

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 245]

Administration of the Storage Tank and Spill Prevention Program

Order

The Environmental Quality Board (Board) by this order amends 25 Pa. Code Chapter 245 (relating to Administration of the storage tank and spill prevention program).

This order was adopted by the Board at its meeting of September 15, 2009.

A. *Effective Date*

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

B. *Contact Persons*

For further information, contact Charles M. Swokel, Chief, Division of Storage Tanks, P. O. Box 8763, Rachel Carson State Office Building, Harrisburg, PA 17105-8763, (717) 772-5806; or Kurt Klapkowski, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the Pennsylvania AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department of Environmental Protection's (Department) web site (<http://www.depweb.state.pa.us>).

C. *Statutory Authority*

The rulemaking is being made under the authority of section 106 of the Storage Tank and Spill Prevention Act (Storage Tank Act) (35 P. S. § 6021.106), which authorizes the Board to adopt rules and regulations governing aboveground and underground storage tanks to accomplish the purposes and carry out the provisions of the act; section 501 of the act (35 P. S. § 6021.501), which authorizes the Department to establish program requirements for underground storage tanks; and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which authorizes the Board to formulate, adopt and promulgate rules and regulations that are necessary for the proper work of the Department.

D. *Background of the Amendments*

The Board established the initial rulemaking governing administration of the storage tank and spill prevention program with its final publication of Chapter 245, Subchapters A and B (relating to general provisions; and certification program for installers and inspectors of storage tanks and storage tank facilities) at 21 Pa.B. 4345 (September 21, 1991). In that initial rulemaking, Federal requirements in 40 CFR Part 280 (relating to technical standards and corrective action requirements for owners and operators of underground storage tanks (UST)) were adopted by reference in Subchapter A. Comprehensive UST regulations were established in Chapter 245 when the Board adopted Subchapter E in 1997 (27 Pa.B. 5341, October 11, 1997). The Board last amended Subchapter E in 2007, when several UST provisions contained in the

Federal Energy Policy Act of 2005 (August 8, 2005, Pub. L. No. 109-58, 119 Stat. 594) (EPAAct) were adopted at 37 Pa.B. 5979, (November 10, 2007). The most significant provision in this final-form rulemaking addresses UST operator training requirements and codifies the last provision of the Energy Policy Act of 2005 (Pub.L. 109-58) (EPAAct) relating to UST that needs to be addressed by the Department. Provisions for training course and trainer approvals, along with provisions for mandatory training or retraining of UST owners and operators whose tank systems are determined to be out of compliance as a result of an inspection, are already contained in current Chapter 245.

The proper conduct of operations, maintenance and related recordkeeping for USTs has been a problem in this Commonwealth and Nationally. The Department has noted particular compliance concerns relating to routine leak detection monitoring, periodic testing of monitoring equipment and corrosion protection systems, and maintenance. The operator training provisions in this rulemaking will help to improve significantly UST operations, maintenance, recordkeeping and related compliance with the Commonwealth and Federal UST regulatory requirements, which will protect the citizens and the environment of this Commonwealth.

Establishment of an operator training program is necessary to comply with Federal operator training grant guidelines issued by the U.S. Environmental Protection Agency (EPA) on August 8, 2007. Section 9010 of Subtitle I of the Solid Waste Disposal Act (Subtitle I), as amended by section 1524 of the EPAAct (42 U.S.C. § 6991i), required the EPA to develop and publish guidelines for states to establish training requirements for UST operators. This section also requires that states receiving Federal funds under Subtitle I develop state-specific regulatory training requirements consistent with the EPA guidelines by August 8, 2009 or be well underway in that process. The Commonwealth receives Federal funding under Subtitle I in the form of the UST and Leaking Underground Storage Tank Trust Fund grants. Additionally, the guidelines require states to ensure that all three classes of operators are trained according to state-specific training requirements by August 8, 2012. Failure to establish an effective operator training program in the Commonwealth would jeopardize current EPA state program approval and substantial funding provided to the Department under Subtitle I. For Federal Fiscal Year 2009, the Department received \$2.79 million in Federal funds from EPA for the UST and Leaking Underground Storage Tank (cleanup) programs.

The final-form rulemaking amends existing § 245.422(e) (relating to upgrading of existing underground storage tank systems) to clarify that containment is required when replacing an existing product dispenser that involves a major modification.

The final-form rulemaking also amends § 245.435(b) (relating to reporting and recordkeeping) to clarify the time frame for retention of temporary records and to correct errors on the retention of cathodic protection documents. This subsection also adds operator training documents to the temporary recordkeeping requirements.

The final-form rulemaking adds § 245.436 (relating to operator training) to existing regulations. This section establishes three distinct classes of UST operators and related training requirements. It includes the general requirements for trained operators (subsection (a)), descriptions of the classes of storage tank operators to be trained (subsection (b)), required and acceptable forms of training for each class of operator (subsection (c)), deadlines for new and existing operators to meet the training requirements (subsection (d)), and documentation requirements (subsection (e)).

The Department worked with the Storage Tank Advisory Committee (STAC) during development of this rulemaking. The Department also met with UST owners, operators and manufacturers; associations and groups, such as the Pennsylvania Petroleum Marketers and Convenience Store Association; the Tank Installers of Pennsylvania; and the Agricultural Advisory Board. The STAC, which was established by section 105 of the Storage Tank Act (35 P. S. § 6021.105), consists of persons representing a cross-section of organizations having a direct interest in the regulation of storage tanks in this Commonwealth. As required by section 105 of the Storage Tank Act, the STAC has been given the opportunity to review and comment on the final-form rulemaking and to review comments received on the proposed rulemaking. On June 9, 2009, the STAC voted to support the amendments and recommended that the Board consider the amendments for publication as final-form rulemaking. A listing of STAC members and minutes of STAC meetings are available on the Department's web site at ww.depweb.state.pa.us and may also be obtained from Charles M. Swokel, whose contact information appears in Section B of this order.

E. Summary of Changes to and Comments and Responses on the Proposed Rulemaking

The Board received comments on the proposed rulemaking from six commentators. Five individuals submitted comments during the 30-day public comment period, subsequent to the notification of availability published at 39 Pa.B. 1300 (March 14, 2009). The Department provided the Independent Regulatory Review Commission (IRRC) with all comments received during the public comment period. On May 13, 2009, IRRC submitted written comments to the Board. Based on the comments received, several changes have been made in the final-form rulemaking.

One commentator felt that compliance costs included in the preamble of the proposed rulemaking may be understated and did not address travel and labor costs associated with attending an operator training course. The Board recognizes that additional travel and labor costs could be incurred. However, the upper range of the rate shown for national trainers was for onsite training. Since the proposed rulemaking was published, some national trainers have started providing computer-based interactive operator training courses at even lower rates than projected in the preamble. See Section F, Compliance Cost of this order for more discussion on the costs associated with the rulemaking. The Board believes that market factors and national demand for training operators will ensure that training costs are competitive and reasonable.

Two commentators raised concerns that the proposed rulemaking may not meet EPA guidelines for operator training because the proposal does not provide for retraining or mandatory training of storage tank operators when a facility is determined to be out of compliance with regulatory requirements. Since existing regulations al-

ready contain provisions in § 245.411(d) for mandatory training or retraining of owners and operators, when a facility is determined to be out of compliance, the Board does not see a need to further amend the regulation on retraining. The existing regulations cover any formal retraining of owners and operators that may be required.

The Department may also rely on certified third-party inspectors or Department staff to provide instructions to operators during a facility inspection process for minor infractions, such as where on-the-spot corrections can be made or when the operator can provide documentation within a certain time frame to the inspector that demonstrates compliance. This less formal training process should satisfy retraining requirements for minor infractions, so long as it measures the operators understanding of regulatory requirements, achieves compliance for the noted infractions and is documented on the inspection report or other enforcement records. The Board believes that the EPA guidelines allow for flexibility when determining compliance and providing retraining specific to minor or limited infractions, as determined by the Department.

Two commentators complimented the Department on efforts to establish the rulemaking and one recommended that the provision on availability of Class A and Class B operators be retained as proposed. The Board appreciates the comments, and the provision is retained.

One commentator raised concerns about what constitutes a "manned facility" and recommended that definitions be added for manned and unmanned facilities and for determining when a facility is in operation that requires a Class C operator to be onsite. The Board recognizes this concern and has changed § 245.436(a)(ii) in the final-form rulemaking to clarify this issue and to reference 37 Pa. Code Chapter 13 (relating to storage and use of flammable and combustible liquids), which stipulates requirements for onsite operators when dispensing fuel for retail sales to the general public.

One commentator indicated that Class A operators may not make routine management decisions as indicated in § 245.436(b)(1), but may advise the tank owner or management on such matters. The Board has changed the routine requirements in this section to indicate that Class A operators "typically" have certain management responsibilities, thus implying that other methods of handling these responsibilities, such as advising management, may also be acceptable.

Two commentators were concerned that Department-certified entities should not be allowed to serve as operators and expressed that contracting the Class A operators position may pose safety concerns. The Board does not agree with the commentators that Department-certified entities should not be allowed to serve as operators or that contracting these functions poses safety concerns. However, the Board does believe that when designated as Class A or Class B operators, Department-certified entities should maintain current IUM or UMX certification categories or complete the same formal training as other operators. Therefore, the final-form rulemaking requires that Department certification must be "current" in § 245.436(b)(1) and (2) for Department-certified entities when designated as the Class A operator, the Class B operator or both.

Several commentators raised concerns about Class C operator notification and use of environmental hot-line representatives for notification in emergencies. One of the commentators felt the proposed rulemaking was vague on instances when notification must be made. The Board

recognizes these concerns and has included changes in § 245.436(b)(3) and (e)(3) of the final-form rulemaking that notification should be “based on the nature and type of emergency” and that Class C operator “or owner contact information including . . . emergency procedures” shall be posted at unmanned facilities. This helps to clarify that an emergency hot-line representative may be used to satisfy notification, provided that written emergency procedures are provided that adequately address the process. The proposed rulemaking text also allows the hot-line representative to be designated as a Class C operator (additional, alternate or primary), if needed.

One commentator was concerned that maintaining lists of trained operators will be difficult and time-consuming, given the commentator’s experience with the high turnover of Class C operators. This commentator and another commentator also believe that the proposed rulemaking should further clarify retention requirements for operator training documents maintained offsite, such as for unmanned facilities. The Board believes that maintaining current lists of designated operators and other related documents is necessary and appropriate to identify the trained operators responsible for each underground storage tank facility. Retaining documentation at a readily available offsite location is already clarified in § 245.435(b) of the existing regulation, which is referenced in the proposed rulemaking under § 245.436(e)(2).

One commentator felt that the requirement to train a new Class A or Class B operator within 30 days for replacing a trained operator should be waived if the company has other trained operators already available to designate. The Board believes that the proposed rulemaking already allows for substitution of trained operators and no waiver is required. When designating any operator who is not yet trained, that operator must be trained within the time frames stated in the regulation.

Finally, one commentator indicated that the corporate owner of multiple UST facilities is developing in-house training programs to fulfill the requirements to train and certify their own Class A and Class B operators under § 245.141 (relating to training approval). The Board agrees that the proposed rulemaking, coupled with existing training approval provisions in § 245.141, does not preclude an owner from developing in-house operator training courses and submitting the course outlines for approval by the Department for training the owner’s operators. The regulations require that the course instructor have professional background and knowledge necessary for the technical material covered and that the training course meet regulatory requirements, including testing and certification of the operators.

F. *Benefits, Costs and Compliance*

Benefits

The amendments are expected to result in significant improvements in the routine operation, maintenance and monitoring of UST. This will help to further reduce the number of releases from UST and in turn protect public health and the environment. These regulatory changes will provide economic opportunities for third-party trainers. By recognizing a wide array of training options, it is expected that costs to storage tank owners and operators will be minimized.

By establishing a viable operator training program, the Commonwealth will retain UST state program approval and will remain eligible for continued substantial Federal funding for the program under Subtitle I.

Compliance Costs

There are approximately 3,500 tank owners and their operators with nearly 8,700 UST facilities regulated by the Department in this Commonwealth. Many of the owners are major corporations, while the remaining owners are mostly small businesses and various government entities. Many of the small businesses and corporations belong to organizations and associations that have shown an interest in helping with the required training for operators. The number of operators at any particular facility range from one to several, depending on the size of the facility and hours of operation. Generally, retail sales facilities have more operators than government entities or nonretail facilities.

The current National availability of UST training vendors for operators is somewhat limited, but is expected to expand significantly as all states implement mandatory operator training requirements. Many states have indicated that they will rely on third-party or industry trainers. The current cost of National training vendors ranges from \$145 to \$500 per training course for Class A and Class B operators. However, several organizations and associations in this Commonwealth, as well as Department-certified tank installers, inspectors and companies have indicated an interest in becoming approved trainers or in some cases providing services as qualified operators. It is anticipated with in-State and National trainers expanding into the UST program that the cost of operator training courses will be minimized through these market forces.

The costs for training Class C operators should be very minimal. The Class C operators only require in-house training on emergency procedures and written instructions. Tank owners should already provide this training to satisfy U.S. Occupational Safety and Health Administration requirements in 29 CFR Part 1910 (relating to Occupational Safety and Health Standards); and Department of Labor and Industry requirements in 37 Pa. Code Chapter 13.

Compliance Assistance Plan

It is not anticipated that the Commonwealth will provide sources of financial assistance to aid in compliance with the final-form rulemaking.

As for technical and educational assistance, the Department currently operates a fairly extensive program of outreach activities designed to assist owners and operators of storage tanks as well as individuals. This program includes a series of fact sheets that focus on single issues in the storage tank program (for example, Leak Detection: Meeting the Requirements); periodic seminars and conferences focusing on storage tank technical and administrative issues; training sessions presented by regional and central office training teams on a variety of issues; numerous guidance documents addressing technical and policy issues; and a great deal of information available on the Department’s web site. The Department will work with organizations, associations, companies and individuals to establish a base of industry trainers to provide the necessary training, testing and related documentation for owners and operators of UST.

Paperwork Requirements

There are very few new paperwork requirements in this rulemaking and no new reporting requirements. The rulemaking addresses requirements to maintain a list of designated operators, certificates or documentation of training, and facility contacts and written emergency procedures. The list of operators, training records and

some contact information is new; emergency procedures should already be available at most facilities. These records will be checked during the periodic inspections currently required at UST facilities and will not be routinely required to be submitted to the Department.

G. Pollution Prevention

The programs set out in this rulemaking package and in the current regulations are designed to prevent the release and spread of regulated substances from storage tanks located in this Commonwealth. They create a program similar to the cradle-to-grave process with the goal of making sure that the storage tank is installed, maintained, operated, closed and removed in a manner that will minimize the likelihood of a release occurring. If a release does occur, these amendments and regulations that currently exist in Chapter 245 are designed to detect and contain the release quickly, and make sure that corrective action is carried out expeditiously, minimizing exposure to the public and the environment.

In this rulemaking, the Department is attempting to reach or improve upon these goals through a combination of performance standards and training of storage tank operators. The final-form rulemaking has built-in flexibility as to how the regulated community achieves the goals and reliance on industry standards and trained industry professionals. By taking this approach, the Department hopes to improve routine storage tank operation and maintenance, reduce pollution, lower the number of corrective actions that must eventually be performed, decrease the amount of contaminated soil and groundwater that must be dealt with, and do so in a manner that is flexible, reasonable and cost effective.

H. Sunset Review

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

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 27, 2009, the Department submitted a copy of the notice of proposed rulemaking, published at 39 Pa.B. 1300 (March 14, 2009) to IRRC and the House and Senate Environmental Resources and Energy Committees (Committees) for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j2)), on November 4, 2009, this final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 5, 2009, and approved the final-form rulemaking.

J. Findings

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968,

P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

(3) These regulations do not enlarge the purpose of the proposal published at 39 Pa.B. 1300.

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing Storage Tank Act identified in Section C of this order.

K. Order of the Board

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

(a) The regulations of the Department, 25 Pa. Code Chapter 245, are amended by amending §§ 245.422 and 245.435 to read as set forth at 39 Pa.B. 1300; and by adding § 245.436 to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this order, 39 Pa.B. 1300 and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson shall submit this order, 31 Pa.B. 1300 and Annex A to IRRC and the Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order, 39 Pa.B. 1300 and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately.

JOHN HANGER
Chairperson
Environmental Quality Board

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 6705 (November 21, 2009).)

Fiscal Note: Fiscal Note 7-432 remains valid for the final adoption of the subject regulation.

Annex A

**TITLE 25. ENVIRONMENTAL PROTECTION
PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Subpart D. ENVIRONMENTAL HEALTH AND SAFETY

ARTICLE VI. GENERAL HEALTH AND SAFETY

CHAPTER 245. ADMINISTRATION OF THE STORAGE TANK AND SPILL PREVENTION PROGRAM

Subchapter E. TECHNICAL STANDARDS FOR UNDERGROUND STORAGE TANKS

GENERAL OPERATING REQUIREMENTS

§ 245.436. Operator training.

(a) *Requirement for trained operators.*

(1) An owner shall designate Class A, Class B and Class C operators for each underground storage tank system or facility that has underground storage tanks permitted to operate by the Department.

(2) A facility may not operate after August 8, 2012, unless operators have been designated and trained as required in this section, unless otherwise agreed upon by the Department.

(3) Trained operators shall be readily available to respond to suspected/confirmed releases, other unusual operating conditions and equipment shut-offs or failures.

(i) The Class A or Class B operator shall be available for immediate telephone consultation when a facility is in operation. A Class A or Class B operator must be able to be onsite at the storage tank facility within 24 hours.

(ii) Facilities that dispense motor fuel for retail sales to the general public shall be manned by an onsite Class C operator when open for business with the public in accordance with 37 Pa. Code §§ 13.115 and 13.117 (relating to attended self-service stations; and supervision of dispensing). During an unexpected absence of a Class C operator, such as employee no-shows or call-offs, an onsite Class A or Class B operator may fill-in or temporarily substitute for the Class C operator. Facilities that do not dispense motor fuel to the general public may be manned based on the facility owner's requirements and routine operational needs.

(iii) For unmanned facilities, a Class C operator shall be available for immediate telephone consultation and shall be able to be onsite within 2 hours of being contacted. Emergency contact information shall be prominently displayed at the site. Emergency procedures for users of unmanned facilities shall also be prominently posted at the site.

(4) Designated operators shall successfully complete required training under subsection (c) by August 8, 2012.

(5) A person may be designated for more than one class of operator.

(b) *Operator classes.*

(1) *Class A operator.* A Class A operator has primary responsibility to operate and maintain the underground storage tank system and facility. The Class A operator's responsibilities typically include managing resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements. In general, this person focuses on the broader aspects of the statutory and regulatory requirements and standards necessary to properly operate and maintain the underground storage tank system and facility.

(i) A Class A operator assists the owner by ensuring that underground tank systems are properly installed and expeditiously repaired, and records of system installation, modification and repair are retained and made available to the Department and certified IUM inspectors.

(ii) A Class A operator shall be familiar with training requirements for each class of operator and may provide required training for Class C operators.

(iii) A Class A operator may prepare site drawings that indicate equipment locations for Class C operators and routine maintenance checklists for Class B operators. (See PEI RP 900—"Recommended Practices for the Inspection and Maintenance of UST Systems.")

(iv) Department-certified companies, installers and inspectors with current underground storage tank UMX or IUM certification categories may perform Class A operator duties when employed or contracted by the tank owner to perform these functions.

(A) Department-certified installers, inspectors and companies identified in this subparagraph are excluded from required training under subsection (c), unless required by the Department to successfully complete mandatory operator training under § 245.411(d) (relating to inspection frequency).

(B) A certified IUM inspector may not perform a facility operation inspection for a facility where the inspector is also the designated Class A operator. (See § 245.106 (relating to conflict of interest).)

(2) *Class B operator.* A Class B operator implements applicable underground storage tank regulatory requirements and standards in the field or at the storage tank facility. This person oversees and implements the day-to-day aspects of operations, maintenance and recordkeeping for the underground storage tanks at one or more facilities. For example, the operator ensures that release detection methods, release prevention equipment and related recordkeeping and reporting requirements are met, relevant equipment manufacturer's or third-party performance standards are available and followed, and appropriate persons are trained to properly respond to potential emergencies caused by releases or spills from underground storage tank systems at the facility.

(i) A Class B operator checks spill prevention and overfill control equipment and corrosion protection equipment to ensure that they are functioning properly and that any required system tests are performed at required intervals.

(ii) A Class B operator assists the owner by ensuring that release detection equipment is operational, release detection is performed at the proper intervals and release detection records are retained and made available to the Department and certified IUM inspectors.

(iii) A Class B operator shall be totally familiar with Class B and Class C operator responsibilities, and may provide required training for Class C operators.

(iv) Department-certified companies, installers and inspectors with current underground storage tank UMX or IUM certification categories may perform Class B operator duties when employed or contracted by the tank owner to perform these functions.

(A) Department-certified installers, inspectors and companies identified in this subparagraph are excluded from required training under subsection (c), unless required by the Department to successfully complete mandatory operator training under § 245.411(d).

(B) A certified IUM inspector may not perform a facility operation inspection for a facility where the inspector is also the designated Class B operator. (See § 245.106.)

(3) *Class C operator.* A Class C operator is the first line of response to events indicating emergency conditions. This person is responsible for responding to alarms or other indications of emergencies caused by spills or releases from underground storage tank systems and equipment failures. The Class C operator shall notify the Class A or Class B operator and appropriate emergency responders when necessary, based on the nature or type of emergency.

(i) A Class C operator may control or monitor the dispensing or sale of regulated substances.

(ii) After June 28, 2010, written instructions or procedures shall be provided and visible at manned storage tank facilities, and be readily available for unmanned facilities for persons performing duties of the Class C operator to follow and to provide notification necessary in the event of emergency conditions.

(iii) There may be more than one Class C operator at a storage tank facility, but not all employees of a facility are necessarily Class C operators.

(c) *Required training.*

(1) *Class A operators.* A Class A operator shall successfully complete a training course approved under § 245.141 (relating to training approval) or recognized by the Department under paragraph (5) that includes a general knowledge of underground storage tank system requirements. Training must provide information that should enable the operator to make informed decisions regarding compliance and to ensure that appropriate persons are fulfilling operation, maintenance and recordkeeping requirements and standards of this chapter or Federal underground storage tank requirements in 40 CFR Part 280 (relating to technical standards and corrective action requirements for owners and operators of underground storage tanks (UST)), or both, including the following:

- (i) Spill and overfill prevention.
- (ii) Release detection and related reporting requirements.
- (iii) Corrosion protection.
- (iv) Emergency response.
- (v) Product and equipment compatibility.
- (vi) Financial responsibility.
- (vii) Notification and storage tank registration requirements.
- (viii) Temporary and permanent closure requirements.
- (ix) Operator training requirements.

(2) *Class B operators.* A Class B operator shall successfully complete a training course approved under § 245.141 or recognized by the Department under paragraph (5) that includes an in-depth understanding of operation and maintenance aspects of underground storage tank systems and related regulatory requirements. Training must provide specific information on the components of underground storage tank systems, materials of construction, methods of release detection and release prevention applied to underground storage tank systems and components. Training must address operation and maintenance requirements of this chapter or Federal underground storage tank requirements in 40 CFR Part 280, or both, including the following:

- (i) Spill and overfill prevention.
- (ii) Release detection and related reporting requirements.
- (iii) Corrosion protection and related testing.
- (iv) Emergency response.
- (v) Product and equipment compatibility.
- (vi) Reporting and recordkeeping requirements.
- (vii) Class C operator training requirements.

(3) *Class C operators.* At a minimum, training provided by the tank owner or Class A or Class B operator must enable the Class C operator to take action in response to

emergencies, such as situations posing an immediate danger or threat to the public or to the environment and that require immediate action, caused by spills or releases and alarms from an underground storage tank system. Training must include written instructions or procedures for the Class C operator to follow and to provide notification necessary in the event of emergency conditions.

(4) *Class A and Class B operators.* Successful completion for Class A and Class B operators means attendance for the entire training course and demonstration of knowledge of the course material as follows:

(i) Receipt of a passing grade under § 245.141(b)(4), on an examination of material presented in the training course, or demonstration through practical (hands-on) application to the trainer, operation and maintenance checks of underground storage tank equipment, including performance of release detection at the underground storage tank facility, at the conclusion of onsite training.

(ii) Receipt of a training certificate by an approved trainer upon verification of successful completion of training under this paragraph.

(5) *Reciprocity.* The Department may also recognize successful completion of Class A and Class B operator training on regulatory standards consistent with 40 CFR Part 280, which is recognized by other states or implementing agencies and which is approved by the EPA as meeting operator training grant guidelines published by the EPA.

(6) *Costs of training.* The tank owner or operator shall incur the costs of the training.

(d) *Timing of training.*

(1) An owner shall ensure that Class A, Class B and Class C operators are trained as soon as practicable after December 26, 2009, contingent upon availability of approved training providers, but not later than August 8, 2012.

(2) When a Class A or Class B operator is replaced, after August 8, 2012, a new operator shall be trained within 30 days of assuming duties for that class of operator.

(3) Class C operators shall be trained before assuming duties of a Class C operator. After June 28, 2010, written instructions or procedures shall be provided to Class C operators to follow and to provide notification necessary in the event of emergency conditions. Class C operators shall be briefed on these instructions or procedures at least annually (every 12 months), which may be concurrent with annual safety training required the Occupational Safety and Health Administration, 29 CFR Part 1910 (relating to Occupational Safety and Health Standards).

(e) *Documentation.*

(1) The owner of an underground storage tank facility shall prepare a list of designated operators. The list must represent the current Class A, Class B and Class C operators for the underground storage tank facility and include:

(i) The name of each operator, class of operation trained for and the date each operator successfully completed initial training and refresher training, if any.

(ii) For Class A and Class B operators that are not permanently onsite or assigned to more than one facility, telephone numbers to contact the operators.

(2) A copy of the certificates of training for Class A and Class B operators shall be on file and readily available and a copy of the facility list of Class A, Class B and Class C operators and Class C operator instructions or procedures shall be kept onsite and immediately available for manned storage tank facilities and readily available for unmanned facilities. (See § 245.435(b)(3)(ix) (relating to reporting and recordkeeping).)

(3) Class C operator or owner contact information, including names and telephone numbers, and emergency procedures, shall be conspicuously posted at unmanned facilities.

[Pa.B. Doc. No. 09-2366. Filed for public inspection December 24, 2009, 9:00 a.m.]

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY [34 PA. CODE CHS. 401 and 403]

Uniform Construction Code Training and Certification of Code Administrators; Administration

The Secretary of Labor and Industry (Secretary), under the authority of sections 301 and 304 of the Pennsylvania Construction Code Act (act) (35 P.S. §§ 7210.301, 7210.304), amends §§ 401.1, 403.1, 403.21, 403.26, 403.27, 403.28, 403.42, 403.42a, 403.43, 403.62, 403.62a, 403.63, 403.65, 403.102, 403.121 and 403.122 to read as set forth in Annex A.

Proposed Rulemaking Omitted

The Department of Labor and Industry (Department), under section 204 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. § 1204), known as the Commonwealth Documents Law (CDL), and 1 Pa. Code § 7.4 (relating to omission of notice of proposed rulemaking), finds that notice of proposed rulemaking under the circumstance is unnecessary and impractical and therefore may be omitted. The Department's justification for utilizing the proposed rulemaking omitted process is that the only changes being made in this amendment are those specifically mandated by the act or that reflect the numerous amendments to the act.

Section 304 of the act requires the Department, by December 31 of the year of the issuance of a new International Code Council (ICC) International Building Code, to promulgate regulations adopting the new code as the Uniform Construction Code (UCC), if the Uniform Construction Code Review and Advisory Council (Council) does not inform the Department that it should exclude any provisions of the triennial code from the UCC. The ICC updated its National codes and issued 2009 editions in early 2009. The Council informed the Department that it should not exclude any provisions of the new triennial ICC Codes. The act was amended by Act 157 of 2006 (Act 157); Acts 9 and 39 of 2007 (Acts 9 and 39, respectively) and Act 106 of 2008 (Act 106).

Background

Under section 304(a)(1) of the act, the Department is required to promulgate regulations adopting new triennial

codes issued by the ICC as the UCC. This was done through final-omitted rulemaking upon the issuance of an updated triennial code by the ICC. The last triennial update to this code occurred through final-omitted regulations issued at 36 Pa.B. 7548 (December 16, 2006).

Act 106 amended the act to create the Council. This Council was given authority to review all new and amended provisions of the triennial ICC codes that comprise the UCC and to direct the Department to exclude any provision that is inconsistent with the act's intent and purpose or which is otherwise inappropriate for inclusion in the UCC. Otherwise, the Department will adopt the triennial updates as the UCC through regulation. See sections 107 and 304(a)(2) of the act (35 P.S. §§ 7210.107 and 7210.304(a)(2)).

During the month of April 2009, the Council held four public meetings and accepted testimony from stakeholders regarding various new and amended provisions of the 2009 ICC codes. On April 30, 2009, the Council notified the Department that it was not directing exclusion of any new or amended provision of the 2009 ICC codes. Therefore, the Department is required by section 304(a)(2) of the act to adopt the new triennial ICC codes as the UCC.

Purpose of the Final-Omitted Rulemaking

The purpose of this final-omitted rulemaking is to update §§ 401.1, 403.21, 403.26 and 403.27 as required by section 304 of the act, to incorporate the new successor building codes issued by the ICC and ANSI, and to incorporate the 2006-2008 amendments to the act in §§ 401.1, 403.1, 403.42, 403.42a, 403.43, 403.62, 403.62a, 403.63, 403.65, 403.102, 403.121 and 403.122.

Explanation of Regulatory Requirements

§ 401.1. Definitions.

The definition of agricultural building is amended to conform to Act 157. Act 157 exempted mushroom growing houses from the statutory definition of an agricultural building. See section 103 of the act (35 P.S. § 7210.103) (definition of "agricultural building").

The definitions for International Building Code, International Energy Conservation Code, International Existing Building Code, International Fire Code, International Fuel Gas Code, International Mechanical Code, International Performance Code, International Plumbing Code, International Residential Code, International Wildland-Urban Interface Code and Uniform Construction Code are amended in this regulation to reflect the most current editions required by section 304 of the act. In this amendment, the publication year in each definition is being changed from 2006 to 2009.

The definition of ICC Electrical Code is being deleted to reflect the ICC's decision not to publish a separate electric code. The definition of NEC is being added to reflect the decision of the International Code Council to refer to and incorporate parts of the NEC in its publications. The NEC is also referenced in Act 39. The definition of NFPA is also added, as the NFPA issues the NEC.

The definition of Residential building is updated to reflect changes to that definition made by the ICC in the new triennial version of the International Residential Code.

The definition of Pennsylvania’s alternative residential energy provisions is amended to reflect the most current edition issued by the PHRC and to provide that it includes errata issued by the PHRC. The publication year is changed from 2006 to 2009.

§ 403.1. *Scope.*

Subsection (a)(2) is amended to reflect the changes to the regulatory process mandated by Act 106. Act 106 provides that the December 31 deadline for the adoption of the latest triennial codes does not apply if the Council informs the Department that it should exclude any provisions of the triennial codes from the UCC. See section 304(a)(1) of the act.

Subsection (b) is amended to include exemptions to the UCC by Act 39. Subsection (b)(12) is added to reflect the exclusion for certain structures erected for less than 30 days contained in section 104(b)(8) of the act (35 P. S. § 7210.104(b)(8)). This section excludes structures which are erected for the purpose of participation in a fair, flea market, arts and crafts festival or other public celebration, which are less than 1,600 square feet in size, erected for a period of less than 30 days and are not a swimming pool, spa or hot tub. Subsection (b)(13) is added to reflect the exclusion of pole barns at agricultural fairs that are used for agricultural purposes and animal display contained in section 901(e) of the act (35 P. S. § 7210.901(e)).

Section 403.1(f) is amended to reflect the Act 157 exclusion of the UCC plumbing provisions as applied to dwelling units or one-room schoolhouses utilized by members of a recognized religious sect. See section 901(b) of the act (35 P. S. § 7210.901(b)). Additionally, grammatical errors are corrected.

§ 403.21. *Uniform Construction Code.*

Subsection (a)(1) is amended to include language from Act 13 of 2004 (Act 13) regarding stairway riser height and tread depth in certain occupancies. See section 301(a)(6) of the act. Act 13 established special requirements for stairways in certain residential and commercial dwelling units. When the Department submitted final-omitted regulatory changes in 2006, it included the act’s requirements for residential buildings, but failed to include the stairway requirement applicable to certain commercial buildings.

Subsection (a)(2)—(4) is amended to delete the reference to the International Electrical Code in recognition of the ICC’s decision not to publish an electrical code and to insert the “International Performance Code” published by the ICC.

Subsection (a)(6)(i) is amended to reflect a change in the numbering of the referenced section of the “International Residential Code” that applies to interconnected smoke alarms.

Subsection (a)(7) is amended to reflect a change in the numbering of the referenced section of the “International Fire Code” relating to natural cut trees.

Subsection (b) is amended to conform with section 302(a)(1) (35 P. S. § 7210.302(a)(1)), which provides that the codes and standards referenced in Chapter 35 of the “BOCA National Building Code,” or its successor code, are adopted to the extent that they are referenced in Chapter 35. However, the International Building Code, which is the successor code to the BOCA National Building Code, was altered so that other chapters now adopt all ICC codes in their entirety, except the International Fire Code. This section clarifies that the “International Fire Code” was not adopted in its entirety and that it is only adopted

to the extent that it is referenced in Chapter 35 of the “International Building Code.”

A typographical error is corrected in § 403.21(c). The reference to paragraphs (a)(9) and (12)—(14) was changed to accurately reference paragraphs (a)(9) and (11)—(13). In addition, this subsection was amended to clarify that both appendices and resource information are adopted for use. A mistaken reference to other code appendices is also being corrected.

§ 403.26. *Swimming pools.*

Subsection (a) is amended to update the references to sections of the “International Building Code” and the “International Residential Code.” The sections have been renumbered or renamed in the new triennial edition of the adopted codes.

§ 403.27. *Applicability and use of standards.*

Subsection (a) is amended to remove the reference to the ICC Electrical Code in recognition of the ICC’s decision not to publish an electrical code. In addition, the reference to the 2006 codes is removed as unnecessary. The definition of each listed code in § 401.1 specifies the edition of each code which is adopted.

§ 403.28. *Uncertified buildings.*

Subsection (b)(5) is amended to conform to section 902(c)(2) of the act (35 P. S. § 7210.902(c)(2)), which provides that a construction code official may deny a certificate of occupancy to an uncertified building. When the current regulation was promulgated, the Department inadvertently excluded this language.

§ 403.42. *Permit requirements and exemptions.*

Subsection (e) is amended to conform to Act 157, which provides that a permit is not required for equipment that is under the ownership and control of a public service agency. See section 502(a.1) of the act (35 P. S. § 7210.502(a.1)).

§ 403.42a. *Permit application.*

Subsection (b) is amended to require that a permit application include all other permits or approvals related to construction required under § 403.102(n). This amendment reflects changes to the act made by Act 157. See section 502(a)(1) of the act (35 P. S. § 7210.502(a)(1)).

Subsection (k) is amended to revise the reference to section 1709 to 1710 of the “International Building Code,” due to renumbering of sections in the 2009 edition by the International Code Council.

§ 403.43. *Grant, denial and effect of permits.*

Subsection (a) is amended to reflect the Act 157 requirement addressing denial of a building permit. If a permit is denied, the code administrator must, in writing, identify the elements of the application which are not in compliance with the relevant UCC provisions and ordinance, as appropriate, and provide a citation to the relevant provisions of the UCC and ordinance. See section 502(a)(2) of the act.

§ 403.62. *Permit requirements and exemptions.*

Subsection (e) is amended to conform to Act 157, which provides that a permit is not required for equipment that is under the ownership and control of a public service agency. See section 502(a.1) of the act.

§ 403.62a. *Permit application.*

Subsection (b) is amended to require that a permit application include all other permits or approvals related to construction required under § 403.102(n). This amendment reflects changes to the act made by Act 157. See section 502(a)(1) of the act.

§ 403.63. *Grant, denial and effect of permits.*

Subsection (a) is amended to reflect the Act 157 requirement that, when drawings are prepared by design professionals who are licensed or registered and contain a certification that the plans meet the applicable UCC standards and ordinance, as appropriate, a building permit must be granted or denied within 5 business days of the date of filing or the application is deemed approved. It also reflects the Act 157 requirement that reasons for denial must identify the elements of the application which are not in compliance with the relevant provisions of the UCC and ordinance and provide a citation to the relevant provisions of the UCC and ordinance. See section 502(a)(2) of the act.

§ 403.65. *Certificate of occupancy.*

Subsection (b) is amended to require that a building code official issue a certificate of occupancy after receipt of a final inspection report that indicates compliance with the UCC and ordinance within 10 business days in cities of the first class and within 5 business days in all other jurisdictions. This amendment reflects changes made by Act 157. See section 502(a)(1) of the act.

§ 403.102. *Municipalities electing to enforce the Uniform Construction Code.*

Subsection (i) is amended to conform to changes in Act 157 requiring that a municipality seeking to enact an ordinance containing standards that equal or exceed the UCC include in its submission to the Department a detailed statement containing the differences between the proposed ordinance and the UCC that includes code sections affected by the changes and the time and place of public hearing. See section 502(f) of the act. Subsection (k) is amended to provide that an aggrieved party shall serve a copy of any challenge to an ordinance upon the municipality. See section 502(j) of the act.

Subsection (n) is amended to include the Act 157 requirement that a municipality provide a list of all other required permits necessary prior to the issuance of a building permit. See section 502(a)(1) of the act. The existing subsections (n) and (o) are now renumbered to (o) and (p).

Subsection (q) is added to provide that a municipality may enact an ordinance imposing code requirements on structures exempted under § 403.1(b)(12). This provision is required by Act 39.

§ 403.121. *Board of appeals.*

Subsection (h) is added under Act 157, which provides that the fee for an appeal to a board of appeals may not exceed the actual costs of publishing the hearing notice, court reporter services and all other necessary administrative services. See section 501(c)(4) of the act (35 P. S. § 7210.501(c)(4)).

§ 403.122. *Appeals, variances and extensions of time.*

Subsection (e) is amended to include the Act 157 requirement that in cases before a board of appeals involving a residential building, the board of appeals must convene a hearing within 30 days of the appeal. Subsection (j) is also amended under Act 157, to require that appeals involving residential buildings shall be

heard within 30 days and the board shall render a written decision to the parties within 5 business days, or within 10 business days in cities of the first class. Failure by the board to act within the time period results in the appeal being deemed granted. See section 501(c)(5) of the act.

Fiscal Impact

There is no fiscal impact on the Department. Compliance with updated building codes may have some fiscal impact on the regulated community.

Paperwork

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

Sunset Date

The final-omitted rulemaking will become effective on December 31, 2009. The regulation is scheduled for review within 3 years of final publication. No sunset date has been assigned.

Contact Person

The contact person is Edward L. Leister, Director, Bureau of Occupational and Industrial Safety, Labor and Industry Building, 651 Boas Street, 16th Floor, Harrisburg, PA 17120, e-mail: eleister@state.pa.us.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on October 23, 2009, the Department submitted a copy of the final-form regulations, proposed rulemaking omitted, to the Independent Regulatory Review Commission (IRRC) and the Senate Committee on Labor and Industry and the House Labor Relations Committee (Committees). In addition to submitting the final-form regulations, the Department also provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department.

Under section 5.1(j.1)—(j.3) of the Regulatory Review Act, these final-form regulations were deemed approved by the Committees on November 23, 2009. IRRC met on December 10, 2009 and approved the regulations in accordance with section 5.1(e) of the Regulatory Review Act.

Findings

The Department finds that the final-omitted rulemaking is necessary and appropriate for the administration and enforcement of the authorizing statute. Under section 204 of the Commonwealth Documents Law, the Department also finds that the proposed rulemaking procedures in sections 201 and 202 of the Commonwealth Documents Law (45 P. S. §§ 1201 and 1202) are unnecessary because it is in the public interest to expedite this amended regulation.

Order

The Department, acting under authorizing statute, orders that:

(a) The regulations of the Department, 34 Pa. Code Chapters 401 and 403, are amended by amending §§ 401.1, 403.1, 403.21, 403.26, 403.27, 403.28, 403.42, 403.42a, 403.43, 403.62, 403.62a, 403.63, 403.65, 403.102, 403.121 and 403.122 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of Attorney General

and the Office of General Counsel for approval as to legality and form as required by law.

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

(d) This order shall become effective on December 31, 2009.

SANDI VITO, Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 7271 (December 26, 2009).)

Fiscal Note: 12-89. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART XIV. UNIFORM CONSTRUCTION CODE

CHAPTER 401. UNIFORM CONSTRUCTION CODE TRAINING AND CERTIFICATION OF CODE ADMINISTRATORS

§ 401.1. Definitions.

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

* * * * *

Agricultural building—

(i) A structure utilized to store farm implements, hay, feed, grain or other agricultural or horticultural products or to house poultry, livestock or other farm animals, a milk house and a structure used to grow mushrooms.

(ii) The term includes a carriage house owned and used by members of a recognized religious sect for the purposes of housing horses and storing buggies.

(iii) The term does not include habitable space or spaces in which agricultural products are processed, treated or packaged and will not be construed to mean a place of occupancy by the general public.

* * * * *

ICC—International Code Council, 5203 Leesburg Pike, Suite 600, Falls Church, Virginia 22041-3401.

ICC Evaluation Services, Inc.—The ICC Evaluation Services, Inc., 5360 Workman Mill Road, Whittier, California 90601.

* * * * *

International Building Code—Chapters 2—29 and 31—35 of the “International Building Code 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

International Energy Conservation Code—The “International Energy Conservation Code 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

* * * * *

International Existing Building Code—The “International Existing Building Code for Buildings and Facilities 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

International Fire Code—The “International Fire Code 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

International Fuel Gas Code—The “International Fuel Gas Code 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

International Mechanical Code—The “International Mechanical Code 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

International Performance Code—The “International Performance Code for Buildings and Facilities 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

International Plumbing Code—The “International Plumbing Code 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

International Residential Code—The “International Residential Code for One- and Two-Family Dwellings 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

International Wildland-Urban Interface Code—The “International Wildland-Urban Interface Code 2009” (first printing) issued by the ICC. The term includes all errata issued by the ICC.

* * * * *

NEC—NFPA-70, the “National Electrical Code 2008” issued by the NFPA on July 26, 2007. The term includes all errata issued by the NFPA.

NFPA—The National Fire Protection Association, One Batterymarch Park, Quincy, MA 02169.

* * * * *

Pennsylvania’s Alternative Residential Energy Provisions—The “Pennsylvania Alternative Residential Energy Provisions” issued in 2009 by the PHRC. This term includes all errata issued by the PHRC.

* * * * *

Residential building—Detached one-family and two-family dwellings and townhouses which are not more than three stories above grade plane in height with a separate means of egress and their accessory structures.

* * * * *

Uniform Construction Code—This chapter, “The International Building Code 2009” (first printing) and the “International Residential Code for One- and Two-Family Dwellings 2009” (first printing), available from the International Code Council, Inc., 4051 W. Flossmoor Road, Country Club Hills, Illinois 60478-5795, 1 (888) 422-7233; and any standards adopted by the Department in this chapter under section 301 of the act (35 P. S. § 7210.301).

* * * * *

CHAPTER 403. ADMINISTRATION GENERALLY

§ 403.1. Scope.

(a) Application.

* * * * *

(2) The Department will promulgate regulations adopting the new triennial BOCA National Building Code, or its successor building code as the Uniform Construction Code by December 31 of the year of the issuance under section 304(a)(1) of the act (35 P. S. § 7210.304(a)(1)). This deadline will not apply if the Uniform Construction Code Review and Advisory Council established under section 107 of the act (35 P. S. § 7210.107) informs the Department that it should exclude any provisions of the

triennial codes from the Uniform Construction Code. New buildings or renovations to existing buildings for which a design or construction contract was executed before the effective date of the regulatory amendment adopting the latest triennial versions of the construction codes and standards shall comply with the codes and standards in effect at the time that the design or construction contract was executed.

(b) *Exclusions and exemptions.* The Uniform Construction Code does not apply to:

* * * * *

(12) Structures which are:

(i) Erected for the purpose of participation in a fair, flea market, arts and crafts festival or other public celebration.

(ii) Less than 1,600 square feet in size.

(iii) Erected for a period of less than 30 days.

(iv) Not a swimming pool, spa or hot tub.

(13) A pole barn that is constructed on agricultural fairgrounds and is only used for agricultural purposes and animal display. If an exempted pole barn has electrical service, a permit and inspections to determine compliance with the electrical provisions of the Uniform Construction Code are required.

* * * * *

(f) The electrical, plumbing and lumber and wood provisions, except for the wood provisions related to pressure treatment, of the Uniform Construction Code do not apply to a dwelling unit or one-room school house utilized by a member or members of a recognized religious sect if a code administrator grants an exemption under section 901(b) of the act (35 P. S. § 7210.901(b)) as follows:

(1) The permit applicant shall file an application with the code administrator stating the manner in which an electrical provision, a plumbing provision or a lumber and wood provision of the Uniform Construction Code conflicts with the applicant's religious beliefs. The application must also contain an affidavit by the applicant stating:

(i) The permit applicant is a member of a religious sect.

(ii) The religious sect has established tenets or teachings which conflict with an electrical, a plumbing or a lumber and wood provision of the Uniform Construction Code.

(iii) The permit applicant adheres to the established tenets or teachings of the sect.

(A) For a dwelling unit, the dwelling will be used solely as a residence for the permit applicant and the applicant's household.

(B) For a one-room school house, the school house will be used solely by members of the religious sect.

* * * * *

STANDARDS

§ 403.21. Uniform Construction Code.

(a) The Department adopts and incorporates by reference the following codes as the Uniform Construction Code:

(1) The provisions of Chapters 2—29 and 31—35 of the "International Building Code," except that in occupancies in Use Group R-3 and within dwelling units in occupancies in Use Group R-2 the maximum riser height shall be

8 1/4 inches (210 mm) and the minimum tread depth shall be 9 inches (229 mm). A 1-inch (25 mm) nosing shall be provided on stairways with solid risers.

(2) The "International Mechanical Code."

(3) The "International Fuel Gas Code."

(4) The "International Performance Code."

* * * * *

(6) The "International Residential Code," except that:

(i) The provisions of R314.4 requiring interconnected smoke alarms do not apply to one-family and two-family dwellings undergoing alterations, repairs or additions. Noninterconnected battery operated smoke alarms shall be installed in these dwellings.

* * * * *

(7) The "International Fire Code." Section 806.1.1 of the International Fire Code (relating to natural cut trees) is not adopted under this chapter. A municipality that elects to adopt an ordinance for the administration and enforcement of the Uniform Construction Code may, by ordinance, restrict the placement of natural cut trees in an occupancy group. The ordinance restricting the placement of natural cut trees is not subject to section 503(b)—(k) of the act (35 P. S. § 7210.503(b)—(k)) and § 403.102(i)—(k) (relating to municipalities electing to enforce the Uniform Construction Code).

* * * * *

(b) The code adopted under subsection (a)(7) is part of the Uniform Construction Code to the extent that it is referenced in Chapter 35 of the "International Building Code" under section 302(a)(1) of the act (35 P. S. § 7210.302(a)(1)). The provisions of the Uniform Construction Code apply if there is a difference between the Uniform Construction Code and the codes or standards adopted in subsection (a). This chapter's administrative provisions govern under § 403.27(e) (relating to applicability and use of standards) if there is a conflict with the provisions of the codes relating to administration incorporated under subsection (a).

(c) Appendices to a code or standard listed in subsection (a) are not adopted in the Uniform Construction Code except for the appendices and resource information found in the "International Existing Building Code" and the appendices found in (a)(11)—(13).

§ 403.26. Swimming pools.

(a) A swimming pool, hot tub and spa which is accessory to a one- or two-family dwelling must comply with all of the following:

(1) Chapter 42 of the "International Residential Code."

(2) Appendix G of the "International Residential Code."

(3) Section 2406.4, paragraph 9 of the International Building Code (glazing in walls and fences enclosing indoor and outdoor swimming pools, hot tubs and spas).

(4) Section 3109.4 of the "International Building Code" (residential swimming pools).

(b) A swimming pool that is not accessory to a one- or two-family dwelling must comply with this chapter, the "American National Standards for Public Pools" issued by ANSI and APSP (ANSI/NSPI-1 2003) and the Public Bathing Law (35 P. S. §§ 672—680d).

(c) A hot tub or spa that is not accessory to a one- or two-family dwelling must comply with this chapter and

the "American National Standard for Public Spas" issued by ANSI and APSP (ANSI/NSPI-2 1999).

§ 403.27. Applicability and use of standards.

(a) Portions of this chapter designate and incorporate portions of the following ICC copyrighted works:

- (1) The "International Building Code."
- (2) The "International Residential Code."
- (3) The "International Plumbing Code."
- (4) The "International Mechanical Code."

(b) The "International Residential Code" and the "International Existing Building Code" apply to the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, removal and demolition of detached one- and two-family dwellings and multiple single-family dwellings no more than three stories in height with a separate means of egress and their accessory structures.

(c) The ICC owns the copyrighted works in subsection (a). Reproduced with permission. All rights reserved.

(d) If different sections of this chapter specify different materials, method of construction or other requirements, the most restrictive material, method of construction or other requirement shall govern. The specific requirement of this part applies if there is a conflict between a general requirement and a specific requirement.

(e) This chapter governs if there is a conflict between this chapter and the provisions of the codes relating to administration incorporated under § 403.21(a) (relating to Uniform Construction Code).

(f) A provision of the "International Mechanical Code" does not apply if the provision conflicts with the Boiler and Unfired Pressure Vessel Law (35 P. S. §§ 1331.1—1331.9).

§ 403.28. Uncertified buildings.

* * * * *

(b) Under section 902(b) of the act, uncertified buildings within the Department's jurisdiction must meet the following requirements which do not apply to uncertified buildings under subsection (a):

* * * * *

(5) A construction code official may deny the issuance of a certificate of occupancy if the official deems that a building is unsafe because of inadequate means of egress, inadequate lighting and ventilation, fire hazards or other dangers to human life or to public welfare.

* * * * *

PERMIT AND INSPECTION PROCESS FOR COMMERCIAL CONSTRUCTION

§ 403.42. Permit requirements and exemptions.

* * * * *

(e) A permit is not required for the installation, alteration or repair of generation, transmission, distribution, metering or other related equipment under the ownership and control of public service agencies.

* * * * *

§ 403.42a. Permit application.

* * * * *

(b) A permit applicant shall submit an application to the building code official and attach construction documents,

including plans and specifications, and information concerning special inspection and structural observation programs, Department of Transportation highway access permits, all other permits or approvals related to the construction required under § 403.102(n) (relating to municipalities electing to enforce the Uniform Construction Code) and other data required by the building code official with the permit application. The applicant shall submit three sets of documents when the Department conducts the review.

* * * * *

(k) The permit applicant shall describe an inspection program, identify a person or firm who will perform special inspections and structural observations if section 1704 or 1710 of the "International Building Code" requires special inspections or structural observations for the construction.

* * * * *

§ 403.43. Grant, denial and effect of permits.

(a) A building code official shall grant or deny a permit application, in whole or in part, within 30 business days of the filing date. Reasons for the denial must be in writing, identifying the elements of the application which are not in compliance with the relevant provisions of the Uniform Construction Code and ordinance as appropriate and providing a citation to the relevant provisions of the Uniform Construction Code and ordinance as appropriate, and sent to the applicant. The building code official and the permit applicant may agree in writing to extend the deadline by a specific number of days. A building code official may establish a different deadline to consider applications for a permit in an historic district.

* * * * *

PERMIT AND INSPECTION PROCESS FOR RESIDENTIAL BUILDINGS

§ 403.62. Permit requirements and exemptions.

* * * * *

(e) A permit is not required for the installation, alteration or repair of generation, transmission, distribution, metering or other related equipment under the ownership and control of public service agencies.

§ 403.62a. Permit application.

(a) Applications for a permit required under § 403.62 (relating to permit requirements and exemptions) shall be submitted to the building code official in accordance with this section.

(b) A permit applicant shall submit an application to the building code official and attach construction documents with plans and specifications and all other permits or approvals related to the construction required by § 403.102(n) (relating to municipalities electing to enforce the Uniform Construction Code).

(c) A building code official may waive the submission of construction documents if the nature of the construction does not require the review of the construction documents to determine compliance with the Uniform Construction Code.

(d) A permit applicant for a building or structure located in a flood hazard area under the National Flood Insurance Program shall submit the following information with the construction documents:

(1) Delineation of flood hazard areas, floodway boundaries and flood zones and the design flood elevation, as appropriate.

(2) The elevation of the proposed lowest floor including basement and the height of the proposed lowest floor including basement above the highest adjacent grade is to be included in the documents if the building or structure is located in areas of shallow flooding (Zone AO).

(3) Design flood elevations contained on the municipality's Flood Insurance Rate Map produced by the Federal Emergency Management Agency. The building code official and the applicant shall obtain and reasonably utilize design flood elevation and floodway data available from other sources if this information is not contained on the municipality's Flood Insurance Rate Map.

(e) The application must contain a site plan showing the size and location of the new construction and existing structures on the site and the structures' distance from lot lines. If the construction involves demolition, the site plan must indicate construction that is to be demolished and the size and location of existing structures and construction that will remain on the site or plot. A building code official may waive or modify the site plan requirement when the permit application is for an alteration or a repair or if the waiver is warranted for other reasons.

§ 403.63. Grant, denial and effect of permits.

(a) A building code official shall grant or deny a permit application, in whole or in part, within 15 business days of the filing date or the application is deemed approved. If the drawings were prepared by a design professional who is licensed or registered under the laws and regulations of the Commonwealth and the application contains a certification by the licensed or registered design professional that the plans meet the applicable standards of the Uniform Construction Code and ordinance as appropriate, a building code official shall grant or deny a permit application, in whole or in part, within 5 business days of the filing date or the application is deemed approved. Reasons for denial must be in writing, identifying the elements of the application which are not in compliance with the relevant provisions of the Uniform Construction Code and ordinance as appropriate and providing a citation to the relevant provisions of the Uniform Construction Code and ordinance as appropriate, and sent to the permit applicant. The building code official and the applicant may agree in writing to extend the deadline by a specific number of days.

* * * * *

§ 403.65. Certificate of occupancy.

(a) A residential building may not be used or occupied without a certificate of occupancy issued by a building code official.

(b) A building code official shall issue a certificate of occupancy after receipt of a final inspection report that indicates compliance with the Uniform Construction Code and ordinance within 5 business days or within 10 business days in cities of the first class. The certificate of occupancy must contain the following information:

- (1) The permit number and address of the residential building.
- (2) The name and address of the owner of the residential building.
- (3) A description of the portion of the residential building covered by the occupancy permit.

(4) A statement that the described portion of the residential building was inspected for compliance with the Uniform Construction Code.

(5) The name of the building code official who issued the occupancy permit.

(6) The construction code edition applicable to the occupancy permit.

(7) If an automatic sprinkler system is provided.

(8) Any special stipulations and conditions relating to the building permit.

(c) A building code official may issue a certificate of occupancy for a portion of a residential building if the portion independently meets the Uniform Construction Code.

(d) A building code official may suspend or revoke a certificate of occupancy when the certificate was issued in error, on the basis of incorrect information supplied by the permit applicant, or in violation of the Uniform Construction Code. Before a certificate of occupancy is revoked, a building owner may request a hearing before the board of appeals in accordance with § 403.122 (relating to appeals, variances and extensions of time).

(e) A third-party agency under contract with a building permit holder shall submit a copy of the certificate of occupancy to the municipality.

(f) A building code official may issue a temporary certificate of occupancy for a portion or portions of the building or structure before the completion of the entire work covered by the permit if the portion or portions may be occupied safely. The building code official shall set a time period during which the temporary certificate of occupancy is valid.

MUNICIPAL ELECTION

§ 403.102. Municipalities electing to enforce the Uniform Construction Code.

* * * * *

(i) A municipality may enact an ordinance containing standards that equal or exceed the Uniform Construction Code as adopted by § 403.21 (relating to the Uniform Construction Code) under section 503 of the act (35 P. S. § 7210.503) after Department review and approval. A municipality may enact ordinances under this section which adopt additional code requirements for alterations or repairs to residential buildings. A municipality may enact ordinances under this section which adopt stricter code requirements than required by the act for the regulation of utility and miscellaneous use structures. The municipality shall notify the Department of the proposed ordinance and submit the following to the Department for its review:

- (1) The complete ordinance.
- (2) The information required in subsection (c).
- (3) A detailed statement containing the differences between the proposed ordinance and the Uniform Construction Code including code sections affected by the changes and how the ordinance will equal or exceed the Uniform Construction Code.
- (4) The time and place of public hearing.

* * * * *

(k) A written challenge of an ordinance is governed by the following:

- (1) An aggrieved party may file a written challenge of an ordinance within 30 days of its enactment with the

Department and shall serve a copy of the challenge upon the municipality under section 503(j) of the act.

(2) The Secretary will issue a ruling on the challenge within 45 days of receipt of the filing of the last challenge to the ordinance or within 30 days of the Department hearing on the challenge, whichever occurs last, under section 503(k) of the act.

* * * *

(n) A municipality will provide a list of all other required permits necessary before issuance of the building permit. A municipality will not be liable for the completeness of any list.

(o) The Department will enforce Chapter 11 (Accessibility) of the Uniform Construction Code and other accessibility requirements contained in or referenced by the Uniform Construction Code until a municipality employs or contracts with a code administrator certified as an accessibility inspector/plans examiner under this part.

(p) A municipality may observe Department inspections of State-owned buildings in its jurisdiction under section 105(b)(1) of the act (35 P. S. § 7210.105(b)(1)). A municipality may review all building plans and plan review documents for State-owned buildings in the Department's custody.

(q) A municipality may enact an ordinance imposing the code requirements spelled out in section 503(a)(2) of the act (35 P. S. § 7210.503(a)(2)) on the structures exempted under § 403.1(b)(12) (relating to scope).

BOARD OF APPEALS

§ 403.121. Board of appeals.

(a) A municipality which has adopted an ordinance for the administration and enforcement of the Uniform Construction Code or is a party to an agreement for the joint administration and enforcement of the Uniform Construction Code shall establish and appoint members to serve on a board of appeals under section 501(c) of the act (35 P. S. § 7210.501(c)).

(b) The board of appeals shall hear and rule on appeals, requests for variances and requests for extensions of time. An application for appeal shall be based on a claim that the true intent of the act or Uniform Construction Code has been incorrectly interpreted, the provisions of the act or Uniform Construction Code do not fully apply or an equivalent form of construction is to be used.

(c) The composition of a board of appeals is governed by all of the following:

(1) A member of the board of appeals shall be qualified by training and experience to pass on matters pertaining to building construction. Training and experience may consist of licensure as an architect or engineer, experience in the construction industry, and training or experience as an inspector or plan reviewer.

(2) A member of the board of appeals holds office at the pleasure of the municipality's governing body.

(3) Members of a municipality's governing body and its code administrators may not serve on a board of appeals.

(4) A municipality may fill a position on the board of appeals with a qualified person who resides outside of the municipality when it cannot find a person within the municipality who satisfies the requirements of this section.

(d) Two or more municipalities may establish a joint board of appeals through an intermunicipal agreement under 53 Pa.C.S. §§ 2301—2315 (relating to intergovernmental cooperation).

(e) A board of appeals member may not cast a vote or participate in a hearing in any appeal, request for variance or request for extension of time in which the member has a personal, professional or financial interest.

(f) A board of appeals shall schedule meetings and provide public notice of meetings in accordance with 65 Pa.C.S. §§ 701—716 (relating to Sunshine Act).

(g) A board of appeals may not act upon appeals, requests for variance or requests for extension of time relating to accessibility under the act.

(h) The fee for an appeal in a municipality which has adopted an ordinance for the administration and enforcement of the Uniform Construction Code or is a party to an agreement for the joint administration and enforcement of the Uniform Construction Code will not exceed the actual costs of publishing the hearing notice, court reporter services and other necessary administrative services under section 501(c) of the act (35 P. S. § 7210.501(c)(4)).

§ 403.122. Appeals, variances and extensions of time.

* * * *

(e) A board of appeals shall hold a hearing within 60 days from the date of an applicant's request unless the applicant agreed in writing to an extension of time. A board of appeals shall convene a hearing within 30 days of receipt of an appeal or request for variance or extension of time involving the construction of a one- or two-family residential building.

* * * *

(j) The board of appeals shall provide a written notice of its decision to the owner and to the building code official. A board of appeals shall render a written decision regarding an appeal or request for variance or extension of time involving the construction of a one- or two-family residential building within 5 business days, or within 10 business days in cities of the first class, of the latest hearing. The appeal shall be deemed granted if a board of appeals fails to act within this time period.

* * * *

[Pa.B. Doc. No. 09-2367. Filed for public inspection December 24, 2009, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF CHIROPRACTIC

[49 PA. CODE CH. 5]

Needle Acupuncture

The State Board of Chiropractic (Board) amends § 5.81(1)(xv) (relating to unprofessional and immoral conduct) to read as set forth in Annex A.

Description and Need for the Rulemaking

Section 102 of the Chiropractic Practice Act (act) (63 P. S. § 625.102) generally defines chiropractic as a branch of the healing arts dealing with the relationship between the articulations of the vertebral column, as well as other articulations, and the neuro-musculo-skeletal system and the role of these relations in the restoration and mainte-

nance of health. This definition explicitly excludes surgery from the scope of chiropractic practice. Without statutory support for the practice of needle acupuncture to be considered part of the practice of chiropractic (as it is in some other jurisdictions), the Board previously prohibited its licensees from advertising or practicing needle acupuncture. Because the Board may take disciplinary action against a licensee who has displayed misconduct in the practice of chiropractic or committed unprofessional conduct, the Board achieved this prohibition by defining misconduct to include advertising or practicing needle acupuncture.

Under the Acupuncture Licensure Act (63 P. S. §§ 1801—1806.1), a qualified person may become licensed by the State Board of Medicine or the State Board of Osteopathic Medicine to practice acupuncture. Unlike dentists, podiatrists and veterinarians as provided in section 3(h) of the Acupuncture Licensure Act (63 P. S. § 1803(h)), a chiropractor seeking to practice acupuncture must become licensed with one of these medical boards under the Acupuncture Licensure Act and be subject to regulation of that medical board. Although it is not the practice of chiropractic, the Board sees no compelling basis to prohibit the practice of acupuncture by a licensed chiropractor who is licensed with a medical board to practice acupuncture and is acting in accordance with that medical board's regulations concerning the practice of acupuncture.

Summary of Comments and Responses to Proposed Rulemaking

The Board published notice of proposed rulemaking at 39 Pa.B. 1004 (February 21, 2009) with a 30-day public comment period. The Pennsylvania Chiropractic Association and the Pennsylvania Medical Society submitted written comments supporting the proposed rulemaking. The Board received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC) as part of their review of proposed rulemaking under the Regulatory Review Act (71 P. S. §§ 745.1—745.12). The Board did not receive comments from the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) as part of its review of proposed rulemaking under the Regulatory Review Act.

The HPLC noted that Act 91 of 2008 amended the Acupuncture Registration Act to redesignate registration as licensure. The HPLC suggested revising the references to reflect licensure and not registration. IRRC agreed with the HPLC and recommended these changes. The Board has revised the final-form rulemaking to reflect licensure under the Acupuncture Licensure Act. Also, because the State Board of Medicine is currently promulgating final-form rulemaking 16A-4924 (acupuncture licensure) that will amend its regulations to, among other things, reflect licensure rather than registration of acupuncturists, the Board has revised this final-form rulemaking to refer to those amended regulations. See 38 Pa.B. 2059 (May 3, 2008). However, because the State Board of Osteopathic Medicine has not yet amended its regulations to reflect licensure, the Board continues to cite that Board's regulations referring to registration.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions and will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Effective Date

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

Statutory Authority

The final-form rulemaking is authorized under sections 302(3), 506(a)(4) and 506(a)(11) of the act (63 P. S. §§ 625.302(3), 625.506(a)(4) and 625.506(a)(11)).

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 11, 2009, the Board submitted a copy of the notice of proposed rulemaking, published at 39 Pa.B. 1004, to IRRC and the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received 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)), the the final-form rulemaking was deemed approved by the HPLC and the SCP/PLC on November 18, 2009. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 19, 2009, and approved the final-form rulemaking.

Additional Information

Persons who require additional information about the final-form rulemaking should submit inquiries to Regulatory Unit Counsel, Department of State, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-7155, or st-chiropractic@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) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

(3) The amendments to this final-form rulemaking do not enlarge the scope of proposed rulemaking published at 39 Pa.B. 1004.

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

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapter 5, are amended, by amending § 5.81 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*.

KATHLEEN G. McCONNELL, D.C.,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 6915 (December 5, 2009).)

Fiscal Note: Fiscal Note 16A-4317 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 5. STATE BOARD OF CHIROPRACTIC

Subchapter H. DISCIPLINARY ACTION

§ 5.81. Unprofessional and immoral conduct.

A licensee who engages in unprofessional or immoral conduct is subject to disciplinary action in accordance with section 506 of the act (63 P. S. § 625.506).

(1) Unprofessional conduct includes the following:

(i) Revealing personally identifiable facts obtained as the result of a doctor-patient relationship without the prior consent of the patient, except as authorized or required by law.

(ii) Performing a chiropractic service incompetently or performing a chiropractic service which the licensee knows or has reason to know that the licensee is not competent to perform.

(iii) Advertising a chiropractic practice in a manner which is intended or has the tendency to deceive the public.

(iv) Knowingly permitting, aiding or abetting a person who is not licensed to perform activities, requiring a license in health care practice.

(v) Continuing to practice chiropractic or to indicate the ability to practice chiropractic while one's license is unregistered or inactive or is suspended or revoked.

(vi) Impersonating another health care practitioner.

(vii) Offering, undertaking or agreeing to cure or treat a disease by a secret method, procedure, treatment or preparation or the treating of a human condition by a method, means or procedure which the licensee refuses to divulge to the Board upon demand of the Board.

(viii) Delegating a radiological procedure to a person whom the chiropractor knows or has reason to know is not qualified to perform the procedure, under section 522 of the act (63 P. S. § 625.522) and § 5.62 (relating to auxiliary personnel who may perform radiological procedures).

(ix) Failing to exercise direct supervision over auxiliary personnel authorized to perform radiological procedures.

(x) Willfully engaging in sexual activity with a patient within the scope of the chiropractor/patient relationship or harassing, assaulting, abusing or intimidating a patient.

(xi) Abandoning a patient. Abandonment occurs when a licensee withdraws services after a doctor-patient relationship has been established, by failing to give notice to

the patient of the licensee's intention to withdraw in sufficient time to allow the patient to obtain necessary chiropractic care.

(xii) Ordering excessive tests, treatment or use of treatment and diagnostic facilities not reasonably warranted by the condition of the patient.

(xiii) Failure to include the word chiropractor, chiropractic, D.C. or a derivative thereof in advertisements, letterhead, signs and other printed material.

(xiv) Practicing or advertising adjunctive procedures without a certificate to use adjunctive procedures issued by the Board.

(xv) Practicing or advertising needle acupuncture, unless the licensee is licensed to do so by the State Board of Medicine or the State Board of Osteopathic Medicine and acting in accordance with the Acupuncture Licensure Act (63 P. S. §§ 1801—1806.1) and regulations of the State Board of Medicine in §§ 18.11—18.18 (relating to licensure and practice of acupuncturists and practitioners of oriental medicine) or regulations of the State Board of Osteopathic Medicine in §§ 25.301—25.308 (relating to registration and practice of acupuncturists).

(2) Immoral conduct includes the following:

(i) Misrepresentation or concealment of a material fact in obtaining a license to practice chiropractic or the reinstatement thereof.

(ii) The commission of an act involving moral turpitude, dishonesty or corruption.

[Pa.B. Doc. No. 09-2368. Filed for public inspection December 24, 2009, 9:00 a.m.]

STATE BOARD OF PHARMACY

[49 PA. CODE CH. 27]

Revisions Regarding Current Pharmacy Practice

The State Board of Pharmacy (Board) deletes § 27.3 (relating to location of office) and amends §§ 27.1, 27.2, 27.12, 27.17—27.19, 27.21, 27.25 and 27.31 to read as set forth in Annex A.

Effective Date

The amendments will be effective upon final-form publication in the *Pennsylvania Bulletin*.

Statutory Authority

The amendments are authorized under sections 4(j) and 6(k)(1) and (9) of the Pharmacy Act (act) (63 P. S. §§ 390-(4)(j) and 390-6(k)(1) and (9)).

Background and Purpose

The Board undertook a wholesale review of its regulations to determine what provisions were outdated. Through careful review and with input from stakeholders, the Board decided to delete certain regulations and to update others to reflect current pharmacy practice.

Summary of Comments and Responses to Proposed Rule-making

The Board published notice of proposed rulemaking at 37 Pa.B. 5260 (September 29, 2007), with a 30-day public comment period. The Board received comments from Patricia Clancy Kienle and Jerry Mucheno, J.D., R.Ph. who wrote on behalf of the P-3 class of Wilkes University Nesbitt School of Pharmacy. The Board received com-

ments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC) as part of their review of proposed rule-making under the Regulatory Review Act (71 P.S. §§ 745.1—745.12). The Board did not receive any comments from the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC).

§ 27.12. *Practice of pharmacy and delegation of duties.*

With regard to § 27.12, one commentator offered comment in support of the change that allows pharmacy interns to accept and transcribe oral orders. The commentator and IRRC suggested that the Board affirmatively add that duty to § 27.12(c)(3) in the list of procedures that pharmacy interns are allowed to perform. That list pertains specifically to processing ingredients. The Board believes that with the removal of the prohibition in § 27.12(c)(2), the intent is clear and declines to add this to the list. The Board does not want to go down the road of listing each specific task that a pharmacy intern may perform. Pharmacists may delegate many aspects of the practice of pharmacy to pharmacy interns; therefore so long as an action is not prohibited the intern may perform it.

IRRC asked whether the Board considered adding a specific penalty provision to § 27.12 for the failure of a pharmacist to supervise a pharmacy intern appropriately. Under section 5(a)(6) of the act (63 P.S. § 390-5(a)(6)), the Board has the authority to discipline a pharmacist who has “violated or knowingly permitted the violation of any provision of this act or regulation of the board.” Therefore, the Board does not intend to include a specific penalty provision in § 27.12 for failure to supervise a pharmacy intern. A disciplinary matter for failure to supervise a pharmacy intern would be treated as any other violation of a regulation and evaluated on a case-by-case basis.

§ 27.17. *Security for Schedule II controlled substances.*

One commentator commented that proposed § 27.17(a) does not allow properly trained pharmacy technicians to access or transport controlled substances. The Board notes, as indicated by the brackets, that this language in the current regulation is being removed. The change that was proposed, and remains unchanged in the final-form regulation, is to remove the specific prohibitions on who can have access to controlled substances.

IRRC noted that the changes to § 27.17 appear to be contradictory, first requiring Schedule II controlled substances to be secured in locked cabinets and then permitting them to be dispersed throughout the stock of noncontrolled substances. Another commentator also suggested a change in the wording of § 27.17(a) with regard to storing Schedule II controlled substances to enhance clarity. The Board intended to be consistent with the Drug Enforcement Administration’s (DEA) regulations in 21 CFR 1301.75(b) (relating to physical security controls for practitioners) and the Department of Health’s (Department) regulations in 28 Pa. Code § 25.63 (relating to security controls for practitioners and research personnel), both of which have been in place for over 30 years, to allow for dispersal as another method of obstructing the theft or diversion of controlled substances. In 1998, the Board had amended § 27.16(b)(3) (relating to construction and equipment requirements) to adopt this change; however, no similar amendment was made to § 27.17 at that time, or anytime since. Therefore, the amendments being made at this time are intended to promote internal consistency within the Board’s regula-

tions, not to change a substantive rule. The language has not been amended in response to these comments to be consistent with the regulations of the DEA and the Department relating to security for controlled substances, both of which use nearly identical language to that being adopted by the Board.

The HPLC asked for the Board’s reasoning for the safety measure of including controlled substances distributed throughout the stock of noncontrolled substances and noted that it did not appear to be an adequate safety measure. As noted, many pharmacies have dispersed their controlled substances throughout the stock of noncontrolled substances for years as the DEA and the Department have had this language in their regulations over 30 years and because similar language has been in § 27.16(b)(3) (relating to construction and equipment requirements) since 1998. See 28 Pa.B. 4532 (September 5, 1998). Dispersing controlled substances throughout the stock is considered to be more secure, as they are not easily identifiable as controlled substances when mixed in with the other stock of the pharmacy. If anyone illegally entered the pharmacy to procure controlled substances they would have to search throughout the stock of the pharmacy to find the controlled substances. Conversely, if all controlled substances were located in one area of the pharmacy, it would be easier to locate them and to procure large quantities of controlled substances illegally in a short period of time.

IRRC further commented that the Board should clarify what a “substantially constructed cabinet” is. The Board notes that this language has been in effect over 30 years in the DEA’s and the Department’s regulations as mentioned, as well as similar language in the Board’s existing regulation at § 27.16(b)(3). The Board has not received any inquiries from licensees or inspectors about what would be considered a substantially constructed cabinet. The Board believes the term is clear and is understood by the regulated community. For this reason, the Board has made no amendment to the final-form rulemaking in response to these comments.

IRRC asked how the Board would enforce these storage provisions. The Board will continue to enforce these provisions through routine inspections and investigating complaints. IRRC next asked whether the Board has considered specifying which categories of medical professionals can access Schedule II controlled substances in facilities under the jurisdiction of the Board. The Board discussed this in drafting the proposed regulation and decided to delete the language in § 27.17 that prohibited anyone except a licensed pharmacist or pharmacy intern or, in an institution, a licensed physician or registered nurse from having access to controlled substances. The Board declines to specify who can access Schedule II controlled substances and instead will leave it up to the pharmacy and pharmacist to determine who is authorized to be present in the pharmacy. In a typical retail pharmacy, the only people in the prescription area would normally be the pharmacist, pharmacy technicians and interns and any authorized staff people. In an institution, that list of people would include other medical professionals who are part of the health care team. The Board is comfortable leaving that decision to the discretion of the pharmacist who must still be present and supervising when other authorized personnel are in the pharmacy.

A commentator also commented that “other persons” in § 27.17(b) should be clarified. The Board has changed the regulation to specify, “authorized personnel.” The commentator also suggested that the Board affirmatively

express the ability of a pharmacy technician to assist in the processing of Schedule II prescriptions in this section. The Board declines to state affirmatively that pharmacy technicians may be in an area where controlled substances are stored. As controlled substances may be stored throughout the pharmacy, the Board feels it is unnecessary to make this change. Also, this section applies to more than just pharmacy technicians.

§ 27.18. *Standards of practice.*

A commentator commented on § 27.18(j), which the Board has amended to provide that prescriptions for Schedule II controlled substances may not be filled more than 6 months from the date of the prescription. The commentator asked the Board to verify that this change is within its purview. The Board feels confident that it is, having previously adopted similar regulations regarding how long prescriptions for Schedule III, IV and V substances are valid. IRRC asked what the Board's statutory authority is for amending § 27.18(j). The Board's authority to regulate the distribution of drugs and devices and the practice of pharmacy is found in section 6(k)(9) of the act. IRRC also asked how the Board determined that 6 months is an appropriate time frame to honor this type of prescription. Similarly, the HPLC asked what the Board's rationale for permitting Schedule II controlled substances to be filled no more than 6 months after the date of the prescription. The Board notes that currently there is no law or regulation that prescribes how long a prescription for a Schedule II controlled substance is valid. Six months is a time frame that other states use, for example Virginia and Arkansas both consider a Schedule II prescription to be valid for 6 months. See Code Ark. R. § 07-04-0004 (relating to time limit on a new Schedule II prescription); and 18 V.A.C. 110-20-290 (relating to dispensing of Schedule II drugs). The Board believes that 6 months is a reasonable time frame during which the Schedule II prescription may be valid.

A commentator suggested that the Board limit the validity of a prescription for a Schedule II drug to no later than 90 days after it was written. The Board declines to make this change. The Board is aware of the provisions of 21 CFR 1306.12(b)(1), which permit practitioners to issue multiple prescriptions authorizing a patient to receive a total of up to a 90-day supply of a Schedule II controlled substance, provided certain conditions are met. See 21 CFR 1306.12(b)(1). The Board is not attempting to override the Federal regulation. The final-form regulation would allow some lag time between the issue date of the prescriptions and the dates when they are actually filled. Given that there was no previous time limit as to how long a Schedule II prescription remained valid, the Board is comfortable with enacting the 6-month limitation. In any case, a pharmacist may refuse to fill a prescription if the pharmacist believes in his professional judgment that in the interest of the safety of the patient the prescription should not be filled. See § 27.18(c).

IRRC commented that amended § 27.18(l)(6) is vague and recommended that more specific language is needed in the final-form regulation. The Board has added examples of various types of shipping that could be used to preserve the integrity of the drug. IRRC also asked how the Board would enforce this provision. The Board will enforce it as it does many of the provisions of the act and regulations through routine inspections and investigating any complaints that are filed.

HPLC commented that the Board's use of "direct supervision" in § 27.18(n) seemed different than other

recently proposed regulations. The Board agrees and has changed § 27.18(n) to specify "direct, immediate and personal supervision".

IRRC asked why the Board replaced "pharmacist or pharmacy" with the word "person" in § 27.18(r)(6). The Board changed the wording to be consistent with use of the term "person" in the rest of § 27.18(r). HPLC inquired whether this section would have an impact on physicians offering coupons, specials and samples. This section would have no impact on physicians offering drugs for sale to their own patients. However, advertising to a larger population than just the prescriber's patient population could rise to the level of operating a pharmacy and the Board would be authorized to impose a civil penalty on a practitioner who violates the act.

§ 27.19. *Prospective drug review and patient counseling.*

IRRC and another commentator thought that amended § 27.19(d) was confusing with two subsections that gave examples of when a PDR is not required. The Board agrees and has amended this section.

§ 27.25. *Licensure by reciprocity.*

IRRC stated that in § 27.25 there appeared to be abbreviations for licensure exams and asked that the Board define the abbreviations used for the licensure exams. The Board has done so in § 27.1 (relating to definitions).

Other Changes

The Department of Public Welfare (DPW) forwarded comments to the Board after the close of the public comment period. DPW asked the Board to clarify whether a physician is required to date the prescription. The Board's current regulation at § 27.18(b)(1) requires prescriptions on file in the pharmacy to show the date the prescription was issued. The Board only regulates pharmacists and pharmacies and cannot put an affirmative duty on a licensee that it does not regulate. Therefore, so long as the prescription on file in the pharmacy is dated, the Board cannot require that the prescriber must date it. As a practical matter, if a prescription is presented to the pharmacy without a date, the pharmacist may contact the prescriber to confirm the validity of the prescription and enter the date either by hand or a computer-generated label and that becomes the date of the prescription.

DPW also commented that the phrase "authorized by the prescriber" in § 27.18 is ambiguous and suggests that the regulation should be clarified to state when the authorization may or must occur. The Board has amended the final-form regulation to specify that refills may be authorized at any time during the 1-year period during which the prescription is valid.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions and will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on September 19, 2007, the Board submitted a copy of the notice of proposed rulemaking, published at 37 Pa.B. 5260 to IRRC and the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period,

as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 18, 2009, the final-form rulemaking was deemed approved by the HPLC and the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 19, 2009, and approved the final-form rulemaking.

Additional Information

Persons who require additional information about the final-form rulemaking should submit inquiries to Regulatory Unit Counsel, Department of State, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-7156, or st-pharmacy@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) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

(3) The amendments to this final-form rulemaking do not enlarge the scope of proposed rulemaking published at 37 Pa.B. 5260.

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

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapter 27, are amended, by deleting § 27.3 and by amending §§ 27.1, 27.2, 27.12, 27.17—27.19, 27.21, 27.25 and 27.31, to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(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*.

MICHAEL A. PODGURSKI, R.Ph.,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 6915 (December 5, 2009).)

Fiscal Note: Fiscal Note 16A-5416 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 27. STATE BOARD OF PHARMACY GENERAL PROVISIONS

§ 27.1. Definitions.

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

ACPE—The Accreditation Council for Pharmacy Education.

* * * * *

FDLE—Federal Drug Law Examination.

* * * * *

Licensed person—A person holding a license issued by the Board.

* * * * *

MPJE—Multistate Pharmacy Jurisprudence Examination.

* * * * *

PDR—Prospective drug review performed to assure that a drug dispensed under a prescription is not likely to have an adverse medical result by attempting to identify potential drug therapy problems that might result from therapeutic duplication, drug-drug interactions, incorrect dosage, incorrect duration of drug treatment, drug-allergy interactions, and clinical abuse or misuse.

* * * * *

§ 27.2. Other definitions.

The definitions contained in the act and also in The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101—780-144), including the term “controlled substances” and the schedules thereof, apply to this chapter. A requirement contained in this chapter for a controlled substance applies to the lowest schedule of a controlled substance now or subsequently classified as a controlled substance by either the DEA or the Secretary of the Department of Health.

§ 27.3. (Reserved).

STANDARDS

§ 27.12. Practice of pharmacy and delegation of duties.

* * * * *

(c) *Pharmacy interns.*

(1) A pharmacy intern may work only under the direct, immediate, personal supervision of a pharmacist in accordance with subsection (b)(2).

(2) A pharmacy intern may neither enter nor be in a pharmacy if a pharmacist is not on duty.

(3) A pharmacy intern working under the direct, immediate, personal supervision of a pharmacist may perform procedures which require professional skill and training. Examples of these procedures include: verifying ingredients, weighing ingredients, compounding ingredients and other similar processing of ingredients.

* * * * *

§ 27.17. Security for Schedule II controlled substances.

(a) Schedule II controlled substances shall be stored in securely locked, substantially constructed cabinets. However, Schedule II controlled substances may be dispersed throughout the stock of noncontrolled substances in such a manner as to obstruct the theft or diversion of the controlled substances.

(b) The occasional entry of authorized personnel into an area where the controlled substances are accessible to clean, deliver or perform other necessary functions shall be allowed only when a licensed pharmacist is present and supervising.

(c) The pharmacist manager shall be responsible for assuring that licensed persons, employees and others who enter the prescription area know and abide by the standards of security and that the other measures are taken as may be necessary to insure their enforcement.

§ 27.18. Standards of practice.

* * * * *

(b) Prescriptions kept on file in the pharmacy must meet the following requirements:

(1) Prescriptions on file must show the name and address of the patient; the name and address or other identifier of the prescriber; the date the prescription was issued, if the prescription is for a controlled substance or if it was written with a PRN or ad lib refill designation; the name and quantity of the drug prescribed; directions for its use; cautions communicated to the ultimate consumer by means of auxiliary labels or other means when dispensed to the ultimate consumer; the date the prescription was compounded and dispensed; and the name or initials of the dispensing pharmacist.

(2) Prescriptions for controlled substances must show the DEA number of the prescriber. Prescriptions for Schedule II controlled substances must be written with ink, indelible pencil, typewriter, word processor or computer printer and must be manually signed by the prescriber. The pharmacist is responsible for compounding and dispensing nonproprietary drugs consistent with the Federal Controlled Substances Act (21 U.S.C.A. §§ 801—904), The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101—780-144) and the regulations promulgated under these acts.

(3) If a prescription for a nonproprietary drug is refilled, a record of the refill must show the date of the refill, the name or initials of the dispensing pharmacist and the quantity dispensed. If the pharmacist dispenses a quantity different from that of the original prescription, the pharmacist shall indicate the changes on the back of the original prescription or must enter the changes in the computerized files of the pharmacy.

(4) Original prescriptions or readily retrievable images of the original prescriptions shall be kept for 2 years from the date of the most recent filling.

(5) In an institution, Schedule II controlled substances which the pharmacy dispensed and which were ultimately received by the patient shall be recorded and the record kept for 2 years.

* * * * *

(i) Prescriptions for nonproprietary drugs may be refilled for 1 year from the date of the prescription if refills have been authorized by the prescriber. A nonproprietary

drug which is refillable by statute on the basis of designation, such as ad lib, PRN or similar instruction, may be refilled for 1 year from the date of the prescription. Refills may be authorized at any time during the 1-year period.

(j) Prescriptions for Schedule II controlled substances may not be filled more than 6 months from the date of the prescription. Prescriptions for Schedule II controlled substances may not be refilled. A controlled substance in Schedule III, IV or V may not be filled or refilled more than five times in the 6-month period from the date of the prescription.

* * * * *

(l) Prescriptions sent through the mail to a pharmacy shall be compounded and dispensed in the following manner:

(1) Prescription medication shall be sent only in first class mail or common carrier, except where the purchaser is advised in advance that a slower means of transportation will be used and agrees thereto.

(2) The mailing of antibiotics which have been reconstituted is prohibited.

(3) The mailing of a medication or prescription drug or device generally accepted and recognized to be subject to significant deterioration of the original content due to heat, cold fermentation or prolonged agitation is permissible if it is shipped in a manner which would preserve the integrity of the drug, such as cold packs or other temperature control devices and sensors that would alert the patient if the integrity of the drug was compromised.

* * * * *

(n) A prescription by means of an oral order, telephone or otherwise, shall be received and transcribed by either a registered pharmacist or a pharmacy intern under the direct, immediate and personal supervision of a pharmacist.

(o) Except as provided under the definition of order, an oral prescription shall be reduced to writing immediately by the pharmacist or pharmacy intern and shall be filled by, or under the direction of the pharmacist. An order entered on the chart or medical record of a patient in an institution for the diagnostic care and treatment of a patient on an overnight basis, or on the chart or medical record of a patient under emergency treatment in an institution by or on the order of a practitioner authorized by statute to prescribe drugs or devices, shall be considered to be a prescription if the medication is to be furnished directly to the patient for self-administration. It is the responsibility of the prescriber to see that the chart or medical record contains the information required for a prescription and that it is signed by the prescriber himself at the time the drug is given or if he is not present, then on his next visit to the institution. A registered pharmacist may not compound, prepare, dispense, fill, sell, or give away a drug or device on the basis of a prescription or order in an institution or hospital unless the prescription or order is an original prescription or order or direct copy thereof issued by the authorized prescriber or practitioner who may be using electronic or computerized equipment.

* * * * *

(r) The following provisions apply to the advertisement and sale of drugs:

(1) A person may not advertise the filling or refilling of prescriptions for a consumer or patient in this Common-

wealth if that person is not licensed under the act or the prescription is not filled or refilled in a pharmacy licensed by the Board.

(2) A person may not promote to the public the sale of any controlled substances.

(3) Advertisements of prescription drugs and devices may not be false or misleading, and must be truthful, reasonable, informative and understandable to the public.

(4) A drug or device misbranded or adulterated in Federal law is misbranded and adulterated in Commonwealth law.

(5) An advertisement of a prescription must be for a commercially reasonable quantity.

(6) A person advertising special prices for prescriptions, dangerous drugs or nonproprietary drugs, preparations or products, devices and appliances, if using a percentage number such as 10% off, 20% off, and the like, as to selected items, shall state or publish a price list from which the percentage prices are derived, so the consumer or patient knows exactly what the retail price is.

(7) The patient has the right to request a copy of an original prescription. The copy must clearly indicate on its face that it is a copy and may not be used to obtain a new prescription or refill. Before a pharmacist provides a copy of a written prescription to a patient or an authorized agent of the patient, the person requesting the copy shall show the pharmacist acceptable authorization and identification, such as a driver's license. The pharmacist shall record in writing the date, to whom and by whom the copy was given.

(8) A violation of the Unfair Trade Practices and Consumer Protection Law (73 P. S. §§ 201-1—201-9.2) is a violation of this chapter.

* * * * *

(t) A pharmacist may only refill a prescription at a reasonable time prior to the time when the contents of the prescription shall be consumed according to prescriber's directions.

* * * * *

§ 27.19. Prospective drug review and patient counseling.

(a) *PDR Required.* A pharmacist shall perform a PDR before filling, delivering or sending a new prescription or drug order, except when a physician dispenses a drug to a patient being treated in the emergency room. The PDR requires that the pharmacist review a profile of the patient maintained in the pharmacy in accordance with subsection (f) prior to dispensing the medication to the patient or caregiver.

(b) *Purpose.* The purpose of the PDR is to help assure that a drug dispensed under a prescription is not likely to have an adverse medical result. The PDR accomplishes this by attempting to identify potential drug therapy problems that might result from therapeutic duplication, drug-drug interactions, incorrect dosage, incorrect duration of drug treatment, drug-allergy interactions, and clinical abuse or misuse.

(c) *Scope.*

(1) The PDR is required for prescriptions and drug orders.

(2) The following are examples of situations in which a PDR is required:

(i) A patient visits a physician in the physician's office and receives a prescription. The patient has the prescription filled in a retail pharmacy.

(ii) A pharmacist fills a prescription for a patient who lives in a personal care home.

(iii) A pharmacist in a hospital pharmacy fills an outpatient prescription for a hospital employee.

(iv) A patient is treated on a nonemergency basis in an outpatient clinic of a hospital and is given a prescription. The patient has the prescription filled either in the hospital pharmacy or in a retail pharmacy.

(v) A pharmacist fills a prescription for a patient in a nursing home.

(vi) A pharmacist in a hospital dispenses a drug which will be administered to a patient in the hospital.

(3) The following are examples of situations in which a PDR is not required:

(i) A physician dispenses a drug to a patient being treated in the emergency room.

(ii) A pharmacist dispenses a radiopharmaceutical to a physician who will administer it to a patient.

(iii) A medical practitioner dispenses a drug.

(iv) A pharmacist dispenses a drug to a medical practitioner which the practitioner will administer to a patient.

(d) *Offer to counsel.*

(1) An offer to counsel shall be made to each patient or caregiver when the pharmacist fills, delivers or sends a new retail or outpatient prescription.

(2) The pharmacist or designee of the pharmacist shall orally make the offer in person if a patient or caregiver comes to the pharmacy. If the pharmacist in the exercise of professional judgment in the interest of a patient believes that an oral offer would be less effective than a written offer, the pharmacist may substitute a written offer. The following are examples of situations in which a pharmacist might substitute a written offer:

(i) The patient or caregiver is hearing impaired.

(ii) The patient or caregiver is not an English speaker.

(3) If neither the patient nor caregiver comes to the pharmacy, the offer to counsel shall be made in one of the following ways:

(i) The pharmacist or designee may telephone the patient or caregiver.

(ii) The pharmacy delivery person may orally make the offer to the patient or caregiver.

(iii) The pharmacist may send a written offer to counsel together with the filled prescription which is delivered or sent to the patient.

(4) A written offer to counsel must include the telephone number of the pharmacy.

(5) A pharmacy shall provide toll-free telephone service if its primary patient population is beyond the local or toll-free exchange.

(6) A mail order pharmacy shall make the offer to counsel either by telephone or by sending a written offer together with the filled prescription. The written offer must include a toll-free telephone number of the pharmacy which a patient or caregiver may use to obtain counselling.

(7) The obligation to make an offer to counsel will be fulfilled by making one offer in accordance with this subsection.

(e) *Counselling.*

(1) Only a pharmacist may counsel.

(2) If a patient or caregiver who comes to the pharmacy indicates that he wants counselling, the pharmacist shall counsel the patient or caregiver in person, or, at the discretion of the patient or caregiver, by telephone.

(3) If the filled prescription is sent or delivered to the patient or caregiver, counselling shall be by telephone.

(4) The following are examples of matters which a pharmacist in the exercise of professional judgment might deem significant and discuss with the patient or caregiver:

(i) The name and description of the medication.

(ii) The route of administration, dosage form and duration of drug therapy.

(iii) Special directions and precautions for preparation, administration and use by the patient.

(iv) Common severe side effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur.

(v) Techniques for self-monitoring drug therapy.

(vi) Proper storage.

(vii) Prescription refill information.

(viii) Action to be taken in the event of a missed dose.

(5) If a pharmacist discovers a specific problem with a medication during the course of a PDR, the pharmacist shall intervene to attempt to resolve the problem.

(f) *Patient profile.*

(1) The pharmacist or designee of the pharmacist shall make a reasonable effort to obtain, record and maintain the following information about each patient:

(i) The name, address, telephone number, date of birth (or age) and gender.

(ii) Individual history, if significant, including known allergies and drug reactions, and a list of medications and relevant devices, as provided by the patient or caregiver.

(iii) Pharmacist comments relative to the individual's drug therapy.

(2) The patient profile may be maintained electronically or manually.

(3) The pharmacist or designee of the pharmacist shall begin a patient profile when the pharmacist fills a prescription for a new patient or for a current patient for whom a profile had not previously been maintained.

(4) The patient profile shall be maintained for at least 2 years after the last entry.

(5) The Board will consider a single request for information for a patient profile made to a patient or caregiver a reasonable effort to obtain the information outlined in this subsection.

(g) *Refusal to accept counselling or to provide information.*

(1) A pharmacist is not required to provide counselling or obtain information for the patient profile if the patient or caregiver refuses the offer to counsel or refuses to

divulge information for the patient profile. If a patient or caregiver fails to respond to an offer to counsel or a request for information, the failure to respond will be deemed a refusal.

(2) The pharmacist or designee shall document the refusal of a patient or caregiver to accept counselling or provide information. The documentation must include the name or initials of the pharmacist or designee noting the refusal. The following kinds of documentation are acceptable:

(i) A notation made by the pharmacist or designee on the prescription or patient profile or the electronic records of the pharmacy.

(ii) A writing signed by the patient or caregiver.

(h) *Confidentiality.*

(1) Information gained by a pharmacist, pharmacy or employee of a pharmacy about a patient under this section shall be regarded as confidential. The information shall be maintained in accordance with section 8(10) of the act (63 P. S. § 390-8(10)).

(2) The pharmacist or pharmacy may reveal the information if one of the following circumstances occurs:

(i) The patient consents to the disclosure.

(ii) The Board or its authorized agents require the information for any proceeding under the act.

(iii) State or Federal law or regulations require or authorize the disclosure.

(iv) A court orders the disclosure.

PHARMACISTS

§ 27.21. Application for examination and licensure.

(a) A candidate for licensure to practice pharmacy by examination applying to take the North American Pharmacist Licensure Examination (NAPLEX) and the Multistate Pharmacy Jurisprudence Examination (MPJE) shall obtain an application for licensure from the Board, complete the application and file the application with the Board.

(b) The applicant shall include in the application proof of graduation with a B.S. or advanced degree in pharmacy granted by an ACPE accredited school or college; affidavits of all internship experience gained prior to submitting the application; and the application fee.

(c) The applicant shall also complete and submit the examination fees and examination registration forms to the test administrator.

(d) Affidavits of internship experience shall be filed before authorization to take the exam is given.

§ 27.25. Licensure by reciprocity.

(a) An applicant for licensure by reciprocity shall comply with section 3(g) of the act (63 P. S. § 390-3(g)).

(b) Except as provided in subsection (c), an applicant for licensure by reciprocity who received a license to practice pharmacy in any other state, territory or possession of the United States, after January 26, 1983, shall be required to demonstrate that the applicant passed the FDLE.

(c) If an applicant licensed after January 26, 1983, cannot demonstrate that the applicant passed the FDLE, the applicant shall be required to demonstrate that the applicant passed the Pennsylvania MPJE.

**RENEWAL OF PHARMACIST LICENSE AND
PHARMACY PERMIT****§ 27.31. Biennial renewal.**

(a) A holder of a pharmacy permit shall renew the permit every 2 years, in odd-number years. Renewal requires completion of a form mailed to the holder by the Board in advance of the renewal period, and payment of the specified fee.

(b) A licensed pharmacist shall renew the license every 2 years, in even-numbered years. Renewal requires completion of a form mailed to the pharmacist by the Board in advance of the renewal period or completion of an online electronic form, and payment of the specified fee. A pharmacist shall also submit proof of compliance with the continuing education requirements of § 27.32 (relating to continuing education).

(c) A pharmacist or holder of a pharmacy permit who fails to timely renew shall cease practice or operation until the license or permit is renewed. The holder may be subject to disciplinary action, and will be assessed an additional fee of \$5 for each month or part of month after which renewal occurs beyond the date specified by the

Board. Notice of lapsed pharmacy permits shall be forwarded to other Commonwealth agencies, including the Department of Health, the Department of Public Welfare and the Department of Aging.

(d) A pharmacist allowing the license to lapse may so notify the Board on the renewal form. Reasons shall be briefly stated, and the pharmacist's pocket license and display license shall be surrendered to the Board with the renewal form. A pharmacist who has had a lapsed license for 1 year or more, and who then seeks to reactivate the license, will be required to show current proficiency to practice pharmacy. The full-time practice of pharmacy in another state, during the period of lapsed licensure in this Commonwealth, will be evidence of current proficiency. A holder of a lapsed license who engaged in activities outside the profession of pharmacy during the lapsed period shall complete hours of continuing education equivalent to the hours which he would have been required to take had he held an active license.

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