by amending § 7.2 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*.

KARIE M. SCHOENEMAN,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 1534 (March 15, 2014).)

Fiscal Note: Fiscal Note 16A-4515 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 7. STATE BOARD OF COSMETOLOGY

GENERAL PROVISIONS

§ 7.2. Fees.

Fees charged by the Board are as follows:

Licensure of cosmetologist, nail technician, esthetician or natural hair braider	$10
Licensure of cosmetology teacher or limited practice teacher	$10
Licensure of cosmetology salon or limited practice salon	$100
Licensure of cosmetology school	$180
Licensure by reciprocity	$60
Registration of cosmetology apprentice	$70
Biennial renewal of nail technician license	$67
Biennial renewal of esthetician license	$67
Biennial renewal of cosmetologist license	$67
Biennial renewal of natural hair braider license	$67
Biennial renewal of cosmetology teacher or limited practice teacher license	$105
Biennial renewal of cosmetology salon or limited practice salon license	$114
Biennial renewal of cosmetology school license	$285
Approval of cosmetology school supervisor	$20
Change in cosmetology salon or limited practice salon (inspection required)	$85
Change in cosmetology salon or limited practice salon (no inspection required)	$30
Change in cosmetology school (inspection required)	$110
Change in cosmetology school (no inspection required)	$35
Reinspection of cosmetology salon or limited practice salon or cosmetology school	$85
Certification of student or apprentice training hours	$30
Verification of license, registration, permit or approval	$15

[Pa.B. Doc. No. 14-765. Filed for public inspection April 11, 2014, 9:00 a.m.]