

# RULES AND REGULATIONS

## Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

### STATE BOARD OF PHARMACY [49 PA. CODE CH. 27] Deletion of Exam Fees

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

#### A. *Effective Date*

The final-form rulemaking takes effect upon final-form publication in the *Pennsylvania Bulletin*.

#### B. *Statutory Authority*

The final-form rulemaking is authorized under sections 6(k)(1) and (9) and 8.2(a) of the Pharmacy Act (act) (63 P. S. §§ 390-6(k)(1) and (9) and 390-8.2(a)) and section 812.1 of The Administrative Code of 1929 (71 P. S. § 277.3a).

#### C. *Background and Purpose*

The amendment to § 27.91 deletes references to the fees for the North American Pharmacist Licensure Examination and the Multistate Pharmacy Jurisprudence Examination. The administrators of the examinations, not the Board, set these fees. To avoid the necessity of amending the regulations whenever the examination administrator changes the fees, the Board proposes to delete references to the fees.

#### D. *Summary of Comments and Responses on Proposed Rulemaking*

Notice of the proposed rulemaking was published at 34 Pa.B. 4901 (September 4, 2004). Publication was followed by a 30-day public comment period during which the Board received no public comments. The Independent Regulatory Review Commission (IRRC) had no objections, comments or recommendations to offer on this final-form rulemaking. The House Professional Licensure Committee (HPLC) and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) did not comment.

#### E. *Fiscal Impact and Paperwork Requirements*

The final-form rulemaking will have no fiscal impact on the Board or its licensees. The final-form rulemaking should have no fiscal impact on the private sector, the general public or political subdivisions. The final-form rulemaking will avoid preparation of new regulations each time that an examination fee is changed and will not create additional paperwork for the private sector.

#### F. *Sunset Date*

The Board continuously monitors its regulations. Therefore, no sunset date has been assigned.

#### G. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 4, 2004, the Board submitted copies of the notice of proposed rulemaking, published at 34 Pa.B. 4901, to IRRC and the Chairpersons of the SCP/PLC and the HPLC for review and comment. The

Board did not receive any comments from IRRC, the SCP/PLC and the HPLC or the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), this final-form rulemaking was approved by the HPLC on June 28, 2005, and deemed approved by the SCP/PLC on July 13, 2005. Under section 5.1(g) of the Regulatory Review Act (71 P. S. § 745.5a(g)), this final-form rulemaking was deemed approved by IRRC effective July 13, 2005.

#### H. *Contact Person*

Further information can be obtained by contacting Melanie Zimmerman, Executive Secretary, State Board of Pharmacy, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-3402, www.dos.state.pa.us.

#### I. *Findings*

The Board finds that:

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

(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 acts identified in Part B of this preamble.

#### J. *Order*

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

(a) The regulations of the Board, 49 Pa. Code Chapter 27, are amended by amending § 27.91 to read as set forth at 34 Pa.B. 4901.

(b) The Board shall submit this order and 34 Pa.B. 4901 to the Office of General Counsel and to the Office of Attorney General as required by law.

(c) The Board shall certify this order and 34 Pa.B. 4901 and deposit them with the Legislative Reference Bureau as required by law.

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

MICHAEL J. ROMANO,  
*Chairperson*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 4270 (July 30, 2004).)*

**Fiscal Note:** Fiscal Note 16A-5413 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 05-1558. Filed for public inspection August 19, 2005, 9:00 a.m.]

### STATE REAL ESTATE COMMISSION [49 PA. CODE CH. 35] Reciprocal License

The State Real Estate Commission (Commission) amends Chapter 35 to read as set forth in Annex A. This final-form rulemaking addresses reciprocal licenses.

*Statutory Authority*

The final-form rulemaking is authorized under sections 201, 501, 601, 602 and 604 of the Real Estate Licensing and Registration Act (RELRA) (63 P. S. §§ 455.201, 455.501, 455.601, 455.602 and 455.604).

*Response to Public Comments and Regulatory Review and Amendments in Final Form Rulemaking*

Notice of proposed rulemaking was published at 34 Pa.B. 4913 (September 4, 2004). Publication was followed by a 30-day public comment period during which the Commission received comments from the Pennsylvania Association of Realtors (PAR). Following the close of the public comment period, the Commission received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) did not comment.

The following is a section-by-section description of the comments and the Commission's response.

*§ 35.201. Definitions.*

*Broker; builder-owner salesperson, campground membership salesperson, cemetery broker; cemetery salesperson, licensee and salesperson*

The definitions of "broker," "builder-owner salesperson," "campground membership salesperson," "cemetery broker," "cemetery salesperson," "licensee" and "salesperson" contain the phrase "unless otherwise specified." The HPLC recommended that the Commission delete this phrase in each of the definitions. The Commission found this suggestion reasonable and has amended each definition accordingly.

*Broker of record*

In the definition of "broker of record," the Commission deleted language regarding a limited broker's license. The HPLC asked for an explanation why the Commission deleted this language. In that limited broker's licenses were removed from the RELRA on June 29, 1990, the Commission has removed the reference from the regulations.

*Main office*

The HPLC recommended that the Commission add the phrase "other than a branch office" to the definition of "main office." The HPLC also suggested that "main office" and "branch office" be further amended to differentiate between the two types of offices. The Commission found these suggestions reasonable and has amended both definitions.

The PAR commented that the definitions for "main office" and "branch office" should be removed because they are unnecessary. The PAR recommended replacing the terms with "fixed office." However, various provisions of the regulations specifically apply to main offices; other provisions apply to branch offices. The Commission was unable to use one definition to refer to both offices.

*Principal place of business*

The PAR recommended that the definition of "principal place of business" be amended to be "the principal office address at which a licensee offers real estate services." However, to qualify for a reciprocal license under section 602(a) of the RELRA, among other requirements, the licensee's principal place of business must not be in this Commonwealth. When the principal place of business moves to this Commonwealth, under section 602(g) of the RELRA, the licensee must convert the reciprocal license

to a standard license. Because the PAR's recommended definition does not incorporate this distinction, the Commission was unable to implement the suggestion.

Similarly, the Commission believes that it would be impracticable to determine "principal place of business" based on sales volume as the PAR suggested. Because real estate offices' sales volume fluctuates monthly or annually, or both, a reciprocal broker with an office in this Commonwealth that has an unusually high volume of sales at one time would be required to convert the reciprocal license to a standard license negating the intent of the RELRA. The Commission believes that a better construction would be to tie the "principal place of business" to the state where the licensee holds a standard license.

Notwithstanding the Commission's decision not to amend the definition, the Commission agrees with the PAR that for reciprocal licensees, their "main office" and the "principal place of business" are the same out-of-State address. Any offices of reciprocal licensees opened within this Commonwealth are characterized as "branch offices."

*Reciprocal license*

In the proposed rulemaking, the definition of "reciprocal license" referred only to licensees from other states that have executed reciprocal agreements with the Commission. The HPLC, IRRC and PAR commented that section 602(e) of the RELRA permits licensees from states that have not executed reciprocal agreements with the Commission to also obtain a reciprocal license. The Commission agreed with the commentators and has amended the definition accordingly.

*Standard licensee*

The HPLC commented that the definition of "standard licensee" could be interpreted as applying to both standard and reciprocal licensees. The HPLC and IRRC recommended that the definition of "standard licensee" be amended to clarify that it applies only to nonreciprocal license holders. To obtain a standard license under the definition, the licensee must fulfill the education/experience and examination requirements of the RELRA. The examination requirement in the RELRA involves passing both the National and Pennsylvania portion of the license examination. While reciprocal licensees are required to pass an examination in the state that issued their licenses, applicants have not passed the Pennsylvania portion of the examination and therefore would not automatically qualify for a standard license as the HPLC suggests. Nonetheless, owing to the HPLC and IRRC's concern, the Commission amended this definition in final-form rulemaking to specifically exclude reciprocal licensees.

The PAR and IRRC questioned whether the Commission intended to limit the issuance of standard licenses to only applicants who reside in this Commonwealth. The Commission does not. Residency is not a requirement for any license. Two classes of out-of-State applicants qualify for standard licenses (assuming that the education/experience and examination requirements have been met): (1) current out-of-State licensees from states that have not either executed reciprocal agreements with the Commission or whose licensure requirements are not substantially comparable with those of this Commonwealth; and (2) out-of-State applicants who desire a standard license.

- § 35.222. *Licensure as a broker.*
- § 35.223. *Licensure as salesperson.*
- § 35.224. *Licensure as cemetery broker.*
- § 35.225. *Licensure as cemetery salesperson.*
- § 35.226. *Licensure as builder-owner salesperson.*
- § 35.227. *Licensure as rental listing referral agent.*
- § 35.228. *Licensure as campground membership salesperson.*
- § 35.229. *Licensure as time-share salesperson.*

Proposed §§ 35.222(b)(1), 35.225(b)(1), 35.226(b)(1), 35.227(b)(1), 35.228(b)(1), 35.229(b)(1) delineate the requirements for reciprocal licenses for each licensure class under the RELRA. When another state agreed to issue a license to a standard Pennsylvania licensee without further requirement, the applicant needed only possess a current broker's license issued by that state. When an applicant applied from a state which would require a standard Pennsylvania licensee to complete additional education, experience or examination requirements, the applicant for a Pennsylvania license would be required to complete equivalent requirements. The HPLC made two comments: a reciprocal license can be issued to an applicant from a state that has not executed a reciprocal agreement with this Commonwealth and the section is internally inconsistent.

Regarding the first comment, the Commission agrees with the HPLC and the PAR that section 602(e) of the RELRA permits licensees from states that have not executed reciprocal agreements with the Commission to also obtain a reciprocal license. The Commission has made the same amendment to §§ 35.222(b)(1), 35.223(b)(1), 35.224(b)(1), 35.225(b)(1), 35.226(b)(1), 35.227(b)(1), 35.228(b)(1) and 35.229(b)(1) that it did to the definition of "reciprocal license" in § 35.201 (relating to definitions).

Regarding the second comment, in addition to authorizing the Commission to issue reciprocal licenses to applicants from states that have either executed reciprocal agreements or have comparable requirements, section 602(e) of the RELRA also authorizes the Commission to issue reciprocal licenses to applicants from states whose requirements are not comparable. In the latter instance, the reciprocal applicants are required to complete whatever equivalent requirements would be imposed on Pennsylvania applicants. For example, if Pennsylvania applicants would be required to take an additional state-specific ethics course in the other state to obtain a license, the reciprocal applicant would be required to take a Pennsylvania-specific ethics course to obtain a license in this Commonwealth. Owing to the HPLC's concern that this interpretation was not clearly reflected in proposed rulemaking, the Commission has also amended the second clause in §§ 35.222(b)(1), 35.223(b)(1), 35.224(b)(1), 35.225(b)(1), 35.226(b)(1), 35.227(b)(1), 35.228(b)(1) and 35.229(b)(1) accordingly.

Proposed §§ 35.222(b)(3)(iv), 35.223(b)(2)(iv), 35.224(b)(3)(iv), 35.225(b)(3)(iv), 35.226(b)(3)(iv), 35.227(b)(3)(iv), 35.228(b)(3)(iv) and 35.229(b)(3)(iv) specifically required applicants to comply with the out-of-State service provisions in § 35.221(3) (relating to general requirements). The PAR recommended that these provisions be deleted because the introduction to subsection (b) includes the requirement that applicants comply with § 35.221. The Commission found this recommendation reasonable and has removed these provisions in this final-form rulemaking.

The HPLC also questioned why the Commission does not require reciprocal applicants to provide their license number and date of issuance of that license on their reciprocal application. Because the reciprocal state is required to provide a certification to the Commission including this information, the Commission believed that requiring it also from the licensee would be unnecessary.

§ 35.229. *Licensure as time-share salesperson.*

The PAR recommended that the pronoun in subsection (b)(4) be removed and replaced with gender-neutral language to parallel § 35.228(b)(4) (relating to licensure as campground membership salesperson). The Commission has made this change in this final-form rulemaking.

§ 35.241. *General office requirements.*

Section 35.241 contains general office requirements. The PAR recommended that the Commission delete all of its revisions. As previously explained, "fixed office" does not accurately reflect the distinction between main and branch offices. In addition, the current regulation refers to "jurisdiction" instead of state. An earlier version of the amendments to the RELRA referenced "jurisdiction." However, the final version removed all references to "jurisdiction" and replaced them with references to "state." Accordingly, in this final form rulemaking, the Commission has not amended this provision further.

§ 35.244. *Supervision and operation of office.*

Section 35.244 permits either a standard or reciprocal broker to supervise a real estate office and real estate licensees in this Commonwealth. The HPLC questioned why the Commission would permit a reciprocal licensee to supervise a Pennsylvania office. Section 602(h) of the RELRA specifically confers the same standards and responsibilities on reciprocal licensees as standard licensees (with the exception of their being able to be a member of the Commission, their completing the Pennsylvania continuing education requirement and their passing the Pennsylvania examination). Given that the standards and responsibilities are the same, the Commission believes that there is no statutory basis for preventing reciprocal brokers from supervising real estate offices in this Commonwealth. In fact, before obtaining a reciprocal license, the applicant must verify that the applicant has reviewed, is familiar with and agrees to be bound by the requirements in the RELRA and this chapter. Additionally, permitting reciprocal brokers to supervise their associate brokers and salespersons who have obtained reciprocal licenses in this Commonwealth provides a continuity in supervision.

§ 35.245. *Display of licenses in office.*

Proposed § 35.245 required the broker to conspicuously display the licenses of all standard license holders in the broker's employ in the broker's main office, all reciprocal license holders in the broker's employ in the broker's branch office and a list of all the licensees working out of a particular office at each office. The PAR commented that this provision would be confusing to implement. Upon further reflection, the Commission agrees with the PAR and has adopted, in this final-form rulemaking, a simpler rule applicable to all licensees: Effective with the next renewal period, all real estate licenses must be maintained in the broker's main office and each branch office must maintain a list of employees working out of that office. Because the broker has supervisory responsibility, the Commission continues to believe that original licenses should be maintained at the broker/cemetery broker's main office. However, the Commission does not believe that it is necessary for the licenses to be conspicu-

ously displayed. At the time this provision was adopted, consumers and investigators did not have immediate access to the licensure status of a licensee. Today, however, the Bureau of Professional and Occupational Affairs' online record system allows consumers and investigators immediate access eliminating the need for conspicuous display. Accordingly, in this final-form rulemaking, the Commission has amended § 35.245 to require brokers and cemetery brokers to maintain all original licenses in their main office and a list of licensees in the branch office where the licensees work.

IRRC also recommended that the term "broker" be added after "cemetery." Finding this recommendation reasonable, the Commission has made this amendment.

*§ 35.246. Inspection of office.*

In the proposed rulemaking, the Commission attempted through the inspection rules to further clarify that a standard licensee would have a main and branch office in this Commonwealth while a reciprocal licensee would only have a branch office in this Commonwealth. The PAR recommended that this language be removed because it is unnecessary. Owing to the PAR's concern, the Commission deleted the new language and has returned to the original version.

*§ 35.255. Reciprocal licenses.*

Proposed § 35.255(c) required reciprocal licensees to advise the Commission within 90 days of changing their principal places of business from another state to this Commonwealth, thereby requiring them to convert their reciprocal license to a standard license by the end of the renewal period. IRRC requested that the Commission justify the 90-day period. The HPLC recommended that the Commission reduce the notification period from 90 days to 30 days. The Commission found the HPLC's recommendation acceptable and has reduced the notification period to 30 days.

The HPLC and IRRC also recommended that an office inspection occur whenever a reciprocal licensee converts that license to a standard license. Prior to any real estate office being opened in this Commonwealth, an office must be inspected and found in compliance with the regulations. If the reciprocal licensee already had a real estate office in this Commonwealth, an office inspection would have already been conducted. In that the professional standards and responsibilities of standard and reciprocal license holders are the same, the Commission does not believe that there would be any reason to reinspect the real estate office without further evidence that another inspection was necessary. When the licensee seeking to convert a reciprocal license would also be opening a real estate office in this Commonwealth, an office inspection would be performed prior to that office being opened.

The PAR also suggested a technical amendment to subsection (a) to clarify that the renewal would be for a reciprocal license. Finding this suggestion reasonable, the Commission has amended this subsection accordingly.

*§ 35.271. Examination for broker's license.*

The HPLC recommended two changes to § 35.271(b): the addition of a closing bracket to current subsection (b) and renumbering of the paragraphs in the subsection. The Commission found both recommendations reasonable and has made the changes.

The HPLC also asked the Commission to provide an explanation of the method it uses to count experience in subsection (b)(6). The Commission responds as follows. To qualify to take the broker's examination, an applicant

must acquire 200 points. Points are acquired based on the services provided. In the commercial/industrial area, an applicant would receive 5 points for each sale, 5 points for an exclusive listing which sold, 5 points for each lease and 1 point for an unsold exclusive listing. In the residential area, an applicant would receive 5 points for each sale, 5 points for an exclusive listing which sold, 1 point for each lease and 1 point for an unsold exclusive listing. For each month of full-time employment in property management assistance, an applicant is granted 6 points. A month of full-time employment is defined as a month in which the applicant devoted full-time to performing in this capacity and which the applicant did not perform or earn points for any other real estate activity.

An applicant who is not licensed may be considered to have fulfilled the experience requirement if the applicant has 3 years of equivalent experience (that is, services which fall within the exemptions in section 203 of the RELRA (63 P. S. § 455.203)). An applicant who possesses a real estate broker's license in another jurisdiction will be awarded credit for out-of-State experience provided that the Commission received a certification of licensure from the real estate licensing authority of that jurisdiction indicating active licensure within the last 5 years prior to the application date.

*§ 35.272. Examination for salesperson's license.*

*§ 35.274. Examination for builder-owner salesperson's license.*

Sections 35.272(c) and 35.274(b) refer to "A licensee who is converting that license . . ." The HPLC and the PAR recommended that the Commission replace the word "that" with "reciprocal." Owing to the HPLC's and the PAR's concerns, the Commission has revised the wording of both provisions.

*§ 35.272. Examination for salesperson's license.*

*§ 35.273. Examination for cemetery broker's license.*

*§ 35.275. Examination for rental listing referral agent's license.*

Proposed §§ 35.273(a)(5) and 35.275(b)(4) set forth the requirement that to qualify for a standard license, the applicant's education had to be completed within 10 years prior to passing the examination except for applicants converting a reciprocal license to a standard license. The PAR recommended that the same provision be added to § 35.275(b)(4). In that the subsections immediately following each of the provisions contain an exception for applicants converting a reciprocal license to a standard license, the Commission believes that the additional provisions are unnecessary. Accordingly, in this final-form rulemaking, the Commission has deleted the exception in §§ 35.273(a)(5) and 35.275(b)(4).

The HPLC recommended that § 35.275 be renumbered. Finding this recommendation to be reasonable, the Commission has renumbered the section.

*§ 35.325. Escrow account.*

In § 35.325(b), the Commission replaced the reference to an employing broker with broker of a sole proprietorship and removed partnership, association or corporation. The HPLC questioned whether the change reflects a policy change and, if so, sought the Commission's rationale. By amending this subsection, the Commission merely made a corrective amendment. "Broker of record" is defined as a broker responsible for the real estate transactions of a partnership, association or corporation. Given this definition, the inclusion of "partnership, asso-

ciation or corporation” was mere surplusage. Similarly, in the sole proprietorship context, the correct reference is to a broker who is a sole proprietor rather than an employing broker.

*§ 35.384. Qualifying courses.*

The HPLC and IRRC questioned why the Commission was deleting the requirement that licensees complete a required course developed by the Commission. The deletion of this requirement actually stemmed from a final-form rulemaking package (16A-561) that was simultaneously undergoing regulatory review and became effective on December 11, 2004. See 34 Pa.B. 6530 (December 11, 2004). In the preamble to that final-form rulemaking, the Commission explained that:

In determining whether to retain the required course, the Commission considered the frequency of amendments to the RELRA and the regulations as well as the number of fair housing disciplinary cases. The Commission determined that except in cases where the RELRA or regulations are substantially modified or where, in the Commission’s view, licensees require specific Commission guidance, licensees should be able to take continuing education in subjects that directly benefit their practice or interest. As part of its on-going review of its regulations, however, the Commission intends to monitor trends in disciplinary proceedings. Where the Commission finds an increase in specific violations, it will consider reinstating a required course. As in the past, if a required course becomes necessary, the Commission will notify all licensees and real estate education providers at least 6 months prior to the end of the renewal period.

Because subsection (b) was also being amended in this proposed rulemaking package, the Commission included the amendatory language from the prior regulatory package as well.

*Subchapter H. CONTINUING EDUCATION*

In this final-form rulemaking, the Commission also amended §§ 35.382—35.384 to include the revisions made in the final-form rulemaking published at 34 Pa.B. 6530.

*Fiscal Impact and Paperwork Requirements*

The final-form rulemaking should have no fiscal impact on the Commonwealth, its political subdivisions or the public. The final-form rulemaking should have a positive fiscal impact on the regulated community because the final-form rulemaking reduces the legal, accounting, reporting or other paperwork requirements on the regulated community.

*Sunset Date*

The Commission continually monitors the effectiveness of its regulations through communication with the regulated population. Accordingly, no sunset date has been set.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 13, 2003, the Board submitted a copy of the notice of proposed rulemaking, published at 34 Pa.B. 4913, to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

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

the final-form rulemaking, the Commission has considered all comments from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on June 28, 2005, the final-form rulemaking was approved by the HPLC. On July 13, 2005, the final-form rulemaking was deemed approved by SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on July 14, 2005, and approved the final-form rulemaking.

*Contact Person*

Further information can be obtained by contacting Deborah Misheck, Administrative Assistant, State Real Estate Commission, P. O. Box 2649, Harrisburg, PA 17105-2649, www.dos.state.pa.us/bpoa.

*Findings*

The Commission finds that:

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

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

(3) This final-form rulemaking does not enlarge the purpose of proposed rulemaking published at 34 Pa.B. 4913.

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

*Order*

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

(a) The regulations of the Commission, 49 Pa. Code Chapter 35, are amended by amending §§ 35.203, 35.221, 35.241, 35.242, 35.244, 35.271, 35.305 and 35.325 to read as set forth at 34 Pa.B. 4913; and by amending §§ 35.201, 35.222—35.229, 35.245, 35.255, 35.272, 35.273, 35.274, 35.275 and 35.382—35.384 to read as set forth in Annex A.

(*Editor’s Note:* The Commission has withdrawn the proposal to amend § 35.246, included in the proposed rulemaking at 34 Pa.B. 4913.)

(b) The Commission shall submit this order, 34 Pa.B. 4913 and Annex A to the Office of General Counsel and the Office of Attorney General as required by law.

(c) The Commission shall certify this order, 34 Pa.B. 4913 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*.

BEVERLY R. BROOKES,  
*Chairperson*

(*Editor’s Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 4270 (July 30, 2005).)

**Fiscal Note:** Fiscal Note 16A-5610 remains valid for the final adoption of the subject regulations.

## Annex A

## TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

## PART I. DEPARTMENT OF STATE

## Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

## CHAPTER 35. STATE REAL ESTATE COMMISSION

## Subchapter B. GENERAL PROVISIONS

## § 35.201. Definitions.

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

*Act*—The Real Estate Licensing and Registration Act (63 P. S. §§ 455.101—455.902).

*Agency relationship*—A fiduciary relationship between a broker or licensees employed by a broker and a consumer who becomes a principal.

*Associate broker*—An individual broker who is employed by another broker.

*Branch office*—Any fixed location in this Commonwealth, other than the main office, maintained by a broker or cemetery broker, devoted to the transaction of real estate business.

*Broker*—An individual or entity holding either a standard or reciprocal license, that, for another and for a fee, commission or other valuable consideration, does one or more of the following:

(i) Negotiates with or aids a person in locating or obtaining for purchase, lease or acquisition of interest in real estate.

(ii) Negotiates the listing, sale, purchase, exchange, lease, time share and similarly designated interests, financing or option for real estate.

(iii) Manages real estate.

(iv) Represents himself or itself as a real estate consultant, counsellor or house finder.

(v) Undertakes to promote the sale, exchange, purchase or rental of real estate. This subparagraph does not apply to an individual or entity whose main business is that of advertising, promotion or public relations.

(vi) Undertakes to perform a comparative market analysis.

(vii) Attempts to perform one of the actions listed in subparagraphs (i)—(vi).

*Broker of record*—The individual broker responsible for the real estate transactions of a partnership, association or corporation that holds a broker's license.

*Builder-owner salesperson*—An individual holding either a standard or reciprocal license, who is a full-time employee of a builder-owner of single- and multi-family dwellings located in this Commonwealth and who is authorized, for and on behalf of, the builder-owner, to do one or more of the following:

(i) List for sale, sell or offer for sale real estate of the builder-owner.

(ii) Negotiate the sale or exchange of real estate of the builder-owner.

(iii) Lease or rent, or offer to lease, rent or place for rent, real estate of the builder-owner.

(iv) Collect or offer, or attempt to collect, rent for real estate of the builder-owner.

*Bureau*—The Bureau of Professional and Occupational Affairs of the Department.

*Buyer agent*—A licensee who enters into an agency relationship with a buyer/tenant.

*Campground membership*—An interest, other than in fee simple or by lease, which gives the purchaser the right to use a unit of real property for the purpose of locating a recreational vehicle, trailer, tent, tent trailer, pickup camper or other similar device on a periodic basis under a membership contract allocating use and occupancy rights between other similar users.

*Campground membership salesperson*—An individual holding either a standard or reciprocal license, who, either as an employee or an independent contractor, sells or offers to sell campground memberships under the active supervision of a broker. A licensed broker, salesperson or time-share salesperson does not need to possess a campground membership salesperson's license to sell campground memberships.

*Cemetery*—

(i) A place for the disposal or burial of deceased human beings, by cremation or in a grave, mausoleum, vault, columbarium or other receptacle.

(ii) The term does not include a private family cemetery.

*Cemetery associate broker*—An individual cemetery broker employed by another cemetery broker or by a broker.

*Cemetery broker*—An individual or entity holding either a standard or reciprocal license, that is engaged as, or carrying on the business or acting in the capacity of, a broker exclusively within the limited field or branch of business that applies to cemetery lots, plots and mausoleum spaces or openings.

*Cemetery company*—An individual or entity that offers or sells to the public the ownership, or the right to use, a cemetery lot.

*Cemetery salesperson*—An individual holding either a standard or reciprocal license, employed by a broker or cemetery broker exclusively to perform the duties of a cemetery broker.

*Commission*—The State Real Estate Commission.

*Comparative market analysis*—A written analysis, opinion or conclusion by a contracted buyer's agent, transactional licensee or an actual or potential seller's agent relating to the probable sale price of a specified piece of real estate in an identified real estate market at a specified time, offered either for the purpose of determining the asking/offering price for the property by a specific actual or potential consumer or for the purpose of securing a listing agreement with a seller.

*Consumer*—An individual or entity who is the recipient of any real estate service.

*Credit*—A period of 15 hours of instruction.

*Department*—The Department of State of the Commonwealth.

*Designated agent*—One or more licensees designated by the employing broker, with the consent of the principal, to act exclusively as the agent or agents for the principal to the exclusion of all other licensees within the broker's employ.

*Distance education*—Real estate instruction delivered in an independent or instructor-led format during which the student and the instruction are separated by distance and sometimes time.

*Dual agent*—A licensee who acts as an agent for the buyer/tenant and seller/landlord in the same transaction.

*Hour of instruction*—A period of at least 50 minutes.

*Independent learning*—An interactive educational program, including computer-based technology courses, that provides no contact with an instructor.

*Initial interview*—The first communication between a broker or salesperson and a consumer involving the personal/business or financial needs and motivations of the consumer. A discussion of the objective facts about the property, including dimensions, zoning classification, age, description or list price/lease amount, is not by itself a substantive discussion.

*Instructor-led learning*—An interactive educational program, including a classroom or simulated classroom, that provides significant ongoing contact from the instructor to the participant during the learning process.

*Licensee*—An individual or entity holding either a standard or reciprocal license, under the act. For purposes of the consumer notice in § 35.336(a)(relating to disclosure summary for the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate when the licensee is working on behalf of the tenant), the term means a broker or salesperson.

*Listing broker*—A broker who has entered into a written agreement with a seller/landlord to market property as a seller's agent, dual agent or transaction licensee.

*Main office*—The fixed location other than a branch office of the broker or cemetery broker in this Commonwealth or another state devoted to the transaction of real estate business.

*Manager of record*—The individual rental listing referral agent responsible for the rental listing transactions of a partnership, association or corporation that holds a rental listing referral agent's license.

*Nonexclusive buyer agency agreement*—A nonexclusive agreement governed by a memorandum or contract wherein the buyer retains the right to employ multiple brokers to purchase or lease a property.

*Open listing agreement*—A nonexclusive listing agreement governed by a memorandum or contract wherein the seller retains the right to employ multiple brokers to sell or lease a property.

*Principal*—A consumer who has entered into an agency relationship with a broker or another licensee employed by the broker.

*Principal place of business*—The fixed location of the broker or cemetery broker in the state where the licensee holds the equivalent of a standard license.

*Real estate*—An interest or estate in land—whether corporeal or incorporeal, whether freehold or nonfreehold, whether the land is situated in this Commonwealth or elsewhere—including leasehold interests and time share and similarly designated interests.

*Real estate education provider*—A person or institution who offers real estate education regardless of whether the learning is instructor-led or independent, excluding colleges, universities or institutes of higher learning accredited

by the Middle States Association of Colleges and Secondary Schools or equivalent accreditation.

*Reciprocal license*—A license issued to an individual or entity whose principal place of business for the provision of real estate services is outside of this Commonwealth and who holds a current license to provide real estate services from a state that either has executed a reciprocal agreement with the Commission or has qualifications for licensure which are substantially comparable to those required by the Commission.

*Rental listing referral agent*—

(i) An individual or entity that owns or manages a business which collects rental information for the purpose of referring prospective tenants to rental units or locations of rental units.

(ii) The term does not include an official or employee of a public housing authority that is created under State or Federal law.

*Salesperson*—An individual holding either a standard or reciprocal license, who is employed by a broker to do one or more of the following:

(i) Sell or offer to sell real estate, or list real estate for sale.

(ii) Buy or offer to buy real estate.

(iii) Negotiate the purchase, sale or exchange of real estate.

(iv) Negotiate a loan on real estate.

(v) Lease or rent real estate, or offer to lease or rent real estate or to place real estate for rent.

(vi) Collect rent for the use of real estate, or offer or attempt to collect rent for the use of real estate.

(vii) Assist a broker in managing property.

(viii) Perform a comparative market analysis.

*Seller agent*—A licensee who enters into an agency relationship with a seller/landlord.

*Standard license*—A license, other than a reciprocal license, issued to an individual or entity who has fulfilled the education/experience and examination requirements of the act.

*Subagent*—A licensee, not in the employ of the listing broker, who acts or cooperates with the listing broker in selling property as a seller's/landlord's agent and is deemed to have an agency relationship with the seller.

*Time share*—

(i) The right, however evidenced or documented, to use or occupy one or more units on a periodic basis according to an arrangement allocating use and occupancy rights of that unit or those units between other similar users. As used in this definition, the term "unit" is a building or portion thereof permanently affixed to real property and designed for separate occupancy or a campground membership or portion thereof designed for separate occupancy.

(ii) The term does not include a campground membership.

*Time-share salesperson*—An individual who, either as an employee or an independent contractor, sells or offers to sell time shares.

*Transaction licensee*—A licensee who, without entering into an agency relationship with the consumer, provides

communication or document preparation services or performs other acts listed in the definition of "broker" or "salesperson."

### Subchapter C. LICENSURE

#### LICENSURE REQUIREMENTS

##### § 35.222. Licensure as a broker.

(a) An individual who wants to obtain a standard broker's license shall comply with § 35.221 (relating to general requirements) and:

(1) Have scored a passing grade on each part of the broker's licensing examination within 3 years prior to submission of a properly completed license application except that an applicant who has been actively licensed as a broker by another state within the last 5 years shall take and pass only the Pennsylvania portion of the examination. See § 35.271 (relating to examination for broker's license).

(2) Comply with §§ 35.241 and 35.242 (relating to general office requirement; and office of broker or cemetery broker).

(3) Submit a completed application to the Commission with recommendations attesting to the applicant's good reputation for honesty, trustworthiness, integrity and competence from:

(i) One real estate broker holding either a current standard or reciprocal license issued by the Commission.

(ii) Two persons unrelated to the applicant who own property in the county where the applicant resides or has a place of business.

(iii) Two persons unrelated to the applicant who own property in the county where the applicant previously resided, if the applicant changed his county of residence within 1 year prior to the submission of the application.

(b) An individual who wants to obtain a reciprocal broker's license shall comply with § 35.221 and:

(1) Possess a current broker's license issued by another state that agrees to issue a license to a standard Pennsylvania licensee without further requirement, or has qualifications for licensure substantially comparable to those required by the Commission. When a reciprocal applicant applies from a state which would require a Pennsylvania licensee to complete additional education, experience or examination requirements, the reciprocal applicant shall complete equivalent requirements for licensure in this Commonwealth.

(2) Comply with § 35.241 and § 35.242.

(3) Submit a completed license application to the Commission with a verified statement that:

(i) To the applicant's knowledge, the applicant is not the subject of discipline or a current investigation or proceeding alleging misconduct under a licensing law or criminal law of either the Commonwealth or another state.

(ii) The applicant has reviewed, is familiar with and agrees to be bound by the act and this chapter.

(iii) The applicant agrees to permit the disclosure of the record in any disciplinary proceeding involving alleged misconduct by the applicant from any state in which the applicant is or has been licensed.

(4) If the applicant will be acting as an associate broker, submit a sworn statement from the broker with whom the applicant desires to be affiliated:

(i) Attesting to the applicant's good reputation for honesty, trustworthiness, integrity and competence.

(ii) Certifying that the applicant will be actively supervised and trained by the broker.

(5) Submit a certification from the real estate licensing authority of the other state:

(i) Confirming that the applicant's license is active and in good standing.

(ii) Describing any past disciplinary action taken by the licensing authority against the applicant.

(iii) Listing the applicant's office address and the name of the applicant's employing broker.

(c) A partnership, association or corporation that wants to obtain a standard or reciprocal broker's license shall:

(1) Ensure that each member of the partnership or association, or each officer of the corporation, who intends to engage in the real estate business holds either a current standard or reciprocal license issued by the Commission as a salesperson or broker.

(2) Designate an individual who is licensed by the Commission as a broker to serve as broker of record.

(3) Comply with §§ 35.241 and 35.242.

(4) Submit a completed license application to the Commission.

##### § 35.223. Licensure as salesperson.

(a) An individual who wants to obtain a standard salesperson's license shall comply with § 35.221 (relating to general requirements) and:

(1) Have scored a passing grade on each part of the salesperson's licensing examination within 3 years prior to the submission of a properly completed license application except that an applicant who has been actively licensed as a broker or a salesperson by another state within the last 5 years shall take and pass only the Pennsylvania portion of the examination. See § 35.272 (relating to examination for salesperson's license).

(2) Submit a completed license application to the Commission with:

(i) A sworn statement from the broker with whom the applicant desires to be affiliated:

(A) Attesting to the applicant's good reputation for honesty, trustworthiness, integrity and competence.

(B) Certifying that he will actively supervise and train the applicant.

(ii) Official transcripts evidencing the acquisition of degrees or course credits required by § 35.272(a)(2).

(b) An individual who wants to obtain a reciprocal salesperson's license shall comply with § 35.221 and:

(1) Possess a current broker's or salesperson's license issued by another state that agrees to issue a license to a standard Pennsylvania licensee without further requirement or has qualifications for licensure which are substantially comparable to those required by the Commission. When a reciprocal applicant applies from a state which would require a Pennsylvania licensee to complete additional education, experience or examination requirements, the reciprocal applicant shall complete equivalent requirements for licensure in this Commonwealth.

(2) Submit a completed license application to the Commission with a verified statement that:



(i) To the applicant's knowledge, the applicant is not the subject of discipline or a current investigation or proceeding alleging misconduct under a licensing law or criminal law of either the Commonwealth or another state.

(ii) The applicant has reviewed, is familiar with and agrees to be bound by the act and this chapter.

(iii) The applicant agrees to permit the disclosure of the record in any disciplinary proceeding involving alleged misconduct by the applicant from any state in which the applicant is or has been licensed.

(3) Submit a certification from the real estate licensing authority of the other state:

(i) Confirming that the applicant's license is active and in good standing.

(ii) Describing any past disciplinary action taken by the licensing authority against the applicant.

(iii) Listing the applicant's office address and the name of the applicant's employing broker.

(4) Submit a sworn statement from a standard or reciprocal broker with whom the applicant will be affiliated:

(i) Attesting to the applicant's good reputation for honesty, trustworthiness, integrity and competence.

(ii) Certifying that the applicant will be actively supervised and trained by the broker.

**§ 35.224. Licensure as cemetery broker.**

(a) An individual who wants to obtain a standard cemetery broker's license shall comply with § 35.221 (relating to general requirements) and:

(1) Have scored a passing grade on each part of the salesperson's licensing examination within 3 years prior to submission of a properly completed license application except that an applicant who has been actively licensed as a cemetery broker by another state within the last 5 years shall take and pass only the Pennsylvania portion of the examination. See § 35.273 (relating to examination for cemetery broker's license).

(2) Comply with §§ 35.241 and 35.242 (relating to general office requirement; and office of broker or cemetery broker).

(3) Submit a completed application to the Commission with recommendations attesting to the applicant's good reputation for honesty, trustworthiness, integrity and competence from:

(i) One real estate broker holding either a current standard or reciprocal license issued by the Commission.

(ii) Two persons unrelated to the applicant who own property in the county where the applicant resides or has a place of business.

(iii) Two persons unrelated to the applicant who own property in the county where the applicant previously resided, if the applicant changed his county of residence within 1 year prior to the submission of the application.

(b) An individual who wants to obtain a reciprocal cemetery broker's license shall comply with § 35.221 and:

(1) Possess a current cemetery broker's license issued by a state that agrees to issue a license to a standard Pennsylvania licensee without further requirement or has qualifications for licensure which are substantially comparable to those required by the Commission. When a reciprocal applicant applies from a state that would

require a Pennsylvania licensee to complete additional education, experience or examination requirements, the reciprocal applicant shall complete equivalent requirements for licensure in this Commonwealth.

(2) Comply with § 35.241 and § 35.242.

(3) Submit a completed license application to the Commission with a verified statement that:

(i) To the applicant's knowledge, the applicant is not the subject of discipline or a current investigation or proceeding alleging misconduct under a licensing law or criminal law of either this Commonwealth or another state.

(ii) The applicant has reviewed, is familiar with and agrees to be bound by the act and this chapter.

(iii) The applicant agrees to permit the disclosure of the record in any disciplinary proceeding involving alleged misconduct by the applicant from any state in which the applicant is or has been licensed.

(4) If the applicant will be acting as an associate cemetery broker, submit a sworn statement from the broker with whom the applicant will be affiliated:

(i) Attesting to the applicant's good reputation for honesty, trustworthiness, integrity and competence.

(ii) Certifying that the applicant will be actively supervised and trained by the broker.

(5) Submit a certification from the real estate licensing authority of the other state:

(i) Confirming that the applicant's license is active and in good standing.

(ii) Describing any past disciplinary action taken by the licensing authority against the applicant.

(iii) Listing the applicant's office address and the name of the applicant's employing broker.

(c) A partnership, association or corporation that wants to obtain a standard cemetery broker's license shall:

(1) Ensure that each member of the partnership, association or each officer of the corporation, who intends to engage in the real estate business possesses a standard license as a broker or cemetery broker issued by the Commission.

(2) Designate an individual who is licensed by the Commission as a broker or cemetery broker to serve as broker of record.

(3) Comply with §§ 35.241 and 35.242.

(4) Submit a complete license application to the Commission.

(d) A partnership, association or corporation that wants to obtain a reciprocal cemetery broker's license shall:

(1) Ensure that each member of the partnership, association or each officer of the corporation, who intends to engage in the real estate business possesses a standard or reciprocal license as a broker or cemetery broker issued by the Commission.

(2) Designate a broker or cemetery broker holding a standard or reciprocal license to serve as broker of record.

(3) Comply with §§ 35.241 and 35.242.

(4) Submit a complete license application to the Commission.

**§ 35.225. Licensure as cemetery salesperson.**

(a) An individual who wants to obtain a standard cemetery salespersons license shall comply with § 35.221 (relating to general requirements) and:

- (1) Be 18 years of age or older.
- (2) Submit a completed license application to the Commission with a sworn affidavit from the broker or cemetery broker with whom the applicant will be affiliated:
  - (i) Attesting to the applicant's good reputation for honesty, integrity, trustworthiness and competence.
  - (ii) Certifying that he will actively supervise and train the applicant.
- (b) An individual who wants to obtain a reciprocal cemetery salesperson's license shall comply with § 35.221 and:

(1) Possess a current cemetery salesperson's license issued by a state that agrees to issue a license to a standard Pennsylvania licensee without further requirement or has qualifications for licensure which are substantially comparable to those required by the Commission. When a reciprocal applicant applies from a state that would require a Pennsylvania licensee to complete additional education, experience or examination requirements, the reciprocal applicant shall complete equivalent requirements for licensure in this Commonwealth.

(2) Submit a certification from the real estate licensing authority of the other state:

- (i) Confirming that the applicant's license is active and in good standing.
- (ii) Describing any past disciplinary action taken by the licensing authority against the applicant.
- (iii) Listing the applicant's office address and the name of the applicant's employing broker.

(3) Submit a completed license application to the Commission with a verified statement that:

(i) To the applicant's knowledge, the applicant is not the subject of discipline or a current investigation or proceeding alleging misconduct under a licensing law or criminal law of either this Commonwealth or another state.

(ii) The applicant has reviewed, is familiar with and agrees to be bound by the act and this chapter.

(iii) The applicant agrees to permit the disclosure of the record in any disciplinary proceeding involving alleged misconduct by the applicant from any state in which the applicant is or has been licensed.

(4) Submit a sworn statement from the broker with whom the applicant will be affiliated:

- (i) Attesting to the applicant's good reputation for honesty, trustworthiness, integrity and competence.
- (ii) Certifying that the applicant will be actively supervised and trained by the broker.

**§ 35.226. Licensure as builder-owner salesperson.**

(a) An individual who wants to obtain a standard builder-owner salesperson's license shall comply with § 35.221 (relating to general requirements) and:

(1) Have scored a passing grade on each part of the salesperson's licensing examination within 3 years prior to submission of a properly completed license application except that an applicant who has been actively licensed

as a broker, salesperson or builder-owner salesperson by another state within the last 5 years shall take and pass only the Pennsylvania portion of the examination. See § 35.274 (relating to examination for builder-owner salesperson's license).

(2) Submit a completed license application to the Commission with a sworn statement from a builder-owner:

(i) Attesting to the applicant's good reputation for honesty, trustworthiness, integrity and competence.

(ii) Certifying that he:

(A) Is a builder-owner of single or multifamily dwellings.

(B) Employs the applicant.

(b) An individual who wants to obtain a reciprocal license as a builder-owner salesperson shall comply with § 35.221 and:

(1) Possess a current builder-owner salesperson license issued by a state that agrees to issue a license to a standard Pennsylvania licensee without further requirement or has qualifications for licensure which are substantially comparable to those required by the Commission. When a reciprocal applicant applies from a state that would require a Pennsylvania licensee to complete additional education, experience or examination requirements, the reciprocal applicant shall complete equivalent requirements for licensure in this Commonwealth.

(2) Submit a certification from the real estate licensing authority of the other state:

- (i) Confirming that the applicant's license is active and in good standing.
- (ii) Describing any past disciplinary action taken by the licensing authority against the applicant.
- (iii) Listing the applicant's office address and the name of the applicant's employing broker.

(3) Submit a completed license application to the Commission with a verified statement that:

(i) To the applicant's knowledge, the applicant is not the subject of discipline or a current investigation or proceeding alleging misconduct under a licensing law or criminal law of either this Commonwealth or another state.

(ii) The applicant has reviewed, is familiar with and agrees to be bound by the act and this chapter.

(iii) The applicant agrees to permit the disclosure of the record in any disciplinary proceeding involving alleged misconduct by the applicant from any state in which the applicant is or has been licensed.

(4) Submit a sworn statement from the builder-owner with whom the applicant will be affiliated:

- (i) Attesting to the applicant's good reputation for honesty, trustworthiness, integrity and competence.
- (ii) Certifying that the builder-owner is a builder-owner of single or multifamily dwellings and employs the applicant.

**§ 35.227. Licensure as rental listing referral agent.**

(a) An individual who wants to obtain a standard rental listing referral agent's license shall comply with § 35.221 (relating to general requirements) and:

(1) Have scored a passing grade on each part of the salesperson's examination within 3 years prior to submis-

sion of a properly completed license application except that an applicant who has been actively licensed as a broker, salesperson or rental listing referral agent by another state within the last 5 years shall take and pass only the Pennsylvania portion of the examination. See § 35.275 (relating to examination for rental listing referral agent's license).

(2) Comply with § 35.241 (relating to general office requirement).

(3) Submit a completed license application to the Commission.

(b) An individual who wants to obtain a reciprocal rental listing referral agent's license shall comply with § 35.221 and:

(1) Possess a current rental listing referral agent's license issued by a state that agrees to issue a license to a standard Pennsylvania licensee without further requirement or has qualifications for licensure which are substantially comparable to those required by the Commission. When a reciprocal applicant applies from a state that would require a Pennsylvania licensee to complete additional education, experience or examination requirements, the reciprocal applicant shall complete equivalent requirements for licensure in this Commonwealth.

(2) Submit a certification from the real estate licensing authority of the other state:

(i) Confirming that the license is active and in good standing.

(ii) Describing any past disciplinary action taken by the licensing authority against the applicant.

(iii) Listing the applicant's office address and the name of the applicant's employing broker.

(3) Submit a completed license application to the Commission with a verified statement that:

(i) To the applicant's knowledge, the applicant is not the subject of discipline or a current investigation or proceeding alleging misconduct under a licensing law or criminal law of either this Commonwealth or another state.

(ii) The applicant has reviewed, is familiar with and agrees to be bound by the act and this chapter.

(iii) The applicant agrees to permit the disclosure of the record in any disciplinary proceeding involving alleged misconduct by the applicant from any state in which the applicant is or has been licensed.

(4) Comply with § 35.241 (relating to general office requirement).

(c) A partnership, association or corporation that wants to obtain a standard or reciprocal rental listing referral agent's license shall:

(1) Designate an individual who holds either a current standard or reciprocal license as a rental listing referral agent issued by the Commission to serve as manager of record.

(2) Comply with § 35.241.

(3) Submit a completed license application to the Commission.

**§ 35.228. Licensure as campground membership salesperson.**

(a) An individual who wants to obtain a standard campground membership salesperson's license shall comply with § 35.221 (relating to general requirements) and:

(1) Be 18 years of age or older.

(2) Have successfully completed the one-credit (15 hours), Commission-developed course titled Campground Membership Sales, provided the following conditions are met:

(i) The course was taken prior to onsite training.

(ii) The course was taught at an accredited college, university or institute of higher learning in this Commonwealth or a real estate education provider in this Commonwealth approved by the Commission.

(3) Have successfully completed 30 days of onsite training at a campground membership facility subject to the following conditions:

(i) The 30 days of onsite training shall be completed during a 90-day period within 3 years prior to the submission of a license application.

(ii) The trainee shall be actively supervised and trained by a broker.

(4) Submit a completed license application to the Commission with:

(i) An official transcript evidencing acquisition of the qualifying coursework or degree.

(ii) A sworn statement from the broker under whom the applicant received his onsite training certifying that he actively trained and supervised the applicant and providing other information regarding the onsite training as the Commission may require.

(b) An individual who wants to obtain a reciprocal campground membership salesperson's license shall comply with § 35.221 and:

(1) Possess a current campground membership salesperson's license issued by a state that agrees to issue a license to a standard Pennsylvania licensee without further requirement or has qualifications for licensure which are substantially comparable to those required by the Commission. When a reciprocal applicant applies from a state that would require a Pennsylvania licensee to complete additional education, experience or examination requirements, the reciprocal applicant shall complete equivalent requirements for licensure in this Commonwealth.

(2) Submit a certification from the real estate licensing authority of the other state:

(i) Confirming that the applicant's license is active and in good standing.

(ii) Describing any past disciplinary action taken by the licensing authority against the applicant.

(iii) Listing the applicant's office address and the name of the applicant's employing broker.

(3) Submit a completed license application to the Commission with a verified statement that:

(i) To the applicant's knowledge, the applicant is not the subject of discipline or a current investigation or proceeding alleging misconduct under a licensing law or criminal law of either the Commonwealth or another state.

(ii) The applicant has reviewed, is familiar with and agrees to be bound by the act and this chapter.

(iii) The applicant agrees to permit the disclosure of the record in any disciplinary proceeding involving alleged misconduct by the applicant from any state in which the applicant is or has been licensed.

(4) Submit a sworn statement from the broker from whom the applicant received his onsite training certifying that the broker actively trained and supervised the applicant and providing other information regarding the onsite training the Commission may require.

**§ 35.229. Licensure as time-share salesperson.**

(a) An individual who wants to obtain a standard time-share salesperson's license shall comply with § 35.221 (relating to general requirements) and:

(1) Be at least 18 years of age.

(2) Have successfully completed the two-credit (30 hours), Commission-developed course titled Time Share Sales, provided the following conditions are met:

(i) The course was taken prior to onsite training.

(ii) The course was taught at an accredited college, university or institute of higher learning in this Commonwealth or a real estate education provider in this Commonwealth approved by the Commission.

(3) Have successfully completed 30 days of onsite training at a time share facility subject to the following conditions:

(i) The 30 days of onsite training shall be completed during a 90-day period within 3 years prior to the submission of a license application.

(ii) The trainee shall be actively supervised and trained by a broker.

(4) Submit a completed license application to the Commission with:

(i) An official transcript evidencing acquisition of the qualifying coursework or degree.

(ii) A sworn statement from the broker under whom the applicant received his onsite training certifying that he actively trained and supervised the applicant and providing other information regarding the onsite training the Commission may require.

(b) An individual who wants to obtain a reciprocal time-share salesperson's license shall comply with § 35.221 and:

(1) Possess a current time-share salesperson's license issued by a state that agrees to issue a license to a standard Pennsylvania licensee without further requirement or has qualifications for licensure which are substantially comparable to those required by the Commission. When a reciprocal applicant applies from a state that would require a Pennsylvania licensee to complete additional education, experience or examination requirements, the reciprocal applicant shall complete equivalent requirements for licensure in this Commonwealth.

(2) Submit a certification from the real estate licensing authority of the other state:

(i) Confirming that the applicant's license is active and in good standing.

(ii) Describing any past disciplinary action taken by the licensing authority against the applicant.

(iii) Listing the applicant's office address and the name of the applicant's employing broker.

(3) Submit a completed license application to the Commission with a verified statement that:

(i) To the applicant's knowledge, the applicant is not the subject of discipline or a current investigation or proceeding alleging misconduct under a licensing law or criminal law of either this Commonwealth or another state.

(ii) The applicant has reviewed and is familiar with the act and the regulations and agrees to be bound by the act and regulations.

(iii) The applicant agrees to permit the disclosure of the record in any disciplinary proceeding involving alleged misconduct by the applicant from any state in which the applicant is or has been licensed.

(4) Submit a sworn statement from the broker from whom the applicant received his onsite training certifying that he actively trained and supervised the applicant and providing other information regarding the onsite training the Commission may require.

**OFFICES**

**§ 35.245. Display of licenses in office.**

(a) Commencing with the 2006-2008 renewal period the current license of a broker, cemetery broker or rental listing referral agent and those licensees employed by or affiliated with that broker, cemetery broker or rental listing referral agent shall be maintained at the main office.

(b) A broker or cemetery broker shall maintain a list of licensees employed or affiliated with the broker or cemetery broker at the branch office out of which each licensee works.

**STATUS OF LICENSURE**

**§ 35.255. Reciprocal licenses.**

(a) *Renewal.* In addition to completing the application and paying the fee, a licensee applying for renewal of a reciprocal license shall provide the Commission with a certification that the license is current and in good standing from the state where the licensee has his principal place of business.

(b) *Reactivation.* A licensee who fails to renew a reciprocal license may reactivate the license without being reexamined provided that he holds the equivalent of a current standard license in the state where the licensee has his principal place of business.

(c) *Conversion to standard license.* A reciprocal licensee who designates his principal place of business as in this Commonwealth or who fails to maintain a current standard license in the state of his principal place of business shall notify the Commission within 30 days of the change. To continue to practice in this Commonwealth at the end of the renewal period, the reciprocal licensee shall obtain a standard license in accordance with the applicable requirements of this chapter. Thereafter, the standard licensee shall comply with the requirements for a standard license, including completion of the continuing education requirement.

**Subchapter D. LICENSING EXAMINATIONS**

**§ 35.272. Examination for salesperson's license.**

(a) An individual who wants to take the salesperson's examination for the purpose of obtaining a standard salesperson's license shall:

(1) Be 18 years of age or older.

(2) Have successfully completed four credits, or 60 hours of instruction, in basic real estate courses as determined by the Commission under subsection (b).

(3) Submit a completed examination application to the Commission or its designee with the examination fee.

(b) The Commission will apply the following standards in determining whether an examination candidate has met the education requirement of subsection (a)(2):

(1) A candidate who has obtained one of the following degrees will be deemed to have met the education requirement and will not be required to show completion of coursework in specific areas of study:

(i) A bachelor's degree with a major in real estate from an accredited college, university or institute of higher learning.

(ii) A bachelor's degree from an accredited college, university or institute of higher learning, having completed coursework equivalent to a major in real estate.

(iii) A juris doctor degree from an accredited law school.

(2) Credits will be allowed for each of the Commission-developed real estate courses—Real Estate Fundamentals and Real Estate Practice—when offered by:

(i) An accredited college, university or institution of higher learning located outside this Commonwealth.

(ii) A real estate education provider in this Commonwealth approved by the Commission.

(3) Credits will be allowed for acceptable basic real estate courses when offered by:

(i) An accredited college, university or institution of higher learning located outside this Commonwealth.

(ii) A real estate education provider outside this Commonwealth that has been approved by the real estate licensing authority of the jurisdiction where the real estate education provider is located.

(4) Courses shall have been completed within 10 years prior to the date of successful completion of the licensing examination.

(c) A licensee who is converting a reciprocal license to a standard salesperson's license is exempt from the requirements in subsections (a) and (b) and is only required to pass the state portion of the examination.

**§ 35.273. Examination for cemetery broker's license.**

(a) An individual who wants to take the salesperson's examination for the purpose of obtaining a standard cemetery broker's license shall:

(1) Be 21 years of age or older.

(2) Have worked at least 3 years as a licensed salesperson or cemetery salesperson, with experience qualifications that the Commission considers adequate for practice as a cemetery broker, or possess at least 3 years of other experience, education, or both, that the Commission considers the equivalent of 3 years' experience as a licensed salesperson or cemetery salesperson.

(3) Have successfully completed four credits, or 60 hours of instruction, in basic real estate courses as determined by the Commission under subsection (b).

(4) Submit a completed examination application to the Commission or its designee with:

(i) Official transcripts evidencing the acquisition of degrees or course credits.

(ii) A detailed resume of real estate activities performed by the candidate while working as a salesperson or cemetery salesperson, and a sworn statement from the candidate's employing broker confirming that these activities were performed if the candidate is a licensed salesperson or cemetery salesperson.

(iii) A complete description of work experience and education that the candidate considers relevant to the requirements of paragraph (2) if the candidate is not a licensed salesperson or cemetery salesperson.

(iv) The fee for review of the candidate's qualifications to take the examination prescribed in § 35.203 (relating to fees) and the fee for administration of the examination.

(b) The Commission will apply the following standards in determining whether an examination candidate has met the education requirements of subsection (a)(3):

(1) A candidate who has obtained one of the following degrees will be deemed to have met the education requirement and will not be required to show completion of course work in specific areas of study:

(i) A bachelor's degree with a major in real estate from an accredited college, university or institute of higher learning.

(ii) A bachelor's degree from an accredited college, university or institute of higher learning, having completed course work equivalent to a major in real estate.

(iii) A juris doctor degree from an accredited law school.

(2) Credits will be allowed for each of the Commission-developed real estate courses—Real Estate Fundamentals and Real Estate Practice—when offered by:

(i) An accredited college, university or institute of higher learning in this Commonwealth.

(ii) A real estate education provider approved by the Commission in this Commonwealth.

(3) Credits will be allowed for cemetery courses when offered by:

(i) An accredited college, university or institute of higher learning in this Commonwealth.

(ii) A real estate education provider in this Commonwealth approved by the Commission.

(4) Credits will be allowed for acceptable basic real estate courses when offered by:

(i) An accredited college, university or institute of higher learning located outside this Commonwealth.

(ii) A real estate education provider outside this Commonwealth that has been approved by the real estate licensing authority of the jurisdiction where the real estate education provider is located.

(iii) A cemetery association outside this Commonwealth, if the course taught by the cemetery association is equivalent to a course taught by a real estate school in this Commonwealth approved by the Commission.

(5) Courses shall have been completed within 10 years prior to the date of successful completion of the licensing examination.

(c) A reciprocal licensee who is converting a reciprocal license to a standard cemetery broker's license is exempt from subsection (a) and is only required to pass the state portion of the examination.

**§ 35.274. Examination for builder-owner salesperson's license.**

(a) An individual who wants to take the salesperson's examination for the purpose of obtaining a standard builder-owner salesperson's license shall:

- (1) Be 18 years of age or older.
- (2) Be employed by a builder-owner who has a good reputation for honesty, trustworthiness, integrity and competence.
- (3) Submit a completed examination application to the Commission or its designee with the examination fee.

(b) A reciprocal licensee who is converting a reciprocal license to a standard builder-owner salesperson's license is only required to pass the state portion of the examination.

**§ 35.275. Examination for rental listing referral agent's license.**

(a) An individual who wants to take the salesperson's examination for the purpose of obtaining a standard rental listing referral agent's license shall:

- (1) Be 18 years of age or older.
- (2) Have successfully completed four credits, or 60 hours of instruction, in basic real estate courses as determined by the Commission under subsection (b).
- (3) Submit a completed examination application to the Commission or its designee with the examination fee.

(b) The Commission will apply the following standards in determining whether an examination candidate has met the requirements of subsection (a)(2):

(1) A candidate who has obtained one of the following degrees will be deemed to have met the education requirement and will not be required to show completion of coursework in specific areas of study:

- (i) A bachelor's degree with a major in real estate from an accredited college, university or institute of higher learning.
- (ii) A bachelor's degree from an accredited college, university or institute of higher learning, having completed coursework equivalent to a major in real estate.
- (iii) A juris doctor degree from an accredited law school.

(2) Credits will be allowed for each of the Commission-developed real estate courses—Real Estate Fundamentals and Real Estate Practice—when offered by:

(i) An accredited college, university or institute of higher learning in this Commonwealth.

(ii) A real estate education provider in this Commonwealth approved by the Commission.

(3) Credits will be allowed for acceptable basic real estate courses when offered by:

(i) An accredited college, university or institute of higher learning in this Commonwealth.

(ii) A real estate education provider outside this Commonwealth that has been approved by the real estate licensing authority of the jurisdiction where the real estate education provider is located.

(4) Courses shall have been completed within 10 years prior to the date of successful completion of the licensing examination.

(c) A reciprocal licensee who is converting a reciprocal license to a standard rental listing referral agent's license is exempt from the requirements in subsections (a) and (b) and is only required to pass the state portion of the examination.

**Subchapter H. CONTINUING EDUCATION**

**§ 35.382. Requirement.**

(a) *Condition precedent to renewal of current standard license.* A broker or salesperson holding a standard license who desires to renew a current license shall, as a condition precedent to renewal, complete 14 hours of Commission-approved continuing education during the preceding license period. The continuing education shall be completed by the May 31 renewal deadline.

(b) *Condition precedent to reactivation and renewal of noncurrent standard license.* A broker or salesperson holding a standard license who desires to reactivate and renew a noncurrent license shall, as a condition precedent to reactivation and renewal, complete 14 hours of Commission-approved continuing education during the 2-year period preceding the date of submission of the reactivation application. A broker or salesperson holding a standard license may not use the same continuing education coursework to satisfy the requirements of this subsection and subsection (a).

(c) *Exception.* The continuing education requirement does not apply to reciprocal license holders or cemetery brokers, cemetery salespersons, builder-owner salespersons, timeshare salespersons, campground membership salespersons and rental listing referral agents who hold standard licenses.

(d) *Documentation.* A licensee shall provide the Commission with information necessary to establish the licensee's compliance with this subchapter.

**§ 35.383. Waiver of continuing education requirement.**

(a) The Commission may waive all or part of the continuing education requirement of § 35.382 (relating to requirement) upon proof that the standard license holder seeking the waiver is unable to fulfill the requirement because of illness, emergency or hardship. The following are examples of situations in which hardship waivers will be granted.

(1) A standard license holder who seeks to renew a current license that was initially issued within 6 months of the biennial license period for which renewal is sought will be deemed eligible, on the basis of hardship, for a full waiver of the continuing education requirement.

(2) A standard license holder who seeks to renew a current license that was reactivated from noncurrent status within 6 months of the biennial license period for which renewal is sought will be deemed eligible, on the basis of hardship, for a full waiver of the continuing education requirement.

(3) A standard license holder who is a qualified continuing education instructor will be deemed eligible, for the waiver of 1 hour of continuing education for each hour of actual classroom instruction in an approved continuing education topic that the instructor is qualified to teach. Duplicate hours of instruction in the same topic during the same biennial license period will not be considered for waiver purposes.

(b) Requests to waive the continuing education requirement must be filed with the Commission on or before

March 31 of the renewal year unless the applicant proves to the satisfaction of the Commission that it was impracticable to do so.

**§ 35.384. Qualifying courses.**

(a) Except as provided in subsection (b), a licensee shall complete 14 hours of continuing education in acceptable courses in a minimum of 2-hour increments. A standard license holder shall satisfy the continuing education requirement by doing one of the following:

(b) The Commission may, for a given biennial license period and with adequate notice to standard license holders, require that all or part of the 14 hours be completed in required topics.

(c) Acceptable courses include the following:

- (1) Real estate ethics.
- (2) Laws affecting real estate.
- (3) Real estate financing and mathematics.
- (4) Real estate valuation and evaluation.
- (5) Property management.
- (6) Land use and zoning.
- (7) Income taxation as applied to real property.
- (8) Ad valorem tax assessment and special assessments.
- (9) Consumer protection and disclosures.
- (10) Agency relationships.
- (11) Landlord-tenant laws.
- (12) Environmental issues in real estate.
- (13) Antitrust issues in real estate.
- (14) Current litigation related to real estate.
- (15) Legal instruments related to real estate transactions.
- (16) Legalities of real estate advertising.
- (17) Developments in building construction techniques, materials and mechanical systems.
- (18) Real estate investment analysis.
- (19) Management of real estate brokerage operations.
- (20) Property development.
- (21) Real estate securities and syndication.
- (22) Real property exchange.
- (23) Broker courses encompassing supervisory duties and standards of conduct and practice contained in Subchapter E (relating to standards of conduct and practice).
- (24) Marketing promotion and advertising of real estate inventory.
- (25) Use of technology in delivering real estate services.

(d) Unacceptable courses include: mechanical office and business skills; for example, typing, speed writing, preparation of advertising copy, development of sales promotional devices, word processing, calculator and computer operation and office management and related internal operations procedures that do not have a bearing on the public interest.

[Pa.B. Doc. No. 05-1559. Filed for public inspection August 19, 2005, 9:00 a.m.]

**STATE REGISTRATION BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS AND GEOLOGISTS**

[49 PA. CODE CH. 37]

**Biennial Renewal Fees and Examination Fees**

The State Registration Board for Professional Engineers, Land Surveyors and Geologists (Board) amends § 37.17 (relating to schedule of fees) to read as set forth in Annex A.

The final-form rulemaking raises the biennial renewal fees for professional engineers, professional land surveyors and professional geologists from \$25 to \$50. The new biennial renewal fees will initially apply to licensees who renew their biennial registrations for the renewal period that begins October 1, 2005. The final-form rulemaking also deletes examination fees from the Board's fee schedule and adds an explanatory statement about how examination fees are set and collected. The final-form rulemaking also makes minor editorial changes to the descriptions of certain fees for consistency of usage.

*Summary of Comments and Responses to Proposed Rulemaking*

The Board published a notice of proposed rulemaking at 35 Pa.B. 258 (January 8, 2005), with a 30-day public comment period. The proposed rulemaking explained in detail the fiscal and policy reasons for amending the Board's fee schedule. The Board did not receive any public comments.

The Board received comments from the Independent Regulatory Review Commission (IRRC) and the House Professional Licensure Committee (House Committee) as part of their review of proposed rulemaking under the Regulatory Review Act (71 P. S. §§ 745.1—745.14). The Board did not receive comments from the Senate Committee on Consumer Protection and Professional Licensure (Senate Committee) as part of its review of proposed rulemaking under the Regulatory Review Act.

The proposed rulemaking provided for the deletion of examination fees from the Board's fee schedule, but did not add an explanatory statement about examination fees. The House Committee and IRRC recommended that language be added to the fee schedule explaining how examination fees are set and collected. The Board agrees that the clarification would be useful. The Board has incorporated into the final-form rulemaking a statement that examination fees are established by agreement between the Commonwealth and the testing organizations that develop, administer and grade the examinations and that examination candidates pay examination fees directly to the testing organizations.

The House Committee and IRRC also recommended that the Board consider amending § 37.16 (relating to general information; application and examination). Section 37.16(c) provides that examinations are to be held in Pittsburgh, Harrisburg, Philadelphia and other places designated by the Board during the months of April and October of each year. Section 37.16(c) further provides that applications for examination eligibility are to be submitted to the Board by December 1 for the April examination and by July 1 for the October examination.

The House Committee questioned whether § 37.16(c) should be revised, given that the testing organizations administer the examinations. IRRC likewise requested clarification, recommending that the Board replace the current § 37.16(c) with language indicating where exami-

nation candidates can obtain information about current testing organizations, examination fees, examination deadlines, examination dates and examination locations. IRRC also noted that the information in § 37.16(c) is outdated with regard to the application deadlines for the professional geologist examination.

The Board agrees with the House Committee and IRRC that § 37.16(c) should be amended. The Board is in the process of updating and revising its entire set of regulations in Chapter 37. The Board recently sent an exposure draft of the general amendments to professional organizations for preproposal comment. The proposed amendments to § 37.16, as reflected in the exposure draft, would include language similar to that recommended by

IRRC. Examination candidates would be directed to contact the testing organizations for examination applications and examination-related information, including examination fees, examination dates and locations and examination application filing deadlines. Examination candidates would be advised that contact information about testing organizations may be obtained from the Board's website. The Board anticipates that the proposed general revisions will be published for public comment and submitted for regulatory review by early 2006.

#### *Fiscal Impact*

The final-form rulemaking will generate approximately \$960,125 in additional biennial renewal fee revenues, broken down as follows:

| <i>Certification Class</i> | <i>No. of Renewing Licensees</i> |   | <i>Fee Increase</i> | <i>Additional Revenues</i> |
|----------------------------|----------------------------------|---|---------------------|----------------------------|
| Professional Engineer      | 32,355                           | x | \$25                | \$808,875                  |
| Professional Land Surveyor | 3,413                            | x | \$25                | \$85,325                   |
| Professional Geologist     | 2,637                            | x | \$25                | \$65,925                   |

#### *Paperwork Requirements*

The final-form rulemaking will require the Board to change its biennial renewal form to reflect the new fees. The final-form rulemaking will not create additional paperwork requirements for the regulated community.

#### *Effective Date*

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*. The new biennial renewal fees will initially apply to licensees who renew their registrations for the biennial renewal period beginning October 1, 2005.

#### *Statutory Authority*

Section 9 of the Engineer, Land Surveyor and Geologist Registration Law (Registration Law) (63 P.S. § 156) requires the Board to establish fees by regulation and to ensure that revenues derived from fees, fines and civil penalties are adequate to cover the Board's expenditures over a biennial period. Section 4(e) of the Registration Law (63 P.S. § 151(e)) contemplates that the Board may assess biennial renewal fees by regulation.

The Board considers the amendments to be both required by law and the least restrictive means of covering the cost of activities that the Board is required to perform.

#### *Regulatory Review*

Under authority of section 5(a) and (f) of the Regulatory Review Act (71 P.S. § 745.5(a) and (f)), on December 22, 2004, the Board submitted a copy of the notice of proposed rulemaking, published at 35 Pa.B. 258, to IRRC for review and comment. Under authority of section 5(a) and (f) of the Regulatory Review Act, on February 2, 2005, the Board submitted copies of the notice of proposed rulemaking published at 35 Pa.B. 258 to the Chairpersons of the House and Senate 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 authority of section 5.1(e) and (j.2) of the Regulatory Review Act (71 P.S. § 745.5a(e) and (j.2)), the final-form rulemaking was approved by the House Committee on June 28, 2005, and deemed approved by the Senate Committee on July 13, 2005. Under section 5.1(e) of the Regulatory Review Act, IRRC met on July 14, 2005, and approved the final-form rulemaking.

#### *Additional Information*

For additional information about the final-form rulemaking, submit inquiries to Shirley S. Klinger, Administrator, State Registration Board for Professional Engineers, Land Surveyors and Geologists, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-7049, ST-ENGINEER@state.pa.us.

#### *Findings*

The Board finds that:

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

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

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

(4) The amendments to this final-form rulemaking do not enlarge the original purpose of the proposed rulemaking published at 35 Pa.B. 258.

#### *Order*

The Board, acting under the Registration Law, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 37, are amended by amending § 37.17 to read as set forth in Annex A.

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

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



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

THEODORE TESLER, P. G.,  
*President*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 4270 (July 30, 2004).)*

**Fiscal Note:** Fiscal Note 16A-478 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 37. STATE REGISTRATION BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS AND GEOLOGISTS**

**QUALIFICATIONS FOR LICENSURE**

**§ 37.17. Schedule of fees.**

(a) *Professional engineers and professional land surveyors.* The Board will charge the following fees:

Biennial renewal of registration..... \$50

(b) *Professional geologists.* The Board will charge the following fees:

Application for registration..... \$50

Biennial renewal of registration..... \$50

Temporary permit..... \$25

(c) *Other fees.* The Board will charge the following fees:

Certification of license, registration, permit or scores..... \$25

Verification of license, registration or permit.... \$15

(d) *Fees to testing organizations.* Examination fees are established by agreement between the Commonwealth and the testing organizations that develop, administer and grade the examinations. Examination candidates pay examination fees directly to the testing organizations.

[Pa.B. Doc. No. 05-1560. Filed for public inspection August 19, 2005, 9:00 a.m.]

**Title 55—PUBLIC WELFARE**

**DEPARTMENT OF PUBLIC WELFARE**

**[55 PA. CODE CH. 1121]**

**Pharmaceutical Services; Revisions to the State Maximum Allowable Cost for Pharmaceutical Services**

The Department of Public Welfare (Department), under the authority of sections 201(2), 403(b), 443.4 and 454 of the Public Welfare Code (code) (62 P. S. §§ 201(2), 403(b), 443.4 and 454), as amended by the act of July 7, 2005 (P. L. 177, No. 42) (Act 42), amends §§ 1121.2 and 1121.56 (relating to definitions; and drug cost determination) to read as set forth in Annex A.

*Omission of Proposed Rulemaking*

Act 42 amended the code by adding section 454. Section 454 of the code specifies that until December 31, 2005,

notwithstanding any other provision of law, the Department must promulgate regulations to establish provider payment rates under section 204(1)(iv) of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204(1)(iv)), known as the Commonwealth Documents Law (CDL). That section authorizes an agency to omit or modify notice of proposed rulemaking when the regulation relates to Commonwealth grants or benefits. In addition, section 454 of the code expressly exempts provider payment rates from review under the Regulatory Review Act (71 P. S. §§ 745.1—745.15), and from review by the Attorney General under section 205 of the CDL (45 P. S. § 1205) and section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732-204(b)). Finally, section 454(a) and (b) of the code provides that the regulations shall specify the effective date for provider payment rates.

The Department is adopting this final-omitted rulemaking in accordance with section 454 of the code because the final-omitted rulemaking relates to provider payment rates. The final-omitted rulemaking also provides for the effective date for the provider payment rates.

*Purpose*

The purpose of this final-omitted rulemaking is to:

1. Amend the current Medical Assistance (MA) fee-for-service (FFS) methodology in Chapter 1121 (relating to pharmaceutical services) for determining the State maximum allowable cost (MAC) for multisource brand name and generic drugs. The Department will determine the State MAC at the lower of the following:

(i) The upper payment limit established by the Centers for Medicare and Medicaid Services (CMS).

(ii) Provided that the generic product is available at the price established by the Department from at least two wholesalers:

(a) If the generic product is available from more than one manufacturer, the base price of 150% of the lowest acquisition cost for the generic product, unless 150% of the lowest acquisition cost is not at least 120% of the second lowest acquisition cost, in which case the base price will be set at 120% of the second lowest acquisition cost.

(b) If the generic product is available from only one manufacturer, the base price of 120% of the acquisition cost for the generic product.

2. Amend the current MA FFS methodology in Chapter 1121 to provide the time frames for updating the State MAC.

3. Amend the current MA FFS methodology in Chapter 1121 to clarify the package size to be used for determining the product cost for nonbreakables.

*Background*

The Pennsylvania MA Program assures the availability of a wide array of medically necessary healthcare services, supplies and equipment to approximately 1.8 million indigent and disabled persons. Prescription drugs are among the healthcare services that the Commonwealth has opted to include in the MA benefit package. The prescription drug benefit contains two types of drugs: 1) drugs available from only one manufacturer that holds or held the patent for the drug, commonly referred to as single-source brand name drugs; and 2) drugs available from multiple manufacturers and distributors, commonly

referred to as multisource drugs. A multisource drug typically includes both the brand name and the generic versions of the drug.

Under Federal law, the drug cost component of pharmacy reimbursement is based on the Estimated Acquisition Cost (EAC), which is defined as the state Medicaid "agency's best estimate of the price generally and currently paid by providers for a drug marketed or sold by a particular manufacturer or labeler in the package size of the drug most frequently purchased by providers." See 42 CFR 447.301 (relating to definitions). Before August 10, 2005, the Department calculated the EAC for all drugs at the lower of the average wholesale price (AWP) minus 10% and has paid the lower of the EAC or the State MAC plus a \$4 dispensing fee. See 25 Pa.B. 3978 (September 23, 1995). Yet, the MA Program continued to have one of the highest payment rates for prescription drugs in this Commonwealth.

States across the country are struggling to maintain their Medicaid programs as healthcare costs are increasing at a faster rate than state revenues, while the caseload of persons eligible for the program continues to grow. Rising drug costs play a major, if not the primary, role in escalating Medicaid costs. All three of these trends are affecting the Pennsylvania MA Program. The MA Program caseload is projected to increase by 5.9% in State Fiscal Year 2005-2006. MA costs for the State fiscal year are projected to increase by 6.7% while projected State revenues for the same period are projected to increase by only 2.8%. Expenditures for pharmaceutical services increased from \$730,090,896 in calendar year 2002 to close to \$1 billion in calendar year 2004, an increase of almost 37%.

The MA Program has responded to these challenges by implementing a number of initiatives designed to improve the efficiency and cost-effectiveness of the program while maintaining access to quality care for MA recipients. See 35 Pa.B. 4309 (August 6, 2005). Notwithstanding the savings associated with the success of these initiatives, in the face of ever-skyrocketing pharmacy expenditures, the Department cannot ignore the trends occurring in other state Medicaid programs and private third-party plans or the payment rates accepted by pharmacies in this Commonwealth, which show that the Department's pharmacy payment rates for both brand name and generic drugs were higher than those of virtually any other payor in this Commonwealth and many comparable Medicaid programs. The Pharmaceutical Assistance Contract for the Elderly (PACE) Program was the only publicly funded prescription drug program in this Commonwealth whose payment rates for drugs were as generous as those of the MA Program. The payment rates established by the Pennsylvania Employee Benefits Trust Fund and nearly all of the commercial third-party prescription drug programs in this Commonwealth, as well as the HealthChoices managed care organizations (MCOs) under contract to the Department to provide services to some 65% of the MA population, were significantly lower than those in the FFS delivery system.

In setting payment rates for pharmacy services in the MA Program, the Department seeks to assure that high quality pharmacy services are available to MA recipients to the same extent as to the general population in the same geographic area at the best possible price. As a prudent buyer of medical care for its recipients, the Department must be able to obtain rates similar to those extended to other third-party payors and other state Medicaid agencies. Pharmacy providers generally com-

plain that the lower payment rates offered by third-party payors are unfair to them and have an adverse impact on recipient access. The pharmacy industry has on two occasions in the past voiced a similar complaint to the Department, predicting that reduced payment rates would restrict recipient access and diminish the quality of care: in 1995, when the Department revised the pharmacy payment methodology from AWP to AWP minus 10%, and again in 1998 when the HealthChoices MCOs lowered their pharmacy payment rates to below AWP minus 10%. At neither time did the revised payment rates result in less access for MA recipients to pharmacy services of high quality anywhere in this Commonwealth; they certainly did not result in less access than that enjoyed by the general public.

For all of these reasons, effective August 10, 1995, the Department revised its calculation of the EAC for both brand name and generic drugs. See 35 Pa.B. 4309. The Department had announced its intention to revise the methodology for determining the State MAC for multisource drugs at the same time. See 35 Pa.B. 3268 (June 4, 2005). After receiving comments in response to the public notice published at 35 Pa.B. 3268, the Department delayed implementation of a revised State MAC to allow for additional public comment after publishing more specific details regarding the proposed methodology for determining the State MAC. See 35 Pa.B. 4264 (July 30, 2005). Having considered the comments received in response to the public notice published at 35 Pa.B. 4264, the Department is revising the methodology for determining the State MAC as described in the public notice. The revised methodology will apply to those generic drugs that have received an "A-rating" from the United States Food and Drug Administration (FDA) and their brand name counterparts unless a State MAC price cannot be established. In those cases, the Department will pay the EAC as explained in the final-omitted rulemaking published at 35 Pa.B. 4309.

Generic versions of brand name drugs are reviewed and approved by the FDA using the same strict guidelines and inspections used to evaluate and approve brand name drugs. Generic drugs that meet the same standards for strength, quality and purity as the brand name drugs are given an "A rating" by the FDA and are considered to be equivalent to the brand name counterparts. Generically equivalent drugs contain the same active ingredients and come in the same strengths and dosage forms as the brand name counterparts. Therefore, the FDA assures that all "A-rated" generically equivalent drugs can be substituted for the brand name drug with the full expectation that the generic product will produce the same clinical effect and safety profile as the brand name product.

Equally safe and "A-rated" generically equivalent drugs are today available for many brand name drugs at a lower cost. The State MAC is the upper payment limitation that the Department sets on certain multisource drugs for which both the brand name product and at least one A-rated generically equivalent product is available. The State MAC sets a drug cost payment limit on each drug when the generic product has the same active ingredients, is in the same strengths and the same dosage form and is given by the same route of administration as the brand name product. The main purpose of a State MAC is to take advantage of the price differentials between the brand name product and the less expensive equivalent generic drugs.

Currently in the MA Program, the State MAC is comprised of: 1) drugs for which the Federal government

has established a Federal upper limit; and 2) several other multisource drugs that do not have Federal upper limits (FUL).

The Federal upper limit is the maximum Medicaid payment limit established by the CMS on multiple source drugs that are listed as therapeutically equivalent to the brand name or single source drug in the most recent version of "The Approved Drug Products with Therapeutic Equivalence Evaluations" (known as the "Orange Book"), and for which at least three suppliers list the "A-rated" drug as available for sale Nationally. Within each generic formulation, the Federal upper limit is set at 150% of the lowest-priced generic drug as listed in the three nationally recognized pricing services. See 42 CFR 447.332 (a)(1)(i)–(iii) and (b) (relating to upper limits for multiple source drugs).

For drugs that do not have FUL, the Department sets the State MAC for these other multisource drugs at the baseline price as determined using the drug price listed in available Nationally recognized pricing services such as FirstData Bank, Medi-Span and Micromedic. See § 1121.56(d)(1). The baseline price is defined as the recalculated mean average for a multisource drug product using only the prices within one standard deviation of the original mean average. See § 1121.2.

Many new generically equivalent products have become available on the marketplace for which the Federal government has not yet assigned a Federal upper limit and the Department has not yet established a baseline price. Therefore, no State MAC has been established, and the Department had been paying for these drugs at AWP minus 10%, even though the drugs were available at considerably lower cost. For this reason, the Department established a separate EAC for brand name and generic drugs, effective August 10, 2005. See 35 Pa.B. 4309. Even the revised EAC for generic drugs does not enable the Department to take full advantage of the prices that are reported to be currently available.

For example, in September 2002, the Office of the Inspector General of the United States Department of Health and Human Services (OIG) issued a report on actual acquisition pricing, entitled Medicaid Pharmacy-Additional Analysis of the Actual Acquisition Cost of Prescription Drug Products (Report #A-06-02-00041) available on the OIG's website at [www.oig.hhs.gov/oas/reports/region6/60200041.htm](http://www.oig.hhs.gov/oas/reports/region6/60200041.htm). The objectives of this report were to develop estimates of the discount below AWP available for single-source drugs, all drugs without FUL, multisource drugs without FUL and multisource drugs with FUL. With respect to multisource drugs, the OIG concluded that pharmacies were able to purchase multisource drugs with FUL at an estimated discount of 72.1% below AWP and multisource drugs without FUL at an estimated discount of 44.2% below AWP.

In December 2004, the Congressional Budget Office (CBO) issued a report on Medicaid FFS reimbursement to pharmacies for prescription costs from 1997 to 2002, available on the CBO's website at [www.cbo.gov/showdoc.cfm?index=6038&sequence=0](http://www.cbo.gov/showdoc.cfm?index=6038&sequence=0). As explained in the report:

One of the main factors behind high markups for some types of drugs was Medicaid's reimbursement system. That system relies on the published list prices of drugs (which are largely set by manufacturers) to determine pharmacies' reimbursements, instead of using the actual cost of the drugs to the pharmacies. States reimburse pharmacies using for-

mulas that are typically based on the average wholesale price (AWP) of a drug, which (like the sticker price on a car) is a published list price that few purchasers actually pay. For example, a state might reimburse a pharmacy 85 percent to 90 percent of the average wholesale price of a drug plus a fixed dollar amount of \$3 to \$5 (as a dispensing fee) to cover the pharmacy's other costs. By relying on list prices, Medicaid's reimbursement formulas lead to large markups on drugs that have large differences between their list price and the price that the pharmacy actually pays . . . .

Especially in the case of a newer generic drug, manufacturers have an incentive to set a high list price but to make the drug available to pharmacies at a significantly lower price. A relatively high markup on a generic drug gives a pharmacist an incentive to substitute that drug for another generic or brand-name drug. When a new generic drug becomes available, manufacturers can compete for the pharmacy's business partly by setting a high list price and a low actual price for the pharmacy . . . .

[www.cbo.gov/showdoc.cfm?index=6038&sequence=0](http://www.cbo.gov/showdoc.cfm?index=6038&sequence=0). The report noted that an incentive to maintain high list prices diminishes over time, largely because the States' payment rates become subject to the FUL. [www.cbo.gov/showdoc.cfm?index=6038&sequence=0](http://www.cbo.gov/showdoc.cfm?index=6038&sequence=0). As also observed in the report, however, there is sometimes a delay before CMS establishes a Federal upper limit. [www.oig.hhs.gov/oei/reports/oei-03-02-00670.pdf](http://www.oig.hhs.gov/oei/reports/oei-03-02-00670.pdf).

Many private, commercial third-party payors previously used the FUL to establish the size and pricing of their MACs. Almost all have adopted an expanded MAC list, including more generic drugs than on the Federal upper limit list. Public third-party payors such as HealthChoices MCOs and the Pennsylvania Children's Health Insurance Programs (CHIP), as well as other state Medicaid agencies are also adopting expanded MAC lists. See the report on the CBO's website at [www.cbo.gov/showdoc.cfm?index=6038&sequence=0](http://www.cbo.gov/showdoc.cfm?index=6038&sequence=0).

Like these other payors, the Department will revise the methodology to determine the State MAC to take advantage of the prices that are now available.

Before selecting a new State MAC methodology, the Department reviewed the state MAC Programs of other state Medicaid programs and the impact those programs have on recipient access to drugs. That review revealed that some MAC methodologies were so aggressive that they prompted legitimate concerns about whether pharmacists could buy the drugs at the established prices, thereby presenting a barrier to access. Taking the lessons learned from those state Medicaid programs, the Department's methodology encompasses not only a quantitative pricing calculation but also ongoing monitoring to assure that drugs are in fact available at the State MAC.

Based on its review of existing reports addressing the cost of multisource drugs as well as the MAC programs of other States, the Department is revising its MAC methodology both by subjecting all eligible drugs to the same methodology and by changing the pricing calculation.

Rather than applying the Federal upper limit to all drugs for which the CMS has established limits, the Department will set the State MAC for all multisource brand name and generic products at the lower price of the Federal upper limit or the State MAC calculation. The State MAC calculation borrows from the methodology that the CMS uses to establish the FUL, but the Depart-

ment has included additional safeguards in the methodology to assure that the drug is available at the established price. In addition, the Department will also consider the financial impact of the Federal rebate before subjecting a newly approved generic drug to State MAC pricing. In some cases, primarily for a period of time after a branded drug loses patent protection, it might be more advantageous for the Department to pay the brand name product and receive the Federal rebate than to pay the State MAC price for the generic product.

In summary, the Department will establish the State MAC for brand name and "A-rated" therapeutically equivalent generic multisource drugs at the lower of the following:

1. The upper payment limit established by the CMS.
2. Provided that the generic product is available at the price established by the Department from at least two wholesalers:
  - (a) If the generic product is available from more than one manufacturer, the base price of 150% of the lowest acquisition cost for the generic product, unless 150% of the lowest acquisition cost is not at least 120% of the second lowest acquisition cost, in which case the base price will be set at 120% of the second lowest acquisition cost for the generic product.
  - (b) If the generic product is available from only one manufacturer, the base price of 120% of the acquisition cost.

The purpose of including a separate base price in those situations where the generic product is available from only one manufacturer is to recognize the two primary pharmacy markets, chains and independents, as well as rural versus urban locations, and their respective purchasing options. This State MAC provision takes into account additional market forces, such as the costs related to the carrying of inventory, which is not considered a component of the dispensing fee.

In calculating the State MAC, the MAC price will be calculated based on the typical use of 100-count bottles, or smaller sizes if 100-count bottles are not manufactured. An exception to this requirement is where standard practice patterns preclude this requirement, for example the situation where oral contraceptives are packaged only in a 28-day supply. Larger bottle sizes may be used to calculate the MAC price based on typical pharmacy stocking patterns if, for example, a particular product is typically purchased in 1,000-count bottles. In no case, however, will the MAC price be calculated using repackaged drugs.

The Department, in establishing the State MAC, has included additional safeguards. The Department will require the use of a National database of wholesaler information to ensure that only those products that are readily available will be used to develop the MAC price points. The generic product must have no manufacturing problems or shortages. The Department will monitor and verify drug shortage information through pharmacies, National drug wholesalers and public information as well as the National pricing services. Even after a MAC price is established for a drug, the Department will suspend the drug from the State MAC if these conditions are not met.

The revised EAC for the drug cost component of generic drugs, published as final-omitted rulemaking at 35 Pa.B. 4309 and the revised State MAC methodology enacted through this amendment, aligns the Department's pay-

ment methodology for generic drugs with those of other public payors and more closely approximates the cost of generic drugs, as reported by both the OIG and the CBO. These measures enable the Department to purchase generic drugs at the best possible price and provide access to pharmaceutical services to MA recipients.

The Department is also making two additional revisions to the State MAC payment methodology relating to the timeframes for updating of the State MAC and clarifying the package size to be used for determining the product cost for nonbreakables.

The Department currently updates the State MAC based on two timeframes:

- (1) The time frame established by the CMS when CMS issues the FUL.
- (2) For multisource drugs not subject to the CMS FUL, every 6 months.

The Department will retain the current CMS FUL timeframe for multisource drugs where the price has been established at the CMS FUL. However, to ensure that the Department is able to respond to and benefit from the frequent pricing changes occurring in pharmacy pricing the Department has revised the timeframe for updating all other multisource drug State MAC pricing to every 3 months as opposed to every 6 months.

In addition, the Department has made a technical revision to the package sizes the Department will use for the purpose of determining the product cost as it relates to nonbreakables, for example, ointments and creams. The Department will use the smallest size available. The use of the smallest size will provide for a price that will help ensure availability of the product as there are instances where manufacturers do not produce the nonbreakables in larger sizes.

#### *Requirements*

Section 1121.2 is amended to delete the definition of "BaseLine price." Section 1121.56 is amended to revise the methodology for calculating the State MAC for multisource drugs, clarification of common package sizes and the timeframe for updating the State MAC.

#### *Affected Individuals and Organizations*

Pharmacies and other providers that dispense prescription drugs to MA recipients will be affected by this final-omitted rulemaking, which revises the methodology for determining the State MAC for brand name and generic multisource drugs.

#### *Accomplishments and Benefits*

This final-omitted rulemaking aligns the Department's pharmacy payment rates within those of other private third-party payors in this Commonwealth as well as comparable or contiguous state Medicaid programs by expanding the State MAC methodology to include more multisource drugs. The final-omitted rulemaking enables the MA Program to take advantage of all available generic drug pricing opportunities and potential savings while maintaining recipient access to medically necessary drugs.

#### *Fiscal Impact*

This final-omitted rulemaking will result in reduced payments to pharmacies enrolled in the MA Program. The Commonwealth will realize \$22.353 million (\$10.279 million in State funds) in savings in Fiscal Year 2005-2006.

*Paperwork Requirements*

No new or additional paperwork requirements result from the adoption of this final-omitted rulemaking.

*Public Process*

The Department published an advance public notice at 35 Pa.B. 3268 announcing its intent to revise the payment methodology for both brand name drugs and generic drugs. The Department invited interested persons to comment on the proposed changes. In response to comments received, the Department published a second advance public notice at 35 Pa.B. 4264 describing the proposed State MAC methodology in greater detail and inviting additional public comment on the proposed methodology. Five commentators, including two trade associations, provided additional comment.

Before publishing the public notice at 35 Pa.B. 3268, the Department presented a copy of the proposed regulation, including the revised State MAC pricing methodology for multisource drugs, at the Medical Assistance Advisory Committee (MAAC) meeting on December 9, 2004. In addition, the Department discussed the revised payment methodology for both brand name and multisource drugs at the MAAC meeting on February 24, 2005, and shared an advance copy of the public notice announcing the proposed revision to the pharmacy payment methodology for brand name and multisource drugs at the May 26, 2005, MAAC meeting. The Department received no comments from the MAAC.

At the MAAC meeting on July 28, 2005, the Department informed the MAAC that it would publish a new public notice to allow for additional comment and provided the email address to which comments could be sent in addition to the usual mailing address.

*Discussion of Comments*

Most of the comments received in response to the public notice published at 35 Pa.B. 4264 were duplicative of those received in response to the notice issued at 35 Pa.B. 3268, which were addressed at the final-omitted rulemaking at 35 Pa.B. 4309. Following is a summary of the comments received that were not addressed in the final-omitted rulemaking and the Department's response to those comments.

*Comment*

Three commentators complained that pharmacies have to cover copayments if an MA recipient cannot pay, with one commentator requesting that the Department should be liable for any copayments that recipients cannot pay.

*Response*

The Department has required recipient copayment since September 1, 1984, and has informed providers, as set forth in § 1101.63(b)(5) (relating to payment in full), that the amount of the copayment will be deducted from the Commonwealth's payment to the provider. In addition, as set forth in § 1101.63(b)(8), the Commonwealth has informed providers of their responsibility to provide services even if the MA recipient is unable to pay the copayment amount as well as their right to attempt to collect the copayment amount.

The amendments to the recipient pharmacy copayment liability will be mitigated to the extent recipients will accept generic drugs.

*Comment*

One commentator observed that reducing the payment rates for generic products does not encourage the use of

generics and suggested that the Department should support pharmacies that dispense generic medications.

*Response*

While the commentator provided no specifics, the Department has already implemented pharmacy changes to encourage the use of generics. Among these changes are mandatory substitution requirements and specific drug prior authorization criteria. In addition, through planned revisions to pharmacy copayments, the Department intends to raise the recipient copayment for brand name drugs and either will maintain or decrease the copayment for generic drugs. Thus, the Department will provide an incentive for prescribing and dispensing of generic drugs. These changes will be implemented in a future rulemaking.

*Comment*

One commentator suggested that the Department should have taken into consideration the budget effect of 250,000 dual eligible recipients transferring to the Medicare Part D Drug Program on January 1, 2006, as well as the savings from the prior authorization of Proton Pump Inhibitors (PPI), before revising the pharmacy payment rates.

*Response*

The Department continues to review any potential savings as a result of the implementation of the Part D pharmacy benefit for dual eligibles. The review, taking into consideration the required State phase-down contributions under Medicare Part D, currently projects no net savings to the Department.

The Department has benefited from savings through the prior authorization of PPI. However, while generating certain savings to the Department, this prior authorization's primary purpose was to bring the Department in line with current industry pharmacy standards from both a quality of care and fiscally prudent standpoint.

*Comment*

One commentator repeated concerns submitted to the Department on July 22, 2005, asking the Department to specify how the Department will establish the State MAC and to request a delay until there is a "study" of the pharmacy payment proposals. The commentator also alleged that when North Carolina implemented a similar state MAC, it experienced operational issues.

*Response*

The Department, in response to comments regarding the public notice published at 35 Pa.B. 3268, thereafter published the methodology to establish the State MAC at 35 Pa.B. 4264. The commentator did not raise specific concerns regarding the actual methodology proposed by the Department.

As to the request that the Department perform a "study" prior to implementing pharmacy payment changes, the Department, as previously stated, has already performed studies and has reviewed studies regarding pharmacy pricing conducted by other agencies. For example, the OIG's report, entitled "Medicaid Pharmacy-Additional Analysis of the Actual Acquisition Cost of Prescription Drug Products," issued September 2002, found that pharmacies were able to purchase multisource drugs, without Federal upper limits, with an estimated discount of 44.2% below AWP. The Department also reviewed the pharmacy pricing methodologies of other states' Medicaid programs, as well as other third-party payors in this Commonwealth. The Department deter-

mined that the revised State MAC methodology will align its payment policies with those of other payors. Regarding the statement that the Department did not comply with the obligation of section 2213-A of The Administrative Code of 1929 (71 P. S. § 581-13), the Department has previously addressed this issue. See 35 Pa.B. 4309.

In regard to the MAC Program in North Carolina, which is similar to that being implemented in this Commonwealth, the Department contacted the contractor administering the state MAC as well as North Carolina State staff to discuss their experience in implementing the MAC. North Carolina staff reported that there have been no significant administrative issues and that no additional staff was needed to address complaints.

#### *Regulatory Review Act*

Under section 454 of the code, this final-omitted rule-making is not subject to review under the Regulatory Review Act.

#### *Findings*

The Department finds that:

(1) Notice of proposed rulemaking is omitted in accordance with section 204(1)(iv) of the CDL and 1 Pa. Code § 7.4(1)(iv) because the final-omitted rulemaking relates to Commonwealth grants and benefits.

(2) Adoption of this final-omitted rulemaking in the manner provided by this order is necessary and appropriate for the administration and enforcement of the code.

#### *Order*

The Department, acting under the code, orders that:

(a) The regulations of the Department, 55 Pa. Code Chapter 1121, are amended by amending §§ 1121.2 and 1121.56 to read as set forth in Annex A.

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

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

(d) This order takes effect on August 22, 2005.

ESTELLE B. RICHMAN,  
*Secretary*

**Fiscal Note:** 14-499. No fiscal impact; (8) recommends adoption. Implementation of the notice will generate savings to the General Fund beginning in Fiscal Year 2005-2006 of \$10.279 million.

### **Annex A**

## **TITLE 55. PUBLIC WELFARE**

### **PART III. MEDICAL ASSISTANCE MANUAL**

#### **CHAPTER 1121. PHARMACEUTICAL SERVICES**

#### **GENERAL PROVISIONS**

#### **§ 1121.2. Definitions.**

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

*AWP*—The average wholesale price for a drug as found in the Department's pricing service publication.

*Brand name*—A registered trade name commonly used to identify a drug.

*Compounded prescription*—A prescription that is prepared in the pharmacy by combining two or more ingredi-

ents and involves the weighing of at least one solid ingredient which shall be a compensable item or a legend drug in a therapeutic amount.

*Department's pricing service*—A Nationally recognized pricing guide currently under contract with the Department, selected by competitive bids consistent with the Commonwealth procurement practices, which can supply the Department with services needed to maintain the drug reference file under this chapter.

*DESI drug*—A drug product for which Federal Financial Participation (FFP) is not available under 42 CFR 441.25 (relating to less than effective drugs).

*Experimental drug*—A drug or product currently being investigated under licensure by the Food and Drug Administration (FDA) to determine its safety and effectiveness.

*Federal upper limit*—The per unit amount set for a multisource drug which is established by the HCFA under 42 CFR 447.331—447.333 (relating to upper limits for multisource drugs).

*HCFA*—The Health Care Financing Administration.

*HCFA multisource drug*—A multisource drug identified by the HCFA for which FFP is limited under 42 CFR 447.331—447.333.

*Legend drug*—A drug or product that under Federal law or State law can be dispensed only upon the order of a physician.

*Licensed prescriber*—A person currently licensed under the law of a state to order medication.

*Multisource drug*—A drug marketed or sold by two or more manufacturers or labelers or a drug marketed or sold by the same manufacturer or labeler under two or more different proprietary names or both under a proprietary name and without such a name.

*Nonlegend drug*—A drug or product that can be purchased without a prescription.

*OBRA '90*—The Omnibus Budget Reconciliation Act of 1990 (Pub. L. No. 101-508, 104 Stat. 1388).

*State MAC*—The maximum allowable cost established for a multisource drug.

*Usual and customary charge*—The pharmacy's lowest net charge an MA recipient would pay for a prescription as a non-Medicaid patient at the time of dispensing for the same quantity and strength of a particular drug or product, including all applicable discounts, such as special rates to nursing home residents, senior citizens, or other discounts extended to a particular group of patients. This lowest net price does not apply to special in-store rates or discounts extended to charitable organizations, religious groups, store employees and their families, nonprofit organizations, members of the medical profession or other similar non-Medicaid groups.

#### **PAYMENT FOR PHARMACEUTICAL SERVICES**

#### **§ 1121.56. Drug cost determination.**

(a) The Department will base its drug cost for compensable legend and nonlegend drugs on the lower of:

(1) The Estimated Acquisition Cost (EAC) established by the Department as the current AWP found in the Department's pricing service for the most common package size of that product minus 10%.

(2) The State MAC established by the Department.

(b) The Department will update the EAC for individual drugs on a monthly basis as it appears in the Department's pricing service.

(c) HCFA establishes lists that identify and set Federal upper limits for the HCFA multisource drugs and provides the listing of these drugs and revisions to the list to the Department through Medicaid manual transmittals on a periodic basis.

(d) The Department will determine the State MAC by one of the following methods:

(1) For multisource drugs, the Department will set the State MAC at the lower of the following:

- (i) The upper payment limit established by the CMS.
- (ii) Provided that the generic product is available at the price established by the Department from at least two wholesalers:

(A) If the generic product is available from more than one manufacturer, the base price of 150% of the lowest acquisition cost for the generic product, unless 150% of the lowest acquisition cost is not at least 120% of the second lowest acquisition cost, in which case the base price will be set at 120% of the second lowest acquisition cost.

(B) If the generic product is available from only one manufacturer, the base price is 120% of the acquisition cost for the generic product.

(2) For disposable insulin syringes, the Department will set the State MAC at the amount listed in the MA Program Fee Schedule.

(e) The Department will update the State MAC:

(1) If the State MAC for a multisource drug is set at the Federal upper payment limit established by CMS, the Department will apply the Federal upper limits for CMS multisource drugs to be effective on the date established by CMS and will describe the update to each pharmacy enrolled in the MA Program when it is available.

(2) The Department will apply the price for all other State MAC multisource drugs every 3 months, and will distribute the update to each pharmacy enrolled in the MA Program.

(f) With the exception of the HCFA multisource drugs, the Department will make further additions to the list of State MAC drugs after consultation with the Medical Assistance Advisory Committee as to whether the application of a State MAC is cost effective to the Department for a particular multisource drug. The Department will add the HCFA multisource drugs to the State MAC list effective as of the effective date established by HCFA.

(g) With the exception of disposable insulin syringes, the State MAC does not apply if the conditions are met as described in § 1121.53(b)(1) and (2) (relating to limitations on payment).

(h) The most common package size for the purposes of determining the product cost is one of the following:

(1) For capsules, tablets and liquids available in breakable package sizes:

(i) The listed package size if only one package size is listed.

(ii) The 100 or pint package size if more than one package size is listed.

(iii) The next smaller package size from the 100 or pint size, excluding a drug company's unit-dose package size, if more than one package size is listed other than the 100 or pint package size.

(iv) The package size closest to the 100 or pint package size, excluding a drug company's unit-dose package size, if the next smaller package is the unit-dose package size.

(2) The listed package size for all dosage forms available for all nonlegend drug products.

(3) The smallest package size for all dosage forms available in nonbreakable packages.

[Pa.B. Doc. No. 05-1561. Filed for public inspection August 19, 2005, 9:00 a.m.]