

RULES AND REGULATIONS

Title 28—HEALTH AND SAFETY

DEPARTMENT OF HEALTH

[28 PA. CODE CH. 26]

Opioid Treatment Agreements; Temporary Regulations

The Department of Health (Department) is publishing temporary regulations regarding the Opioid Treatment Agreements. Authority to promulgate these temporary regulations is found in section 52B03 of the act of November 27, 2019 (P.L. 764, No. 112) (Act 112). The authority granted to the Department under section 52B03 provides for the Department to promulgate temporary regulations within 90 days of the effective date of Act 112. Section 52B03 further provides that the temporary regulations are not subject to sections 201—205 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201—1205), known as the Commonwealth Documents Law, the Regulatory Review Act (71 P.S. §§ 745.1—745.14) and sections 204(b) and 301(10) of the Commonwealth Attorneys Act (71 P.S. §§ 732-204(b) and 732-301(10)).

The Department engaged various stakeholders in the drafting of these temporary regulations prior to their submission and received various helpful comments. One such comment questioned the use of urine testing (which is the only testing that is specifically mentioned under Act 112). The commenter raised the issue that some individuals cannot produce urine for drug testing and questioned whether other types of drug tests were permissible. As a result of this comment, the Department will allow for other drug testing only when a patient, out of medical necessity, cannot produce urine for drug testing. The Department believes that allowing the exception for other drug tests under this limited and rare circumstance is reasonable and within the parameters of Act 112. Therefore, in these temporary regulations, the Department has added a provision in subsection 26.4(h) addressing this issue.

The Department made a few other changes in the regulations as well. The Department clarified the definition of “individual” to mean a natural person who is at least 18 years of age. The Department added the definition for “prescription” or “prescription order” as defined in section 2 of The Controlled Substance, Drug, Device and Cosmetic Act (35 P.S. § 780-102). This addition was a result of comments received that requested clarification as to what exactly constituted a prescription, as differentiated from direct administration of a drug, since that term is used in the statute but was not defined. Section 26.4(a)(3) of the temporary regulations sets forth the items which must be included in an opioid treatment agreement. This regulatory section combines the requirements of section 52B02(a)(3) and (b) of the act so that all requirements are located in one place. The Department added a provision regarding the termination of Opioid Treatment Agreements based on comments received. Commenters requested detail regarding when they may terminate Opioid Treatment Agreements. Finally, the Department added a provision regarding its role in enforcement. Section 26.5(b) was added based on questions from commenters as to when and how the Department would enforce Act 112. Since the Department has no enforcement authority and all enforcement is delegated to

the appropriate licensing boards, the Department will refer any known complaints to those boards.

In drafting these temporary regulations, the Department reached out to stakeholders affected by Act 112. Pennsylvania Osteopathic Medical Association, Pennsylvania Medical Society, Pennsylvania Coalition of Nurse Practitioners, the Pennsylvania Society of Physician Assistants, the Achieving Better Care by Monitoring All Prescriptions Advisory Committee, the Hospital and Healthsystem of Pennsylvania, and the Safe and Effective Opioid Prescribing Practices Task Force were engaged in the drafting of these temporary regulations and were provided an opportunity to comment. All comments were considered and, where appropriate, the temporary regulations were modified in response to comments received. Following implementation, if further guidance is necessary, the Department may address other comments by means of a “Frequently Asked Questions” page published on the Department’s web site.

For additional information or persons with a disability who require an alternative format of this document (for example, large print, audiotope, Braille) contact Peter Blank, Executive Policy Specialist, Department of Health, Harrisburg, PA at (717) 547-3454, or for speech and/or hearing impaired persons, call the Pennsylvania AT&T Relay Service at (800) 654-5984 (TDD users) or (800) 654-5988 (voice users).

RACHEL L. LEVINE, MD,
Secretary

(Editor’s Note: Title 28 of the Pennsylvania Code is amended by adding temporary regulations in §§ 26.1—26.5 as set forth in Annex A.)

Fiscal Note: 10-220. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 28. HEALTH AND SAFETY

PART III. PREVENTION OF DISEASES

CHAPTER 26. OPIOID TREATMENT AGREEMENTS—TEMPORARY REGULATIONS

Sec.	
26.1.	Purpose.
26.2.	Legal basis.
26.3.	Definitions.
26.4.	Procedures.
26.5.	Penalties.

§ 26.1. Purpose.

This chapter provides for the regulation of Opioid Treatment Agreements for those prescribers and individuals who are required to enter into these agreements when opioids are prescribed for the treatment of chronic pain.

§ 26.2. Legal basis.

(a) This chapter is promulgated by the Department under the powers granted and the duties mandated by section 52B03 of the act of November 27, 2019 (P.L. 764, No. 112) (Act 112).

(b) The Department has the power to promulgate temporary regulations within 90 days of the effective date of Act 112. The temporary regulations shall not be subject to:

(1) Sections 201—205 of the act of July 31, 1968 (P.L. 769, No. 240), known as the Commonwealth Documents Law.

(2) Sections 204(b) and 301(10) of the act of October 15, 1980 (P.L. 950, No. 164), known as the Commonwealth Attorneys Act (71 P.S. §§ 732-204(b) and 732-301(10)).

(3) The act of June 25, 1982 (P.L. 633, No. 181) (71 P.S. §§ 745.1—745.14) known as the Regulatory Review Act.

§ 26.3. Definitions.

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

Acute pain—Pain that comes on quickly, may be severe, but lasts a relatively short time and is provoked by a specific condition or injury.

Baseline test—The initial assessment through a urine drug test to:

- (1) identify the presence of an illegal substance prior to prescribing a controlled substance; or
- (2) assess the presence or absence of a prescribed drug or drug class.

Chronic pain—Pain that persists or progresses over a period of time that may be related to another medical condition and is resistant to medical treatment. The term does not include acute pain.

Controlled substance—A drug, substance or immediate precursor included in Schedules II—V of section 4 of the act of April 14, 1972 (P.L. 233, No. 64) (35 P.S. §§ 780-101—780-144), known as The Controlled Substance, Drug, Device and Cosmetic Act.

Definitive drug test—A qualitative or quantitative urine drug test used to identify specific drugs, specific drug concentrations and associated metabolites.

Department—The Department of Health of the Commonwealth.

Individual—A natural person who is at least 18 years of age.

Medical emergency—A situation that, in the good faith professional judgment of the prescriber, creates a time sensitive threat of serious risk to the life or physical health of a person. The term includes treatment received in an emergency department or urgent care center under the act of November 2, 2016 (P.L. 976, No. 122), known as the Safe Emergency Prescribing Act (35 P.S. §§ 873.1—873.9).

Opioid—Any of the following:

- (1) A preparation or derivative of opium.
- (2) A synthetic narcotic that has opiate-like effects but is not derived from opium.
- (3) A group of naturally occurring peptides that bind to or otherwise influence opiate receptors, including an opioid agonist.

Periodic test—A urine drug test that screens for a selection of drugs.

Prescriber—As defined in the act of October 27, 2014 (P.L. 2911, No. 191), known as the Achieving Better Care by Monitoring All Prescriptions Program (ABC-MAP) Act (35 P.S. §§ 872.1—872.40).

Prescription or prescription order—A written, oral or electronic order for a controlled substance, other drug or medication, or device for medication which is dispensed to or for an ultimate user but does not include an order for a controlled substance, other drug or medication, or device for medication which is dispensed for immediate administration to the ultimate user.

Presumptive positive drug test—A urine drug test that is used to identify suspected possible use or nonuse of drugs or a drug class that may be followed by a definitive test to specifically identify drugs or metabolites.

Targeted test—A urine drug test ordered at the discretion of a prescriber, based on observation of the prescriber and related circumstances that enhance clinical decision making.

Treatment agreement—A document signed by a prescriber and individual that contains a statement to ensure that the individual understands:

- (1) Treatment responsibilities.
- (2) The conditions of medication use.
- (3) The conditions under which the treatment of the individual may be terminated.
- (4) The responsibilities of the prescriber.

§ 26.4. Procedures.

(a) *Prescriber requirements.* Except as specified in subsection (c), before issuing an individual the first prescription in a single course of treatment for chronic pain with a controlled substance containing an opioid, regardless of whether the dosage is modified during that course of treatment, a prescriber shall:

- (1) Assess whether the individual has taken or is currently taking a prescription drug for treatment of a substance use disorder.
- (2) Discuss with the individual:
 - (i) The risks of addiction and overdose associated with the controlled substance containing an opioid.
 - (ii) The increased risk of addiction to a controlled substance if the individual suffers from a mental disorder or substance use disorder.
 - (iii) The dangers of taking a controlled substance containing an opioid with benzodiazepines, alcohol or other central nervous system depressants.
 - (iv) Other information deemed appropriate by the prescriber under 21 CFR 201.57(c)(18) (relating to specific requirements on content and format of labeling for human prescription drug and biological products described in § 201.56(b)(1)).
 - (v) The nonopioid treatment options available for treating chronic noncancer pain, if applicable, that are consistent with the best practices per the Pennsylvania Opioid Prescribing Guidelines.

(3) Review and sign a treatment agreement form that includes:

- (i) The goals of the treatment.
- (ii) The consent of the individual to a targeted test in a circumstance where the physician or prescriber determines that a targeted test is medically necessary. The treatment of chronic pain shall be consistent with the Pennsylvania Opioid Prescribing Guidelines.
- (iii) The prescription drug prescribing policies of the prescriber, which policies include:
 - (A) A requirement that the individual take the medication as prescribed.
 - (B) A prohibition on sharing the prescribed medication with other individuals.
 - (iv) A requirement that the individual inform the prescriber about any other controlled substances prescribed or taken by the individual.

(v) Any reason why the opioid therapy may be changed or discontinued by the prescriber.

(vi) Appropriate disposal methods for opioids that are no longer being used by the individual as specified in a consultation with the prescriber.

(vii) The brand name or generic name, quantity and initial dose of the controlled substance containing an opioid being prescribed.

(viii) A statement indicating that a controlled substance is a drug or other substance that the United States Drug Enforcement Administration has identified as having a potential for abuse.

(ix) A statement certifying that the prescriber engaged in the discussion under subsection (a)(2).

(x) The signature of the individual and the date of signing. The prescriber may utilize electronic methods to obtain the signature of the individual and the date of signing.

(4) Obtain written consent for the prescription from the individual. The prescriber may utilize electronic methods to obtain the written consent of the individual.

(5) Record the consent under subsection (a)(4) on the treatment agreement form in subsection (a)(3).

(b) The treatment agreement form under subsection (a)(3) shall be maintained by the prescriber in the medical record of the individual.

(c) *Urine drug testing.*

(1) A baseline test, periodic test or targeted test shall be used to establish a general assessment for an individual new to treatment for chronic pain and in monitoring adherence to an existing individual treatment plan, as well as to detect the use of a nonprescribed drug.

(2) A baseline test shall be required prior to the issuance of the initial prescription for chronic pain and shall include confirmatory or quantitative testing of presumptive positive drug test results.

(3) An individual who is treated for addiction or an individual who is considered moderate or high risk by the prescriber shall be tested at least once annually or as frequently as necessary to ensure therapeutic adherence.

(d) *Exception.* Subsection (c) shall not apply if the treatment of an individual with a controlled substance containing an opioid is associated with or incident to:

(1) A medical emergency documented in the medical record of the individual.

(2) The management of pain associated with cancer.

(3) The use in palliative or hospice care.

(4) The professional judgment of the prescriber under subsections (a)(1) and (2).

(e) *Documentation of exception.* If subsection (d) applies, the prescriber shall document in the individual's medical record the factor under subsection (d) that the prescriber believes applies to the individual.

(f) A prescriber may terminate the treatment agreement form under subsection (a)(3) if the prescriber has reasonable belief, based on standards of professional practice, that the treatment agreement is no longer necessary.

(g) If a prescriber terminates a treatment agreement under subsection (f), the prescriber shall:

(1) Document the reason for the termination of the treatment agreement in the individual's medical record.

(2) Inform the individual of the termination of the treatment agreement.

(3) If necessary, work with the individual, to the fullest extent possible, to ensure continuity of care as outlined under 49 Pa. Code § 16.61(a)(17) (relating to unprofessional and immoral conduct).

(h) *Urine testing exception.* If, because of a medical necessity, an individual is unable to produce urine for the urine drug testing required herein, a different type of drug test may be used that is at least equivalent in accuracy to a urine drug test approved by the Food and Drug Administration. Alternative drug tests may not be substituted for urine drug tests under any other circumstances.

§ 26.5. Penalties.

(a) A violation of this chapter by a prescriber shall be subject to sanctions under the prescriber's professional practice act and by the appropriate licensing board.

(b) The Department will refer a complaint of a violation of this chapter, if known to the Department, to the appropriate licensing board for sanctions under subsection (a).

[Pa.B. Doc. No. 20-320. Filed for public inspection March 6, 2020, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

[49 PA. CODE CH. 43b]

Technical Corrections to Schedules of Civil Penalties

The Acting Commissioner of Professional and Occupational Affairs (Commissioner) hereby amends §§ 43b.4, 43b.8, 43b.9, 43b.12a, 43b.13a and 43b.14a, pertaining to schedules of civil penalties, to read as set forth in Annex A.

Effective Date

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

Statutory Authority

Section 5(a) of the act of July 2, 1993 (P.L. 345, No. 48) (Act 48) (63 P.S. § 2205(a)) authorizes the Commissioner, after consultation with licensing boards in the Bureau of Professional and Occupational Affairs (Bureau), to promulgate a schedule of civil penalties for violations of the acts or regulations of the licensing boards.

Background and Purpose

Act 48 authorizes agents of the Bureau to issue citations and impose civil penalties under schedules adopted by the Commissioner in consultation with the Bureau's boards and commissions. Act 48 citations streamline the disciplinary process by eliminating the need for formal orders to show cause, answers, adjudications and orders, and consent agreements. At the same time, licensees who receive an Act 48 citation retain their due process right to

a hearing prior to the imposition of the civil penalty. The use of Act 48 citations has increased steadily since 1996, when the program was first implemented, and they have become an important part of the Bureau's enforcement efforts.

Over time, some of the statutory and regulatory provisions cited in the schedules of civil penalties have been either amended, renumbered or repealed, resulting in incorrect legal authority being used by agents of the Bureau when issuing citations for violations subject to the civil penalty schedules. In addition, some of the existing legal citations have been held to be incorrect by the Office of Hearing Examiners in administrative enforcement proceedings and therefore need to be corrected. These regulations are needed to make technical corrections to the civil penalty schedules to assure that the correct legal authority is being cited when agents of the Bureau issue citations for violations set forth in the civil penalty schedules. Failure to make these technical corrections will adversely affect the Bureau's enforcement efforts and cause additional delays and expense to both the Commonwealth and the licensees due to the need to initiate formal disciplinary proceedings under the relevant practice act or regulations instead of simply issuing a citation under Act 48.

Omission of Proposed Rulemaking

Under section 204(3) of the Commonwealth Documents Law (CDL) (45 P.S. § 1204(3)), the Commissioner is authorized to omit the procedures for proposed rulemaking in sections 201 and 202 of the CDL (45 P.S. §§ 1201 and 1202) if the Commissioner finds that the specified procedures are impracticable, unnecessary or contrary to the public interest.

Publication of proposed rulemaking is unnecessary because the rulemaking is needed to correct legal citations to the provisions of the acts and regulations, to remove outdated provisions and to restructure some of the schedules, but does not make any substantive changes to the civil penalties to be imposed for the violations set forth in the schedules, therefore public comment is not necessary. It is also contrary to the public interest because until the legal citation is corrected, enforcement efforts are adversely impacted in that citations issued with incorrect legal citation have been dismissed necessitating the refiling of formal disciplinary proceedings, causing unneeded delay and additional expense for the parties.

Description of Amendments

Section 43b.4 Schedule of civil penalties—barbers and barber shops

The Commissioner is restructuring the civil penalty schedules for licensees of the State Board of Barber Examiners (Barber Board) to include citations to the regulations of the Barber Board wherever possible to aid clarity. Language of the statute is archaic and is often confusing, while the regulations are much clearer in establishing the duties of licensees. Thus, where a violation is found in both the act of June 19, 1931 (P.L. 589, No. 202), commonly referred to as the Barber Licensure Law (63 P.S. §§ 551—567), and in the regulations of the Barber Board, the Commissioner is amending the schedule to include both references. In addition, the Commissioner is relocating the civil penalties that rely on regulatory provisions alone so that all violations are contained in one schedule. (Currently, there is a schedule for violations of the Barber Licensure Law, and a schedule for violations of the Barber Board's regulations.) No substantive changes were made to the schedules of civil penalties that were relocated.

For violations relating to practicing barbering or operating a barber shop or school on a lapsed or expired license, the Commissioner is deleting the existing reference to the statutory provisions in sections 8 and 12(a)(2) (63 P.S. §§ 558 and 562(a)(2)) because they have been routinely held by the Office of the Hearing Examiners to support a violation only when the licensee has been convicted of a summary offense in a criminal proceeding. Instead, the Commissioner is replacing these statutory provisions with the regulatory provision at § 3.15(a) (relating to escrow of licenses and failure to renew), which clearly provides the duty of a licensee to biennially register one's license, and that a licensee is not permitted to practice in this Commonwealth while unregistered. The Commissioner is also including the term "unregistered" in the schedule of civil penalties to be consistent with the language used in § 3.15(a). Currently, for violations of operating a business or facility without a license, the statutory authority in 63 P.S. § 560 is cited. However, it is section 12(a)(1) of the Barber Licensure Law that requires "[a]ny copartnership, corporation, or person desiring to operate or conduct a barber shop or barber school, shall first secure from the board a license to do so. . ." Therefore, the statutory authority for operating a business or facility without a license has been corrected. In addition, the Commissioner is replacing the generic terms "business or facility" and "establishment" where they are used in the schedule of civil penalties with the more specific terms "shop" or "school" because these are the only types of businesses/facilities/establishments licensed by the Barber Board. Finally, the Commissioner is deleting the references to "permits" because the Barber Board does not issue permits to operate a shop or school—rather, the Barber Board issues licenses.

Section 43b.8 Schedule of civil penalties—real estate and cemetery brokers, real estate schools

The Commissioner is amending the schedule of civil penalties that applies to licensees of the State Real Estate Commission (Commission) to correct the statutory authority for the violation of section 609(b) of the Real Estate Licensing and Registration Act (RELRA) (63 P.S. § 455.609(b)), which sets forth the duty of a licensee to include the right-of-cancellation information in a time share or campground membership contract. The Commissioner is also removing the schedule for the violation of § 35.245(b) (relating to display of licenses in office) for "failure to display current license" which was deleted in the 2005 amendments to the Commission's regulations. The schedule of civil penalties was not updated at that time to remove the corresponding violation from the schedule, so that oversight is being corrected. The Commissioner is also correcting the regulatory provision cited for the violation of "failure of broker or cemetery broker to maintain a list of licensees employed or affiliated with the broker or cemetery broker at the branch office out of which each licensee works." Currently, the schedule identifies the regulatory provision as § 35.245(c), which is now subsection (b). This amendment was also made in 2005, and the schedule of civil penalties was not corrected at that time.

In addition, the Commissioner is correcting the description of the various violations pertaining to § 35.361 (relating to display of documents and approved name) because this section was amended in 2004, while the schedule of civil penalties was not updated to reflect those revisions. Real estate schools are now referred to as "real estate education providers" and § 35.361 was revised to have only three subsections with revised language. The revised language is now reflected in the

schedule of civil penalties. Specifically, § 35.361(a) was revised to eliminate the requirement that a real estate education provider prominently display a copy of its certificate of approval at any satellite locations. This subset of violation is therefore being removed from the schedule of civil penalties. Subsection (b) was revised to require all real estate education providers to prominently display the approved name “at each location where courses are taught” instead of “outside each school location.” This change in language is being reflected in the revised schedule of civil penalties. Finally, the schedules of civil penalties for violations of § 35.361(c) and (d) are being deleted. The Commissioner is also correcting some typographical errors in the schedule of civil penalties.

Section 43b.9 Schedule of civil penalties—vehicle manufacturers, dealers and salespersons

The act of October 24, 2018 (P.L. 816, No. 134) (Act 134 of 2018) made omnibus amendments to the Board of Vehicles Act (63 P.S. §§ 818.1—818.37) which, among other things, renumbered the entire act. The amendments made by Act 134 of 2018 were effective in 1 year—specifically, on October 24, 2019. Therefore, it is necessary to amend the statutory provisions cited in the schedule of civil penalties to correspond to the renumbered sections. In addition, all of the violations under 49 Pa. Code § 19.18 (relating to established place of business for dealers) need to be corrected because they refer to subsection (a)(1)—(9). However, there is no subsection (a) in § 19.18. There are only paragraphs (1)—(9).

Section 43b.12a Schedule of civil penalties—auctioneers, apprentice auctioneers, auction houses and auction companies

The Commissioner is amending the schedule of civil penalties for violations under the Auctioneer Licensing and Trading Assistant Registration Act (Auctioneer Act) (63 P.S. §§ 734.1—734.34) to correspond to the 2016 amendments made to the Auctioneer Act, including the repeal of sections 9, 10, 11 and 17. First, pertaining to the violation for “Auctioneer or apprentice auctioneer operating on a lapsed license in this Commonwealth,” the Commissioner is adding additional statutory authority in section 5 of the Auctioneer Act (63 P.S. § 734.5(e)), which clearly sets forth the duty of a licensee to renew one’s license biennially. Next, the Commissioner is deleting all violations related to auction houses, as the 2016 amendments eliminated this licensure class. All violations for unlicensed practice have been amended to refer to section 3(a) of the Auctioneer Act (63 P.S. § 734.3(a)), which clearly provides that it is unlawful for any person to engage in the business or profession of an auctioneer, apprentice auctioneer or an auction company without first obtaining a license. Additionally, the violations pertaining to duties of licensees to enter into written contracts and to keep contracts on file in the office of the auctioneer (formerly located in section 17) are now found in section 15.1 of the Auctioneer Act (63 P.S. § 734.15.1) as amended in 2016.

Section 43b.13a Schedule of civil penalties—engineers, land surveyors and geologists

The current schedule of civil penalties provides that, among other violations, a licensee of the State Registration Board for Professional Engineers, Land Surveyors and Geologists may be cited for failure to complete the required amount of continuing education in violation of section 4.5(a) of the Engineer, Land Surveyor and Geologist Registration law (Engineer Law) (63 P.S. § 151.5(a)). However, section 4.5(a) of the Engineer Law merely

provides that the public interest requires continuing professional competency. It is section 4.5(b) that requires licensees to meet the continuing professional competency requirements as a condition of licensure renewal, and section 4.5(c) that specifically requires licensees to obtain 24 professional development hours each biennial renewal cycle. The current schedule thus cites to an incorrect section of the Engineer Law. See *Evans v. State Reg. Bd. For Prof. Engineers, Land Surveyors and Geologists*, 15 A.3d 99 (Pa. Cmwlth. 2011) (holding that licensee cannot be disciplined for “violating” a section of the act that empowers a licensing board to do tasks but does not impose any duties on licensees). This final-omitted rulemaking corrects the schedule to cite to section 4.5(b) and (c) (63 P.S. § 151.5(b) and (c)).

Section 43b.14a Schedule of civil penalties—dentists, dental hygienists and expanded function dental assistants

In August of 2000, the State Board of Dentistry amended its regulations in § 33.105 (relating to biennial renewal of licenses and certificates). At that time, a new subsection was added and the existing subsection (b), which prohibited practice on a lapsed license or certificate, became subsection (c). However, no amendment was made to the corresponding schedule of civil penalties for practicing on a lapsed license/certificate. This final-omitted rulemaking corrects that oversight.

Fiscal Impact and Paperwork Requirements

There is no fiscal impact and no paperwork requirements are associated with this final-omitted rulemaking.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P.S. § 745.5a(c)), on January 16, 2020, the Commissioner submitted a copy of the final-omitted rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) and the House Professional Licensure Committee (HPLC). On the same date, the regulations were submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101—732-506).

Under sections 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a (j.2)), this final-omitted rulemaking was deemed approved by the House and Senate Committees. The Attorney General approved the amendment on February 13, 2020. Under section 5.1(e) of the Regulatory Review Act, IRRC met and approved this final-omitted rulemaking.

Additional Information

For additional information about the final-omitted rulemaking, submit inquiries to the Bureau of Professional and Occupational Affairs, P.O. Box 2649, Harrisburg, PA 17105-2649, ST-BPOA@pa.gov.

Findings

The Commissioner finds that:

(1) Public notice of the Commissioner’s intention to amend these regulations under the procedures in sections 201 and 202 of the Commonwealth Documents Law (CDL) (45 P.S. §§ 1201 and 1202) has been omitted under section 204 of the CDL (45 P.S. § 1204) because publication of proposed rulemaking is unnecessary in that the amendments simply correct legal citations contained in the schedules, remove outdated provisions and restructure some of the schedules, but do not make any substan-

tive changes to the civil penalties to be imposed. It is also contrary to the public interest because citations issued with incorrect legal citations have been dismissed, necessitating the refile of formal disciplinary proceedings resulting in unneeded delay and additional expense for the parties.

(2) The amendment of the regulations in the manner provided in this order is necessary and appropriate to effectuate the purposes of Act 48 and to aid in the enforcement efforts of the Bureau.

Order

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

(a) The regulations at 49 Pa. Code are amended by amending §§ 43b.4, 43b.8, 43b.9, 43b.12a, 43b.13a and 43b.14a to read as set forth in Annex A.

(b) The Commissioner shall submit this order and Annex A to the Office of General Counsel and the Office

of Attorney General for approval as to form and legality as required by law.

(c) The Commissioner shall submit this order and Annex A to IRRC, the SCP/PLC and the HPLC as required by law.

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

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

K. KALONJI JOHNSON,
Acting Commissioner

(Editor's Note: See 50 Pa.B. 1482 (March 7, 2020) for IRRC's approval order.)

Fiscal Note: 16A-062. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 43b. COMMISSIONER OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

Subchapter A. SCHEDULE OF CIVIL PENALTIES, GUIDELINES FOR IMPOSITION OF CIVIL PENALTIES AND PROCEDURES FOR APPEAL

§ 43b.4. Schedule of civil penalties—barbers and barber shops.

STATE BOARD OF BARBER EXAMINERS

<i>Violation under 35 P.S.</i>	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 637.6(a)(1)	Failure of licensed barber shop or school to post a sign as required under section 4 of the Clean Indoor Air Act (35 P.S. § 637.4)	1st offense—\$250 2nd offense (within 1 year of 1st offense)—\$500 3rd offense (within 1 year of 2nd offense)—\$1,000 Subsequent offenses (within 1 year of previous offense)—\$1,000
Section 637.6(a)(2)	Barber shop permitting smoking in the barber shop or barber school permitting smoking in the barber school in violation of the Clean Indoor Air Act (35 P.S. §§ 637.1—637.11)	1st offense—\$250 2nd offense (within 1 year of 1st offense)—\$500 3rd offense (within 1 year of 2nd offense)—\$1,000 Subsequent offenses (within 1 year of previous offense)—\$1,000
Section 637.6(a)(3)	Licensee of the Board smoking in a barber shop or in a barber school in violation of the Clean Indoor Air Act	1st offense—\$250 2nd offense (within 1 year of 1st offense)—\$500 3rd offense (within 1 year of 2nd offense)—\$1,000 Subsequent offenses (within 1 year of previous offense)—\$1,000
<i>Violation under 63 P.S.</i>	<i>Violation under 49 Pa. Code Chapter 3</i>	<i>Title/Description</i>
Section 551	N/A	Practicing without a license
Section 557	Section 3.13(a)	Availability of current license on premises
		<i>Civil Penalty</i>
		1st offense—\$500 2nd offense—Formal action
		1st offense—\$150 2nd offense—\$500

<i>Violation under 63 P.S.</i>	<i>Violation under 49 Pa. Code Chapter 3</i>	<i>Title/Description</i>	<i>Civil Penalty</i>
N/A	Section 3.15(a)	Practicing on a lapsed or expired (unregistered) license	1st offense—Up to 90 days—Warning; 90 days to 1 year—\$250; 1 year to 2 years—\$500; over 2 years—\$1,000 2nd offense—Formal action
N/A	Section 3.15(a)	Operating a shop or school on a lapsed or expired (unregistered) license	1st offense—Up to 90 days—Warning; 90 days to 1 year—\$250; from 1 year to 2 years—\$500; over 2 years—\$1,000 2nd offense—Formal action
Section 559(a)(6)	Section 3.14(a)	Failure to employ licensed persons	1st offense—\$500 for each individual unlicensed barber 2nd offense—Formal action
Section 560	Section 3.51(a)	Opening shop for business before shop inspected and approved	1st offense—\$200 2nd offense—Formal action
Section 560	Section 3.51(a)	Failure to file application when taking over as owner of an existing shop	1st offense—\$500 2nd offense—Formal action
Section 562	N/A	Operating a shop without supervision of designated manager barber or other designated licensee	1st offense—\$250 2nd offense—Formal action
Section 562(a)(1)	N/A	Operating a shop or school without a license	1st offense—\$500 2nd offense—Formal action
Section 560	Section 3.51(a)	Failure to obtain a new shop license when shop moves	1st offense—\$500 2nd offense—Formal action
Section 563(a)	Section 3.14(b)	Licensee practicing in place other than licensed shop	1st offense—\$500 2nd offense—Formal action
N/A	Section 3.51(b)	Failure to register trade name	1st offense—\$100 2nd offense—Formal action
N/A	Section 3.54	Failure to meet minimum equipment requirements	1st offense—\$100 2nd offense—Formal action
N/A	Section 3.55	Failure to meet minimum maintenance and sanitation requirements	1st offense—\$100 2nd offense—Formal action
N/A	Section 3.85	School equipment does not meet requirements	1st offense—\$100 2nd offense—Formal action
N/A	Section 3.86	School maintenance and sanitation requirements not met	1st offense—\$250 2nd offense—Formal action
N/A	Section 3.89	School advertising requirements not met	1st offense—\$250 2nd offense—Formal action

§ 43b.8. Schedule of civil penalties—real estate and cemetery brokers, real estate education providers.

STATE REAL ESTATE COMMISSION

<i>Violation under 35 P.S.</i>	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 637.6(a)(1)	Failure of broker or cemetery broker to post a sign in a real estate office or cemetery office or real estate education provider to post a sign in a real estate school as required under section 4 of the Clean Indoor Air Act (35 P.S. § 637.4)	1st offense—\$250 2nd offense (within 1 year of 1st offense)—\$500 3rd offense (within 1 year of 2nd offense)—\$1,000 Subsequent offenses (within 1 year of previous offense)—\$1,000
Section 637.6(a)(2)	Broker or cemetery broker permitting smoking in a real estate or cemetery office or real estate education provider permitting smoking in a real estate school in violation of the Clean Indoor Air Act (35 P.S. §§ 637.1—637.11)	1st offense—\$250 2nd offense (within 1 year of 1st offense)—\$500 3rd offense (within 1 year of 2nd offense)—\$1,000 Subsequent offenses (within 1 year of previous offense)—\$1,000

<i>Violation under 35 P.S.</i>	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 637.6(a)(3)	Licensee of the Commission smoking in a real estate office, cemetery office or real estate school in violation of the Clean Indoor Air Act	1st offense—\$250 2nd offense (within 1 year of 1st offense)—\$500 3rd offense (within 1 year of 2nd offense)—\$1,000 Subsequent offenses (within 1 year of previous offense)—\$1,000
<i>Violation under 63 P.S.</i>	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 455.301	Acting in capacity of cemetery broker or cemetery salesperson without a license	1st offense—\$250 per violation 2nd offense—\$500 per violation
Section 455.601(a)	Failure of licensee to notify Commission of change of location of office of broker or cemetery broker within 10 days	1st offense—\$125 2nd offense—\$250
Section 455.601(a)	Failure of broker or cemetery broker to maintain sign with licensed name outside office	1st offense—\$250 2nd offense—\$500
Section 455.603	Failure of licensee to notify Commission of change of employing broker within 10 days	1st offense—\$125 2nd offense—\$250
Section 455.604(a)(4)	Use of any trade name or insignia or membership in any real estate association or organization of which the licensee is not a member	1st offense—\$250 2nd offense—\$500
Section 455.604(a)(8)	Placing a “for sale” or “for rent” sign or advertising property without the written consent of the owner	1st offense—\$250 2nd offense—\$500
Section 455.604(a)(16)	Failure to exercise adequate supervision of licensed salesperson or associate broker (when subordinate violates § 455.601(a), § 455.603 or § 455.604(a)(21))	Same as penalty for underlying offense by subordinate
Section 455.604(a)(21)	Failure of licensee to have current license when performing licensed activity	1st offense—\$250 per month up to \$1,000 2nd offense—Formal action
Section 455.609(b)	Failure to include right-of-cancellation information in a time share or campground membership	1st offense—\$500 2nd offense—\$1,000
Section 2205(b)(2)	Aiding and abetting cemetery or real estate sales activities by unlicensed individuals	1st offense—\$250 per individual 2nd offense—\$500 per individual
<i>Violation under 49 Pa. Code Chapter 35</i>	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 35.242(a)	Failure of broker or cemetery broker to devote office to transaction of real estate business in privacy	1st offense—\$125 2nd offense—\$250
Section 35.242(b)	Failure of broker or cemetery broker to maintain separate entrance to office located in private residence	1st offense—\$125 2nd offense—\$250
Section 35.242(c)	Failure of broker or cemetery broker to display business name prominently and in permanent fashion outside office	1st offense—\$250 2nd offense—\$500
Section 35.243(a)	Failure of broker or cemetery broker to obtain license before opening branch office	1st offense—\$250 2nd offense—\$500
Section 35.245(a)	Failure of broker, cemetery broker or rental listing referral agent to maintain the current license of employed or affiliated licensees at main office	1st offense—\$125 2nd offense—\$250
Section 35.245(b)	Failure of broker or cemetery broker to maintain a list of licensees employed or affiliated with the broker or cemetery broker at the branch office out of which each licensee works	1st offense—\$125 2nd offense—\$250
Section 35.285	Failure to provide Commission or its representative with information regarding a franchisor, network or other parent real estate company with which the licensee is or may become affiliated	1st offense—\$250 2nd offense—\$500

*Violation under
49 Pa. Code
Chapter 35*

	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 35.286(a)	Failure of broker to retain a copy of the written estimate of reasonably foreseeable expenses required under 49 Pa. Code § 35.334 (relating to statements of estimated cost and return)	1st offense—\$250 2nd offense—\$500
Section 35.286(a)(1)	Failure of broker, associate broker or salesperson to retain a copy of the acknowledgement portion of the Consumer Notice	1st offense—\$250 2nd offense—\$500
Section 35.286(b)	Failure of a licensed entity other than an individual to produce its corporate, partnership or association records for examination by the Commission or its authorized representative	1st offense—\$250 2nd offense—\$500
Section 35.290(b)	Failure of a licensee to notify the Commission of disciplinary action taken against the licensee by the real estate licensing authority of another jurisdiction within 30 days of receiving notice of the disciplinary action	1st offense—\$500 2nd offense—\$1,000
Section 35.292(a)(6)	Failure of broker, associate broker or salesperson to provide a copy of the Consumer Notice as required under 63 P.S. § 455.608 (relating to information to be given at initial interview)	1st offense—\$250 2nd offense—\$500
Section 35.301(a)	Advertising the sale or lease of real estate without the authority of the seller or lessor or its agent	1st offense—\$250 2nd offense—\$500
Section 35.301(b)	Publishing information about a rental property if the lessor or property manager expressly stated that the property was not to be included in lists prepared by rental listing referral agents	1st offense—\$250 2nd offense—\$500
Section 35.304	Failure of a licensee who sells or leases his own real estate to disclose in ads for the property that he is a licensee	1st offense—\$250 2nd offense—\$500
Section 35.305(a)	Failure of broker, cemetery broker or rental listing referral agent to advertise or hold himself out to public under business name designated on license	1st offense—\$250 2nd offense—\$500
Section 35.305(b)	Advertising or using a nickname that has not been registered with the Commission	1st offense—\$250 2nd offense—\$500
Section 35.305(c)	Failure of salesperson or associate broker to include the business name and telephone number of the broker in at least equal size as the salesperson's or associate broker's name and telephone number on an advertisement	1st offense—\$250 2nd offense—\$500
Section 35.334	Failure of broker to provide a written estimate of reasonably foreseeable expenses	1st offense—\$250 2nd offense—\$500
Section 35.361(a)	Failure of real estate education provider to prominently display certificate of approval at main location	1st offense—\$125 2nd offense—\$250
Section 35.361(b)	Failure of real estate education provider to prominently display approved name at each location where courses are taught	1st offense—\$250 2nd offense—\$500

§ 43b.9. Schedule of civil penalties—vehicle manufacturers, dealers and salespersons.

STATE BOARD OF VEHICLE MANUFACTURERS, DEALERS AND SALESPERSONS

*Violation under
35 P.S.*

	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 637.6(a)(1)	Failure of vehicle dealer, branch lot, public or retain vehicle auction, or wholesale vehicle auction to post a sign as required under section 4 of the Clean Indoor Air Act.	1st offense—\$250 2nd offense (within 1 year of 1st offense)—\$500 3rd offense (within 1 year of 2nd offense)—\$1,000 Subsequent offenses (within 1 year of previous offense)—\$1,000

<i>Violation under 35 P.S.</i>	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 637.6(a)(2)	Vehicle dealership, branch lot, public or retail vehicle auction, or wholesale vehicle auction permitting smoking in an area where smoking is prohibited by the Clean Indoor Air Act (35 P.S. §§ 637.1—637.11)	1st offense—\$250 2nd offense (within 1 year of 1st offense)—\$500 3rd offense (within 1 year of 2nd offense)—\$1,000 Subsequent offenses (within 1 year of previous offense)—\$1,000
Section 637.6(a)(3)	Licensee of the Board smoking in an area of the vehicle dealership, branch lot, public or retail vehicle auction or wholesale vehicle auction where smoking is prohibited by the Clean Indoor Air Act	1st offense—\$250 2nd offense (within 1 year of 1st offense)—\$500 3rd offense (within 1 year of 2nd offense)—\$1,000 Subsequent offenses (within 1 year of previous offense)—\$1,000
<i>Violation under 63 P.S.</i>	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 818.303(a)	Person or entity engaging in business of vehicle dealer, auction, manufacturer or distributor without license or acting as broker	Each offense—\$1,000
Section 818.303(a)	Person engaging in business as a factory representative or distributor representative without a license	1st offense—\$100 2nd offense—\$500 3rd offense—\$1,000
Section 818.303(a)	Individual working as unlicensed salesperson for dealership	1st offense—\$100 2nd offense—\$500 3rd offense—Formal action
Section 818.303(c)	Licensed salesperson working as salesperson for dealership other than for whom salesperson is licensed	1st offense—\$100 2nd offense—\$500 3rd offense—Formal action
Section 818.303(d)	Failure to display license in principal office	1st offense—\$100 2nd offense—\$500 3rd offense—Formal action
Section 818.303(h)	Vehicle auction not posting list of revoked/suspended licensees	1st offense—\$250 2nd offense—\$500 3rd offense—Formal action
Section 818.318(15)	Licensed dealer employing unlicensed salesperson	1st offense—\$500 2nd offense—\$1,000 3rd offense—Formal action
Section 818.318(29)	Wholesale auction permitting unlicensed or revoked or currently suspended dealer or vehicle business to buy, sell or represent vehicle at auction	1st offense—\$250 2nd offense—\$500 3rd offense—\$1,000 Subsequent offense—Formal action
Section 818.318(30)	Dealer permitting revoked or currently suspended salesperson to sell, represent or purchase vehicle at auction	1st offense—\$500 2nd offense—\$1000 3rd offense—Formal action
Sections 818.303(a) and 818.318(27)	Licensed dealer operating an unlicensed branch lot	1st offense—\$1,000 2nd offense—Formal action
Sections 818.303(f)(5) and (g)(1) and 818.318(38)	Person with revoked or currently suspended dealer or salesperson license physically present during auctioning of vehicles	Each offense \$1,000
Section 818.318(34)	Licensed dealer conducting its business under any name other than its licensed name	1st offense—\$250 2nd offense—\$500 3rd offense—Formal action
Section 818.318(37)	Licensed dealer failing to produce records to an authorized agent of the Board	1st offense—\$500 2nd offense—\$1,000 3rd offense—Formal action

<i>Violations under 49 Pa. Code Chapter 19</i>	<i>Title/Description</i>	<i>Civil Penalty</i>
Section 19.17	Broker or dealer business identity combined with other businesses	1st offense—\$100 2nd offense—\$500
Section 19.18(1)	Dealer does not have permanent enclosed building	1st offense—\$100 2nd offense—\$500
Section 19.18(2)	Dealership does not have private office	1st offense—\$100 2nd offense—\$500
Section 19.18(3)(i)(A)	Dealer display area for five vehicles or 5,000 square feet	1st offense—\$100 2nd offense—\$500
Section 19.18(3)(ii)	Display lot not graded and surfaced with required material	1st offense—\$100 2nd offense—\$500
Section 19.18(3)(iii)	Display area separated from adjacent parking area	1st offense—\$100 2nd offense—\$500
Section 19.18(3)(iv)	Display area lighted if open evenings	1st offense—\$100 2nd offense—\$500
Section 19.18(5)	Dealer fails to maintain separate telephone line	1st offense—\$100 2nd offense—\$500
Section 19.18(6)	Business sign not permanent or visible to the public	1st offense—\$100 2nd offense—\$500
Section 19.18(7)	Dealership in violation of land use ordinances	1st offense—\$100 2nd offense—\$500
Section 19.18(9)	Failure to post business hours	1st offense—\$100 2nd offense—\$500

§ 43b.12a. Schedule of civil penalties—auctioneers, apprentice auctioneers and auction companies.

STATE BOARD OF AUCTIONEER EXAMINERS

<i>Violation Under 63 P.S.</i>	<i>Violations Under Title 49 Chapter 1</i>	<i>Description of Violation</i>	<i>Penalties</i>
Sections 734.3(a), 734.5(e) and 734.20(a)(9)	N/A	Auctioneer or apprentice auctioneer operating on a lapsed license in this Commonwealth.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action
Sections 734.3(a) and 734.20(a)(9)	N/A	Engaging in unlicensed auctioneering activities in this Commonwealth.	1st offense—\$1,000 2nd offense—formal action
Sections 734.3(a) and 734.20(a)(9)	N/A	Operating as an unlicensed auction company in this Commonwealth.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action
Sections 734.3(a)(1), 734.5(e) and 734.20(a)(9)	N/A	Operating an auction company on a lapsed license in this Commonwealth.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action
Section 734.20(a)(12)	N/A	Failure of an auctioneer to establish or maintain an escrow account.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action
Sections 734.21 and 734.20(a)(9)	N/A	Failure of an auctioneer to immediately deposit gross auction sale proceeds into an escrow account.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action
Sections 734.15.1 and 734.20(a)(9)	N/A	Failure of an auctioneer to enter into a written contract with the owner or consignor of the property to be sold at auction prior to the auction sale.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action
Sections 734.15.1 and 734.20(a)(9)	N/A	Failure of an auctioneer to keep contracts on file in the office of the auctioneer.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action
Sections 734.16(b) and 734.20(a)(9)	N/A	Failure or refusal of an auctioneer to permit inspection of auction sale records at all reasonable times by BEI inspectors or investigators.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action

<i>Violation Under 63 P.S.</i>	<i>Violations Under Title 49 Chapter 1</i>	<i>Description of Violation</i>	<i>Penalties</i>
Sections 734.18(a) and 734.20(a)(9)	N/A	Failure of an auctioneer to display auctioneer license in the auctioneer's office.	1st offense—\$250 2nd offense—\$500 3rd offense—formal action
Sections 734.18(b) and 734.20(a)(9)	N/A	Failure of an apprentice auctioneer to display the apprentice auctioneer license in the apprentice auctioneer's office.	1st offense—\$250 2nd offense—\$500 3rd offense—formal action
Section 734.20(a)(10)	§ 131(c) and (d)	Failure of a sponsor to either directly supervise the apprentice while the apprentice is conducting an auction or to provide for appropriate substitute supervision of the apprentice by a qualified auctioneer.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action
Section 734.20(a)(10)	§ 1.31(c) and (e)	Apprentice auctioneer conducting an auction sale without direct supervision by either the sponsor or an authorized substitute sponsor.	1st offense—\$500 2nd offense—\$1,000 3rd offense—formal action

§ 43b.13a. Schedule of civil penalties—engineers, land surveyors and geologists.

STATE REGISTRATION BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS AND GEOLOGISTS

<i>Violation Under 63 P.S.</i>	<i>Title/Description</i>	<i>Penalties</i>
Section 150(a)	Offering to practice engineering, land surveying or geology in this Commonwealth by representing oneself as an engineer, land surveyor or geologist on sign, advertisement, letterhead or card, as construed by 63 P.S. § 150(b), without being licensed or registered	1st offense—\$1,000 2nd offense—formal action
Section 151.5(b) and (c)	Failure to complete the required amount of continuing education	First offense—\$50 per hour of deficiency, not to exceed \$1,000 Subsequent offense—formal action

<i>Violation Under 49 Pa. Code Chapter 37</i>	<i>Title/Description</i>	<i>Penalties</i>
Section 37.111(f)	Failure to respond to continuing education audit request within 30 days or other time period in audit request	First offense—\$100 Second offense—\$250 Third offense—\$500 Subsequent offense—formal action
Section 37.18(3)	Practicing engineering, land surveying or geology in this Commonwealth after license and registration have lapsed (while in compliance with continuing education requirements)	One renewal cycle or less—\$50 per month lapsed, not to exceed \$1,000 More than one renewal cycle—formal action

§ 43b.14a. Schedule of civil penalties—dentists, dental hygienists and expanded function dental assistants.

STATE BOARD OF DENTISTRY

<i>Violation under 49 Pa. Code</i>	<i>Title/Description</i>	<i>Civil penalty</i>
§ 33.105(c)	Practicing on a lapsed license/certificate	1st offense— Dentists—\$100/month Dental hygienists—\$50/month Expanded function dental assistants—\$25/month 2nd offense—formal action

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